

## Constitutional Court Review



# Constitutional Court Review



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# EDITOR'S NOTE

STU WOOLMAN

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Chips all in. If you can find a better single volume on South African constitutional law in any South African law journal, then I will buy you a bottle of your favourite scotch. I'm not playing with house money.

Can you sight a finer constellation of legal theorists than those authors ruminating on the virtues and vices of many, though not all, of the constitutional democracies that have sprouted up in the last quarter century? In symposium one – *Constitutional Courts as Hedges against Democratic Authoritarianism* – NYU's Sam Issacharoff trots the globe in search of the answer and finds that very similar, very significant, yet at the time unexpected, perils await countries that undertake 'Democratic Risks to Democratic Transitions'. In a reply that is not quite a reply, UNSW's Theunis Roux takes stock of the past two decades of South African democratic rights jurisprudence and arrives at his own conclusions, through a process of induction, about the extent to which constitutional courts can operate as hedges. His *New South Wales* compatriot, Martin Krygier, then flies us business class at a higher level of elevation and asks us whether we have not gotten ahead of ourselves in his response: 'What about the Rule of Law?' We can't help but get ahead of ourselves in heady times, not even dewy wide-eyed pragmatists such as Martin and I. His answer is that since we almost always allow desire to outstrip reality, we should be prepared, when those 20 years of endorphins wear off, to ask two questions: Is this really what we signed up for? Have we laid down the solid foundations of a just, well-ordered society: the rule of law and a truly civil, civil society?

The three articles that follow do our jurisprudence justice in three very different ways. Deputy Chief Justice Dikgang Moseneke (in 'Courage of Principle') ponders our situation not long after the Marikana Massacre. On this 30th Anniversary of her assassination, he asks us what liberation movement leader Ruth First would make of where we, collectively, are, and what grade she might be inclined to give South Africa's current political institutions and its broader society. In this bracing but balanced critique, the Deputy Chief Justice imagines that she'd give credit where it is due, but would hold back a final mark until such a time as we've made good on the uncompromising promises of the Freedom Charter. The subsequent article returns us to the role that law *qua* law plays in producing a just, well-ordered society. As only UCT's Anton Fagan can, with his customary élan, 'Causation in the Constitutional Court' teases out the Court's new rules of delict after *Lee* and compares them with our well-established rules pre-*Lee*. He proves, once again, that everyone, including our Constitutional Court, can use a good copy-editor. *Wit's* Brahm Fleisch and I then take our cue from collateral remarks made by Deputy Chief Justice Moseneke in *Ermelo*. In 'The Problem of the 'Other' Language', we look at novel language policies designed to enable current learners to one day be in a position to read Anton Fagan's article in a South African language other than English or Afrikaans. We assess these new first, second and third public school

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language policies, and the many constitutional provisions that cabin them, in terms of the following proposition. You haven't discharged your duties to treat fellow South Africans as equal citizens if you haven't made some effort to speak to others in an African language, and not just our two dominant tongues.

Symposium two features yet another mad scramble to make sense of our socio-economic rights discourse. *Cleveland-Marshall's* Brian Ray's second lead essay, 'Evictions, Aspirations and Avoidance', is a monograph length gem. It also reflects a truly gracious effort at hymn sheet jurisprudence. Brian shows us how we might enable proponents of subsidiarity, substantive reasonableness, minimum core analysis and experimental constitutionalism to agree with one another, at the same time as he nudges the Court's housing jurisprudence along. Happily, for our sake, Brian's five interlocutors will have none of it. Well, not none of it – only their part of it. *Boston College's* Katie Young agrees with Brian that avoidance is a fundamental problem with the Court's socio-economic rights judgements in 'The Avoidance of Substantive Rights', but thinks that the move toward subsidiarity raises not so novel problems of avoidance. *Florida State's* David Landau agrees. Much like Katie, he also wonders, in 'Aggressive Weak-Form Remedies' where Brian's previous dual commitment to experimental constitutionalism and socio-economic rights with core content has gone? *Wits's* Jackie Dugard, in 'Beyond Blue Moonlight', and *SERI's* Stuart Wilson, in 'Curing the Poor' don't abjure engagement with theory. They do, however, excoriate the Court for all the adjudicatory models it has thus far proffered. They expressly question whether 'meaningful engagement', as currently constructed, can ever deliver on the promise of socio-economic rights. Their withering assessments are not for the faint-hearted. *Johannesburg's* David Bilchitz's 'Avoidance is Avoidance' – read after Dugard's and Wilson's contributions – is a pretty clear 'I told you so'. Having pounded the drum of the minimum core for well-over a decade, David could (if he wanted) point to recent housing and eviction case law and say here's the proof in the pudding. In fairness to the Court, none of the authors goes quite so far. Read collectively, this sextet instead points out the manifold flaws in the Court's extant housing law jurisprudence and suggests possible avenues for improvement imminent in the Court's own judgments.

Just when you thought it might be safe to go back into the water without diving into the deep end, *Yale's* James Fowkes applies his novel theory of managerial adjudication to such apparently mundane issues such as access to court and the raising of new constitutional questions mero motu. James suggests how they can expand such access and constitutional oversight without danger of judicial overreach. *SAIFAC's* Michael Dafel demurs. He doesn't deny the desirability of a court's doing so with care, but worries that pressing such an approach without extremely careful delimitations risks undermining one of the Constitution's most basic reasons for existence: the entrenchment of the rule of law. We do get a momentary breather in the colloquy between *Johannesburg's* Mia Swart and *Wits's* Tom Coggins, and *Edward Nathan's* Ngwako Raboshakga. This troika considers the relationship between the constitutionally-entrenched separation of powers doctrine and interim interdicts. Fortunately, there's no baby in the bathwater. Mia, Tom and Ngwako are thereby able to limit their disagreement to two questions: (1) Has the standard test for interim interdicts been altered at all, or simply mildly

amended? (2) Did the facts in the recent e-tolling decisions warrant – under any of the tests considered – the imposition of an interim interdict?

Symposium three sends us right back into the deep end. *Glenister* is the departure point for all four contributions. The emphasis here is on departure. The HSRC's Vanessa Barolsky casts her sociologist's gaze upon our police force and asks whether we have, in fact, an effective and independent security service. Her answer flows largely from the perspective of those persons who most matter: the citizens who must rely upon the police for their protection. That's the tease: read the article. The conversation then moves on to one of the bases for the *Glenister* Court's decision: international law. The *Centre for Applied Legal Studies'* Boni Meyersfeld, the *European University Institute's* Juha Tuovinen and *Wits'* Franziska Sucker don't just bitch and moan about the Constitutional Court's rather limited engagement with South Africa's obligations under international law. To their credit, they patiently take us through a complex thicket of oft misunderstood constitutional provisions, set against the background of any equally complex body of international law, and show us when and how FC ss 7, 39, 231, 232 and 233 ought to import international law into our municipal law.

The final two comments return us to concerns that animate the very first symposium: executive overreach. *KwaZulu-Natal's* Karthy Govender shows us how the Court in *Simelane* requires the appointment of public officials that require independence to discharge their duties to be undertaken in terms proper guidelines and rationality review by our courts. *Webber Wentzel's* Okyerebea Ampofo-Anti and Ben Winks ask how our Republic can undertake decisions when the governors, with the assistance of the courts, regularly deny the governed access to the kinds of documents required to make informed assessments themselves or have representatives make such evaluations for them.

After having read every line and every footnote of every article in this volume with the greatest pleasure, I just want to thank the authors, my fellow editors, copy-editor Kallie Pauw, publisher Michelle Govender and our sponsors – the Konrad Adenauer Stiftung, the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, the University of the Witwatersrand, Juta Law and *Constitutional Law of South Africa* – for making this volume the best CCR to date. I stand by my offer at the outset. Find me a better journal volume on constitutional law in South Africa to date, and the scotch is yours. However, the quality of the exchanges here is proof of something far more significant. Though South Africa may find itself in straitened circumstances some 20 years after liberation, there's no shortage of people with the imagination and the will necessary to address with creativity our collective plight. Pace Professor Chicken Little, 'The sky is not falling'. Indeed, the authors of these 22 articles and 500 pages have shown us how to go about setting matters right. They are not alone. Innumerable members of civil society, government and the private sector employ ingenuity and elbow grease, each and every day, in order to make the lives of all of us a little bit better. This volume then provides but one beacon of hope for our constitutional democratic project, even in its edgiest moments.

4 July 2014  
University of the Witwatersrand





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*Stu Woolman*

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Symposium 1:  
Constitutional Courts as Hedges  
against Democratic Authoritarianism



# The Democratic Risk to Democratic Transitions

Samuel Issacharoff\*

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Writing in these pages four years ago, my colleague Sujit Choudhry soberly assessed the prospects for a democracy shorn of real electoral competition. What happens, he inquired, if a democratic system designed for vigorous dissent and electoral challenge is transformed by the will of the people into a one-party bazaar in which ‘one party enjoys electoral dominance and continues to win free and fair elections that are not tainted by force or fraud?’<sup>1</sup> The heart of the question is whether in the absence of electoral competition, a tolerant constitutional order can be established and sustained. For Professor Choudhry, as for myself and other foreign observers, South Africa had been, and continues to be, the most intriguing and compelling example of constitutional hope in the transition to democracy. But that hope has increasing elements of concern over time, to which this Article is directed.

Judged from the outside, I would suggest three phases of the South African constitutional oversight of politics. In the first instance, and focused primarily on the historic *First Certification Judgment*,<sup>2</sup> the Constitutional Court of South Africa enshrined a period of what Bruce Ackerman has termed ‘constrained democracy’.<sup>3</sup> The Court was created as a central institutional guarantor of the orderly transition from apartheid to competitive elections open to all South Africans. At the same time, the transition required that the guarantee of order be itself established so as not to yield to complete majority preferences, something the powerful white minority could never cede to the oppressed majority.

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\* Reiss Professor of Constitutional Law, New York University School of Law. I have benefitted from the presentation of this paper and critical comments at the Fifth Constitutional Court Review conference in Johannesburg, and at the Colloquium on Constitutional Transitions at NYU Law School, and in particular from the commentary of Matthias Kumm, Martin Krygier, Theunis Roux, and especially Stuart Woolman. I also benefitted from the commentary of three anonymous reviewers. Nathan Foell, Swapna Maruri and Maria Ponomarenko provided great research assistance.

<sup>1</sup> S Choudhry ‘“He Had a Mandate”: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 1, 3.

<sup>2</sup> *In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) (*First Certification Judgment*). See, further, M Chaskalson & D Davis ‘Constitutionalism, the Rule of Law and the First Certification Judgment: *Ex Parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC)’ (1997) 13 *South African Journal on Human Rights* 430; S Woolman ‘Humility, Michelman’s Method and the Constitutional Court: Rereading the *First Certification Judgment* and Reaffirming a Distinction between Law and Politics’ (2013) 25 *Stellenbosch Law Review* 281.

<sup>3</sup> B Ackerman ‘Meritocracy v Democracy’ *London Review of Books* (8 March 2007) < <http://www.lrb.co.uk/v29/n05/bruce-ackerman/meritocracy-v-democracy> >.

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The highlight of the transition, formalised as the 34 Constitutional Principles (CPs), was the commitment that certain features of the yet-to-be-formed constitution needed to be entrenched in order to place them safely beyond the realm of ordinary politics. The focus of the outside world, and much of the Court's work, concerned the valourisation of individual rights. As I wrote in my first assessment of the Court, however, the decision held at bay the incipient consolidation of majority rule that might threaten minority expectations and, perhaps democratic governance itself.<sup>4</sup> The prospect of a court capable of securing restraints on pure majoritarian exercises of power was an instrumentally critical factor in facilitating the transition to democracy through negotiation.<sup>5</sup> The *First Certification Judgment* upheld that task admirably and its accounts of the relation between constitutional principles and democratic self-governance set the standard for constitutional courts of the post-1989 third wave of democracy.

In the second period, the Court's mandate for transition from apartheid had largely run its course. South Africa was a democratic state with the ANC a triumphant, strong party riding the crest of its mandate as the driver of the successful anti-apartheid struggle. In this period, the Court continued to exercise its role as protector of individual rights, on important matters such as the death penalty and gay marriage. At the same time, the Court exercised great restraint in not pre-empting parliamentary fiscal and policy decisions in cases regarding matters such as demands for property and medical assistance. Yet, this was also the period in which a post-Mandela ANC government used its legislative super-majority to begin constricting its political accountability. One example, though not utterly decisive, was the attempt to legitimise floor-crossing, a device prohibited by the original constitutional pact as a mechanism that offered a dominant party too tempting a tool to compromise weaker parliamentary delegations. Beyond the practical returns offered by actual floor-crossing practice, the challenge to ANC parliamentary manoeuvres took on jurisprudential significance because it offered the Court an unrealised opportunity to reinforce some basic tenets of democratic contestation on rapidly consolidating one-party rule. During this second period, the Court turned time and again to demands for social justice from groups hoping for more than the government delivered – and likely could deliver – to the still impoverished mass of the population. The nutshell account of this period would describe the Court as not interfering with the ANC's consolidation of political power and, at the same time, allowing great latitude for policy discretion for the government.

After a period of relative quiescence to democratic governance, the Constitutional Court appears to be entering a third period, one whose progress is far from set, but meriting of notice. The defining feature of this latest phase is that the ANC is now the established and dominant political force in the country and,

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<sup>4</sup> S Issacharoff 'Constitutionalizing Democracy in Fractured Societies' (2004) 82 *Texas Law Review* 1861, 1874–82 (Notes that great significance attaches to 'the provisions that reaffirmed limitations on government and those that were struck down for what may be termed an excess of majoritarianism [by the Court]?).

<sup>5</sup> See generally S Issacharoff 'Constitutional Courts and Democratic Hedging' (2012) 99 *Georgetown Law Journal* 961 (This point constitutes the article's central thesis.)



thus far, faces no significant political opposition. As is often the case when electoral competition recedes, the dominant party becomes the center for all political and economic dealings with the government, and an incestuous breed of self-serving politics starts to take hold. In this third period, the Court is confronting some of the efforts of the ANC government to place itself beyond customary forms of legal and democratic accountability. The political transcendence of the ANC limits the ability of the political system to correct course or, at the very least, has frustrated many efforts to date. In a case such as *Ramakatsa & Others v Magashule & Others*, for example, the Court had to confront an allegation of internal ANC voting irregularities in the selection of delegates to the Free State Provincial Congress of the party.<sup>6</sup> In granting relief that included the dissolution of the Provincial Executive Committee, the Court had to apply to the ANC party the constitutional guarantee of a right to participate in the activities of a political party as set out in s 19(1)(b) of the Final Constitution. *Ramakatsa* and a series of other cases from the recent past signal a new constitutional jurisprudence emerging to address the threats to democratic governance coming not from the history of apartheid but from a lack of electoral checks on the consolidation of power.

Like many foreign observers, I was drawn to the emerging South African jurisprudence during the halcyon first stage. The promise of a pacted transition under the constitutional oversight of a sophisticated Constitutional Court made the South African Court the most significant of the new judiciaries created by the post-1989 process of democratisation. As democracy and majority rule consolidated, most commentary turned to the role of the judiciary in securing social rights under the capacious commands of the new Constitution. At the same time, the deference to the policy initiatives of the ANC in the realms of the social and economic began to invite a worrisome deference as well to the consolidation of centralised political power. This prompted cautionary accounts of a different kind of threat to democracy, this time from an excess of majoritarianism. Gauged from afar, the question is now whether the Court will be, and perhaps whether it can be, a restraining influence on excessive consolidation of political power.

The discussion proceeds in three parts. First, let me recount some constitutional history, familiar to most readers in South Africa, to set the stage for the constitutional inquiry. Then I will turn to foreign experiences for points of comparison on constitutional confrontations with excessive democratic consolidation of authority. Finally, I will turn to some recent case examples in South Africa to further develop the main theme of the Article.

## I PROMISE AND CONCERN

South Africa provided an inspiring example of the process of constitutional formation and the hope for constrained democratic governance. The question for outside observers is whether South Africa will also become the exemplar of the perils of constitutional retreat. The question is one of particular significance internationally because of the uniquely open powers, including the power to approve the Final Constitution, given to the newly created Constitutional Court.

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<sup>6</sup> *Ramakatsa & Others v Magashule & Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC) (“*Ramakatsa*”).

It was, as Heinz Klug aptly summarises, a revolution ‘represented by the triumph of constitutionalism over parliamentary sovereignty and, while its impact has yet to work its way fully through the labyrinth of South African law, its basic premise – a justiciable constitution – was fully guaranteed in the Constitutional Principles which guided the democratically elected Constitutional Assembly.’<sup>7</sup>

The debates over the limits of majoritarianism played out along a series of institutional design questions. For outsiders, South Africa offered an unusually open and self-conscious debate over purposive constitutional design. As expressed by Albie Sachs in 1986, ‘the struggle for self-determination takes the form of a struggle within the frontiers of South Africa to create a new constitutional order.’<sup>8</sup> Having suffered under apartheid, the ANC saw constraints on majoritarian political power as a continued denial of political power to the black population. Thus, institutions of fractured or limited government, such as federalism, ‘would prevent the emergence of national government, keep the black population divided, prevent any economic restructuring of the country and free the economically prosperous areas of the country of any responsibility for helping develop the vast poverty stricken areas.’<sup>9</sup>

That majoritarian vision, grounded in the basic tenets of electoral choice by all citizens, proved to be unworkable in securing the cooperation of the white minority in the repudiation of apartheid. Democratic choice, standing alone, can never serve as the guarantor of the rights of a disfavoured minority in the face of a cohesive majority. Other institutional features must be added to the mix to get minority buy-in, and this was a critical feature of the negotiated South African transition. As a result of the Kempton Park negotiations and accords, the constitutional pact that emerged contained significant limitations on the exercise of majoritarian political power. Thus, under the 34 Principles, there are three sets that may be subsumed under the category of antimajoritarian protections. First, there is an elaborate set of rights guarantees that extends to the confiscation of property. Although the new government would be devoted to the amelioration of disparities in wealth across racial lines, Principle V provides that ‘[e]quality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.’<sup>10</sup> In essence, this Principle extends legal protection to the white minority to prevent simple expropriation resulting from the exercise of ordinary political power. Second, there are limitations on the exercise of governmental authority through a balancing of powers within the national government and principles of federalism. These limitations include the requirements of formal lawmaking (CP X)<sup>11</sup> through a multiparty legislature (CP VIII),<sup>12</sup> a separation of powers

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<sup>7</sup> H Klug *The Constitution of South Africa: A Contextual Analysis* (2010) 115.

<sup>8</sup> A Sachs ‘Towards the Constitutional Reconstruction of South Africa’ (1986) 2 *Lesotho Law Journal* 205, 205.

<sup>9</sup> A Sachs *Protecting Human Rights in a New South Africa* (1990) 152–153.

<sup>10</sup> Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution), Sch 4, Constitutional Principle V.

<sup>11</sup> *Ibid* at Constitutional Principle X.

<sup>12</sup> *Ibid* at Constitutional Principle VIII.

(CP VI),<sup>13</sup> an independent judiciary (CP VII),<sup>14</sup> and a multiparty representative government based on proportional representation (CP VIII).<sup>15</sup> More unique are the constitutional guarantees to the provinces and local governments to be able to claim an 'equitable share' of national resources (CP XXVI),<sup>16</sup> and the creation of a Public Service Commission and Reserve Bank independent of legislative control (CP XXIX).<sup>17</sup> Third, there are protections provided by the supermajority processes needed to amend the Constitution that require not only a two-thirds vote in the second chamber of the national Parliament, known as the National Council of Provinces in the Final Constitution, but also approval by a majority of provincial legislatures (CP XVIII).<sup>18</sup>

The 34 Constitutional Principles sought to facilitate the transition to democratic rule by assuring the white minority that democratic rule would not simply be an invitation to majoritarian retribution.<sup>19</sup> Whatever the historical merits of retribution, and whatever the grave injustices of apartheid rule, the fact remained that without some formal guarantee of security, power would never be ceded except on the closing end of a bloody civil war. The mechanism for enforcing security would be the newly crafted Constitution, but its drafting and implementation presented two key problems, which are best set out in the words of the Constitutional Court of South Africa:

The first arose from the fact that [the architects of the constitutional compromise] were not elected to their positions in consequence of any free and verifiable elections and that it was therefore necessary to have this commitment articulated in a final constitution adopted by a credible body properly mandated to do so in consequence of free and fair elections based on universal adult suffrage. The second problem was the fear in some quarters that the constitution eventually favoured by such a body of elected representatives might not sufficiently address the anxieties and the insecurities of such constituencies and might therefore subvert the objectives of a negotiated settlement. The government and other minority groups were prepared to relinquish power to the majority but were determined to have a hand in drawing the framework for the future governance of the country. The liberation movements on the opposition side were equally adamant that only democratically elected representatives of the people could legitimately engage in forging a constitution: neither they, and certainly not the government of the day, had any claim to the requisite mandate from the electorate.<sup>20</sup>

The impasse was resolved by a compromise which enabled both sides to attain their basic goals without sacrificing principle. What was no less important in the political climate of the time was that it enabled them to keep faith with their respective constituencies: those who feared engulfment by a black majority and those who were determined to eradicate apartheid once and for all. What is

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<sup>13</sup> Ibid at Constitutional Principle VI.

<sup>14</sup> Ibid at Constitutional Principle VII.

<sup>15</sup> Ibid at Constitutional Principle VIII.

<sup>16</sup> Ibid at Constitutional Principle XXVI.

<sup>17</sup> Ibid at Constitutional Principle XXIX.

<sup>18</sup> Ibid at Constitutional Principle XVIII.

<sup>19</sup> Ibid at Constitutional Principle XIV ('Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.')

<sup>20</sup> *First Certification Judgment* (note 2 above) at para 12.

more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force.<sup>21</sup>

Of greatest significance for present purposes are the provisions of the Court's judgment that reaffirmed limitations on government and, in particular, a number of the provisions of the draft constitution that were found inconsistent with the 34 CPs because they failed to adequately safeguard the commitment to constitutionalism itself or betrayed the guarantee that both state power and private power would be subject to judicial review. These draft provisions encompassed the attempt to preclude constitutional review of certain categories of statutes (labour laws),<sup>22</sup> the absence of adequate safeguards on centralised power and the failure to elucidate the manner in which coordinate spheres of government would exercise their authority,<sup>23</sup> and the lack of supermajoritarian protection for certain components of the Constitution itself – the Public Protector, the Auditor-General and the Bill of Rights.<sup>24</sup> With regard to this last category (protection of the Bill of Rights), the Court noted that the text failed to meet the obligation to provide for the special procedures – in addition to the special majorities – that the Constitutional Principles required.<sup>25</sup> The Court's majestic ruling turns on critical understandings of permissible constitutional law, often times on the same issues that would return once the ANC had consolidated political power. To the everlasting credit of President Mandela, the government did not waver in directing the Constitutional Assembly to revise the constitutional draft to meet the Court's concerns in October of 1996, and following a second round of judicial scrutiny, the new Constitution came into effect on 4 February 1997.<sup>26</sup>

Of particular concern for present purposes is the Court's broad interpretation of constitutional protections for minority parties, a check even in the early days of post-apartheid governance against the possibility of one-party domination. I want to focus here on a relatively secondary provision among party protections, one that is nonetheless significant. As part of the *First Certification Judgment*, the Court had to address various constitutional provisions protecting minority parties. Beyond the protections of proportional representation, the Constitution contained an 'antidefection' principle in which a member of Parliament would have to resign if he or she attempted to switch parties.<sup>27</sup> The provision was an

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<sup>21</sup> Ibid at paras 12–13.

<sup>22</sup> Ibid at paras 149–150.

<sup>23</sup> Ibid at paras 299–302 and 482. The Court found uncertifiable those provisions that failed to provide the required 'framework for LG [local government] structures,' as well as the failure to ensure the fiscal integrity of political subdivisions. Ibid at para 240. The Court explains that the CPs mandate that legislative powers should be allocated predominantly, if not wholly, to the national government where national uniformity is required.)

<sup>24</sup> Ibid at paras 152–154 (These CPs required that a certifiable text possess 'special procedures involving special majorities' for constitutional amendments that would alter the content of the substantive provisions found in the Bill of Rights and constitutional guarantees of rights found elsewhere in the draft or 'new' text.)

<sup>25</sup> Ibid at paras 157–159.

<sup>26</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24, 1997 (2) SA 97 (CC) ('Amended Text').

<sup>27</sup> Ibid at paras 180–188 (Court considered whether the antidefection principle could be certified.)

express subject of negotiations in the transition from apartheid, reflecting fears that the likely parliamentary majority of the ANC could be used to woo minority legislators and overconcentrate political power. South Africa joined other countries that formalised such antidefection concerns through legal prohibitions on floor-walking or floor-crossing.<sup>28</sup>

But that did not end the debate over floor-crossing in the South African Parliament. Once in office and once its political power was consolidated, the ANC used its legislative supermajority to repeal the antidefection provision. Under the new law, defection was permitted so long as the defecting group constituted at least ten per cent of the party's legislative delegation.<sup>29</sup> This proviso did little to placate critics. For, while it would pose a large hurdle to defections from the ANC, it would leave defection an individual choice for any party with fewer than 10 members of Parliament.<sup>30</sup>

The constitutional amendment prompted a second constitutional challenge, this time a claim that the amendment would violate the principles of party integrity and separation of powers inherent in the entire constitutional structure.<sup>31</sup> Though not an issue of overriding historical significance, the antidefection question nonetheless challenged the Constitutional Court's role in guaranteeing the structures of democracy. The *First Certification Judgment* had been noteworthy precisely for its attentiveness to the problem of structural limitations on the exercise of political power, something that was certainly in the air in the immediate aftermath of the South African negotiations. The question was whether the Court would continue to use the democracy-promoting metric as the analytic foundation for evaluating efforts by the ANC to consolidate power.

Viewed after the passage of apartheid, and after the first generation of leadership left office, the antidefection question could have been a watershed moment in the history of South Africa under the ANC. The robust political exchange at the time of transition assumed that there would be black majority rule, that the ANC would emerge as the dominant political actor, and further that constitutional guarantees would serve as a bulwark against the overcentralisation of power. The political shakeout of post-apartheid politics had not yet occurred, and even the ascension of the ANC into increasing political hegemony was tempered by the calibrated leadership of Nelson Mandela. As the founding generation moved off the historic stage, however, and as less-broad-minded functionaries took the reins of power, the heroic ANC emerged as the head of an increasingly one-party

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<sup>28</sup> New Zealand similarly prohibited party switching by members of parliament in the Electoral (Integrity) Amendment Act, 2001, but the prohibition was statutory and sunsetted in 2005. See MSR Palmer 'Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution' (2006) 54 *American Journal of Comparative Law* 587, 610 and note 64.

<sup>29</sup> The Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 s 23A(2)(a) repealed by the Constitution Tenth Amendment Act of 2003 (previously the Constitution of the Republic of South Africa Amendment Act 2 of 2003).

<sup>30</sup> CM Fombad 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from South Africa' (2007) 55 *American Journal of Comparative Law* 1, 32.

<sup>31</sup> *United Democratic Movement v The President of the Republic of South Africa & Others (No 2)* [2002] ZACC 21, 2003 (1) SA 495 (CC) at paras 26–27, 115–118 ('*United Democratic Movement*').



state, with all the attendant capacity for antidemocratic abuse.<sup>32</sup> South African democracy entered a period of what is termed ‘dominant party’ democracy, a term that may simply connote the imminent collapse of real democratic contestation.<sup>33</sup> From this perspective, the question of the day is whether the ANC will turn into the PRI, the Mexican Institutional Revolutionary Party, which was similarly the inheritor of a romantic revolutionary struggle, but which then imposed one-party rule to suffocate Mexico for almost the entire Twentieth Century.<sup>34</sup>

Translated into the context of constitutional adjudication, the antidefection issue offered the Court the ability to reassert the structural underpinnings of the *First Certification Judgment*. Instead, the Court retreated to a formalistic account of the Constitution as guaranteeing primarily procedural norms and individual rights. Thus, the Court rejected the challenge both on the procedural ground that the mechanisms of constitutional amendment had been adhered to, and on the grounds that no individual voter could claim a right of faithful representation after the election:

The rights entrenched under s[ection] 19 [of the Constitution] are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.<sup>35</sup>

In the words of Theunis Roux, the ‘Court’s political rights jurisprudence thus represents one of the most disappointing aspects of its record,’ one marked by the failure ‘to devise doctrines that might have counteracted the potentially pernicious effects of the ANC’s dominance – doctrines that construed political rights in a way that helped to transform South Africa’s democracy into one more closely resembling the liberal constitutional ideal[.]’<sup>36</sup>

Perhaps the Court could have drawn deeper structural authority not only from the negotiated history of South Africa’s transition from apartheid, but also from the text of the South African Constitution. This Constitution contains a unique provision guaranteeing some form of effective minority party participation consistent with the aims of democracy. As set out in the Constitution, the rules and orders of the National Assembly must provide for ‘the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy’.<sup>37</sup> Within the sections establishing the structure of the legislative bodies at the various levels of the federal system, parallel language requires that the rules for the National Assembly,

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<sup>32</sup> The extent of the threat posed by the ANC’s electoral dominance is still uncertain. See R Southall ‘The “Dominant Party Debate” in South Africa’ (2005) 39 *Africa Spectrum* 61, 61 (Southall contends that although ‘the ANC’s electoral and political hegemony does carry threats to democracy, ... the ability of the ANC to extend its dominance is subject to considerable limitations.’)

<sup>33</sup> For the best account of this process in South Africa, see generally Choudry (note 1 above).

<sup>34</sup> I am indebted to Pablo de Grieff for the analogy to the Mexican PRI.

<sup>35</sup> *United Democratic Movement* (note 31 above) 49.

<sup>36</sup> T Roux *The Politics of Principle: The First South African Constitutional Court 1995–2005* (2013) 335.

<sup>37</sup> Constitution of the Republic of South Africa, 1996 (‘FC’ or ‘Final Constitution’), s 57(2)(b).

the National Council of Provinces,<sup>38</sup> and the provincial legislatures provide for minority party participation ‘in a manner consistent with democracy.’<sup>39</sup> Instead, the Court deferred to the ANC to define the rules of governance. Thus, the antidefection provision was allowed to stand until the ANC itself decided to abandon it, believing the provision had served its purpose and no longer yielded any hoped-for political benefits.<sup>40</sup>

## II AN INDIRECT GAZE

South Africa represents a high point in the sweep of democratisation that gripped the world stage more or less contemporaneous with the collapse of the Soviet Union. The exact connection, if any, between the transition from apartheid and the collapse of the Soviet bloc remains tenuous, though both the National Party and the ANC historically relied on now-diminished support from the contending great powers.<sup>41</sup> But South Africa’s democratisation did coincide historically with what Samuel Huntington describes as the third wave of democratic ascendancy.<sup>42</sup> What follows is a step back from the immediacy of the South African context to examine some parallels from the post-Soviet period.

### A Courts and the Boundaries of Democracy

The reference to the Mexican PRI in the preceding section invites a comparative assessment of the risks involved in democracies without electoral competition. Particularly for a foreign observer trying to assess constitutional developments

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<sup>38</sup> FC s 70(2)(c)(States that the rules and orders of the National Council of Provinces (NCOP) must provide for ‘the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy’). In addition, the allocation of delegates to the NCOP ‘must ensure the participation of minority parties in both the permanent and special delegates’ components of the delegation in a manner consistent with democracy’. See FC s 61(3).

<sup>39</sup> FC s 116(2)(b)(The rules and orders of a provincial legislature must provide for ‘the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy’).

<sup>40</sup> For a fuller account of the efforts of the ANC to secure the right to woo opposing legislators and the role that floor-crossing played in ANC maneuvers at the provincial level, see Choudhry (note 1 above). In December 2007, the ANC concluded at its Polokwane National Conference that floor-crossing should be abolished. The Democratic Alliance characterised the ANC’s decision as one of political expediency, claiming the ANC relented only because it no longer needed the tactic. See ‘Days Numbered for Floor-Crossing’ *Mail & Guardian Online* (20 August 2010) <<http://www.mg.co.za/article/2008-08-20-days-numbered-for-floorcrossing>>. The result was the constitutional abolition of floor-crossing in the Constitution Fourteenth Amendment Act of 2008. Paradoxically, in 2010 Independent Democrats and Democratic Alliance discussed allowing party members to claim dual membership, which would functionally bring back floor-crossing. See ‘ANC Riled by ID, DA Tango’ *Independent Online* (5 May 2010) <<http://www.iol.co.za/business/business-news/anc-riled-by-id-da-tango-1.815561>>.

<sup>41</sup> I thank Martin Krygier for forcing to my attention the interplay between the anti-apartheid struggle and broader geopolitical trends. Although the relation is not nearly so clear as the emergence of democracies in Eastern Europe from nations under direct Soviet control, the historic proximity of the two events in time – and, more importantly, the end of the proxy war between the West and the Soviet Union over South Africa – puts in question any suggestion that these historical moments were mere coincidence.

<sup>42</sup> SP Huntington *The Third Wave: Democratization in the Late Twentieth Century* (1991).

in South Africa, it is useful to analyse the courts indirectly, seeing what looks familiar from afar even if some of the internal attributes may be missing. South Africa is neither the first nor the last of the post-1989 third wave democracies to face the problem of a democratic process yielding a consolidation of political power that defies electoral accountability. The task is to find a constitutional sextant, an instrument able to take measurements indirectly by triangulation. Toward that end, allow me to offer some distant points of comparison before returning to South Africa proper.

My comparisons begin in an unlikely place for any democratic revival, and one that was decidedly an unpropitious site for the development of constitutional doctrine addressing the boundaries of strong-party democracy: Colombia. The issue to be addressed is the role of constitutional courts under conditions of democratic governance compromised by the absence of competitive electoral accountability. Throughout the countries of the third wave of democracy, the problems of today would have seemed an unimaginable gain of freedom prior to the transitions after 1989. So it was for the countries of the Soviet bloc, and so it was for South Africa while still under apartheid.

So too it was for Colombia. The problem there was not an authoritarian state, but the disintegration of civil institutions under conditions of civil war and increasing domination by drug cartels. Perhaps no event more clearly showed the absence of order than the assault on 6 November 1985, by leftist guerrillas from the Colombian 19th of April Movement that overran the Colombian Supreme Court building. The rebels took the Justices of the Court as hostages, and in the ensuing shoot-out with the military, 12 of the judges were killed, along with more than 100 other civilians. The shootings at the Supreme Court were but the most visible signpost that the country's background of war and strife could overwhelm even the central institutions of state in Bogota, the capital. Colombia was for much of the last half of the twentieth century a state struggling for control of its territory against powerful private militias, and the resulting loss of state authority left open the terrain for one of the highest murder rates in the world, pervasive and extreme poverty, and a stubbornly flourishing drug trade.<sup>43</sup> After a civil war that left more than 200,000 people dead during the Gran Violencia of the 1950s, and then the militant uprisings and drug wars of the following decades during which even more succumbed to violence, any prospect of peace and stability seemed nonexistent.

Yet in 1991, in the face of overwhelming odds, a democratically elected constituent assembly promulgated a new constitution that served as part of the 'profound constitutional moment throughout the Americas'.<sup>44</sup> The fall of military dictatorships across much of South America, most notably in Argentina, Brazil, Chile and Uruguay, unleashed a democratic revival in the region and a new commitment to limitations on the powers of government. In many ways, the

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<sup>43</sup> See MJ Cepeda-Espinosa 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529, 532 note 2.

<sup>44</sup> M Schor 'An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia' (2009) 16 *Indiana Journal of Global Legal Studies* 1, 12.



democratic surge in South America paralleled the broader democratic expansion in Eastern Europe and Asia following the fall of the Soviet Union. In each case, central to the desired democratic restoration was the idea of constraint in the exercise of state authority. Authoritarian rule allowed the direct translation of political power into the raw exercise of arbitrary and repressive governmental conduct. In response, the democratic revival sought both to restore civilian authority and to enshrine the primacy of a rule of law.

In one sense, Colombia fit well within the movement to create effective democratic governance in focusing not only on the security of civil and human rights that had been compromised, but also on the structures of governmental authority to secure such rights. The constitution sought to overhaul many of the institutions of Colombian government, but none so much as the judiciary. Among the constitutional innovations was the creation of a constitutional court, and one that ‘must be by any measure one of the strongest courts in the world.’<sup>45</sup> In the words of then President Cesar Gaviria, the Court was integral to the new democratic order, an institution with the ‘mission of preventing any other powerful authority from hampering the transformations you are encouraging with laws, decrees, resolutions, orders, or any other administrative decisions or happenings. ... The new Constitution requires, in order to be adequately applied, a new system of constitutional judicial review.’<sup>46</sup>

While Colombia’s immediate challenges came from armed opponents of any governing authority, the Constitutional Court’s greatest conflict came from within democratic governing power in a form that should be recognisable to a South African audience. Indeed, the Colombian experience exemplifies the post-1989 new constitutional order in which apex courts once and again confront excess concentrations of power in emerging and generally weak democratic states.

The critical question is the role to be played by these constitutional courts as they emerge from a process of reformation of states in the aftermath of civil strife or the overthrow of authoritarian rule. The model for modern constitutional courts comes from Germany whose newly created post-War constitutional court served to oversee a series of state institutions compromised by their integration into Nazism – including the existing judiciary. No country emerging from an authoritarian past is likely to have the human resources to purge from office all individuals tainted by prior association with the deposed government. Positions requiring advanced education degrees and professional certification almost invariably bring individuals into contact with the state and likely compel either membership in the ruling party or other forms of acquiescence with state authority. Efforts at complete lustration not only would deplete the society of those with experience in the technical administration of the society, but would likely force large parts of the society into active opposition to the attempted democratisation, as the United States learned to its chagrin in Iraq.

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<sup>45</sup> D Landau ‘Political Institutions and Judicial Role in Constitutional Law’ (2010) 51 *Harvard International Law Journal* 319, 339.

<sup>46</sup> Cepeda-Espinosa ‘Judicial Activism in a Violent Context’ (note 43 above) at 550–551.

Judges are no exception to this dilemma. Of necessity, they require legal training which brings them into close proximity to the ruling regime, oftentimes no doubt much closer than they truly desire. Yet even authoritarian regimes need some form of legal regularity in the everyday lives of the citizens.<sup>47</sup> There are still marriages and divorces, exchanges of goods or services as permitted by law, and the settling of affairs at death. Certainly these same judges might be conscripted to enforce laws that no democratic society could tolerate. But in the great run of cases, the state had no particular stake in the resolution of the domestic woes of any particular family, and matters of divorce or child custody had to be resolved with the accumulation of knowledge and experience that is the judge's craft.

Germany most clearly presented both the problem and potential resolution. Pre-war Germany was home to one of the world's most sophisticated legal cultures, replete with first-rate legal instruction in its universities and a centuries-old body of jurisprudence. Few, if any, societies could rival the rectitude of German legal proceedings, nor the integrity of the judicial system. At the same time, German legal doctrine was highly formalistic and boasted a strong positivistic commitment to the application of the law as the command of the sovereign, not as reflecting normative aspirational claims. In the familiar jurisprudential debate on the 'is/ought' divide in legal authority, German jurisprudence defined law as that which 'is' as commanded by the sovereign, rather than any transcendent command of a normative 'ought' in what laws must guarantee. With the beginnings of the Third Reich in 1933, the judiciary as an institution, and overwhelmingly the judges as individuals, allowed their legal positivism to deliver their technical expertise to the service of the legal rules of the new totalitarian order.

In an advanced country such as Germany, there were still contract disputes and accidents yielding injury and all sorts of quotidian legal matters that required equitable resolution. Some might be infected by Nazism, especially if one of the parties was a Jew or was for some other reason a political enemy. But many were not. The great moral dilemma was that the German judiciary attended to both sets of cases with the same positivistic dispatch, looking to formal law to command who should win and who should lose, even if it meant enforcing the worst of Nazi racialism.

Post-War Germany sought to preserve the judiciary as an institution, even as a handful of the most notorious Nazis in the system might be put on trial for their crimes. These few trials changed nothing fundamental. The entire judiciary was compromised as an institution such that any defensible system of moral reckoning would have demanded the removal from office of those who lent any manner of legalistic cover for Nazism. The blunt fact, however, was that after 12 years of fascist rule, there were not enough judges untainted by the past that would still have been left available to administer West Germany, a pattern that carries over fairly directly to South Africa.

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<sup>47</sup> Inga Markovits tells a compelling account of the efforts at humanity and decency of East German family court judges under communism, even in the face of ideological intolerance from above. See I Markovitz *Imperfect Justice: An East-West German Diary* (1995).

Germany then was the primary source of the new constitutional model, although the Italian Constitutional Court emerged at the same time. The German solution was to allow the judiciary to largely remain intact, but to create a new constitutional court composed of individuals who had largely been in exile or had, in some sense, become opponents of the Nazi regime. Unlike the US Supreme Court, which sits as the final appellate chamber for all legal disputes in the United States, the constitutional court model assumed a separation between the ordinary workings of the law and the fundamental guarantees of the democratic order. The first category would attend to contracts, domestic relations, property, and all manner of legal oversight of the daily life of the citizenry. By contrast, the constitutional domain would oversee the exercise of state authority, whether in the form of violations of the rights of individual citizens or the exercise of governmental power beyond that allowed by the constitution.

The division of the application of the laws from the oversight over democracy allowed Germany to retain an experienced judiciary, despite its complicity in the Nazi horrors, including in the application of the Nuremberg laws on racial ordering. The ordinary judiciary could continue to apply the laws of the new democratic order which would have to be purged of remnants of Nazi rule, even if the judges were not. But the judges operated under the oversight of a democratic reorganisation of law, including the ability of their decisions to be reviewed by the Federal Constitutional Court on questions of fundamental liberties. The independence of the Federal Constitutional Court from both the stains of the past and the normal working operation of the laws served as a bastion against any threatened return of the authoritarian regime. Again, this is a familiar story in South Africa.

## **B The Colombian Court and Democratic Governance**

On most measures, Colombia appeared an unlikely candidate for an exemplary use of a new constitutional court to protect democratic authority. Unlike post-War Germany, or South Africa and Eastern Europe which command far greater academic attention around the world, the creation of a constitutional court in Colombia did not correspond to any great social transition, as with the defeat of Nazi Germany, or the fall of Communism, or the end of apartheid. Rather, the new constitutional order created in 1991 was at best aspirational, a hope that state authority could be wrested from the armed bands and drug lords that dominated much of the country. Yet even without a functioning consolidated democracy, the Colombian constituent assembly attended to the creation of a new constitutional court with claims to guarantee democratic rule.

The prospects for a stable democratic order improved dramatically after President Alvar Uribe took office in 2002 and dedicated his administration to 'democratic security'. Uribe proved capable of marshalling weak and compromised state institutions to recapture the basic forms of governance, in no small measure militarily. Government exertions against insurgent forces stemmed the tide of violence and stabilised civilian authority over almost the entirety of Colombia. Not surprisingly, the security gains were wildly popular with an embattled population who suddenly were able to reclaim the public spaces of towns and

cities for civilised life. As kidnappings and murders declined, and as a prosperous normality blossomed, Uribe's popularity soared. The prospect of Uribe being forced to retire at the end of his term left Colombians with the prospect of a loss of stable civilian rule. The obstacle was not democracy, but the constitutional mandate of only one term in office.

In the confrontation between a democratically popular president and the rigidity of the constitution, the popular will prevailed, as it is likely to do. The Constitution was amended in 2004 to permit Uribe to seek a second term as President, a departure from the Latin American norm of single-term presidencies. The Constitutional Court readily upheld the constitutional amendment allowing Uribe to seek a second term as procedurally and substantively valid, notwithstanding the unprecedented length of Uribe's tenure in office.<sup>48</sup> Unsurprisingly, Uribe won easily.<sup>49</sup> This public affirmation marked the first time in Colombian history that a chief executive had won a second term in office, and meant that Uribe's eight years in office would become the longest period any chief executive remained in power since Colombia gained its independence in 1819.<sup>50</sup>

As Uribe consolidated power, the trappings of excess began to appear. Democratic security, the greatest conquest of the Uribe administration, began to fade. The military leaders were compromised by their association with paramilitary groups who had moved in as local lords of power when the drug gangs and guerrillas were dislodged. The paramilitary groups and the government itself developed a propensity for retaliation against all enemies, insurgent or not. Corruption and wiretaps of political enemies filled out the picture of democracy ceding to strongman rule. Increasingly, the new democratic order narrowed to the person of the President. Perhaps not surprisingly, Uribe rallied his supporters, pressured his opponents, and forced a reluctant Congress to permit him to run for a third term as President.

The stage was set for the greatest constitutional confrontation in Colombia's history. A third term raised the spectre that Colombia would succumb to the Latin American tradition of *caudillos*, the strongmen who hold on to power indefinitely and become the gravitational centre of political life. Democracy recedes when entrepreneurial sectors 'depend on close personal relationships with the government to obtain permits or public contracts'<sup>51</sup> and when state institutions, even outside the executive, are staffed entirely by individuals who depend on the incumbent president for their appointment.

Incumbent power tends to feed on itself, creating an expanding state bureaucracy with ever greater control of the economy. The pathology of clientelism then rewards incumbent politicians for an expansion of the public sector in a way that facilitates sectional rewards to constituent groups. The phenomenon was described by Mancur Olsen in his classic work on the pressures toward the growth

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<sup>48</sup> International Crisis Group 'Uribe's Possible Third Term and Conflict Resolution in Colombia' *Latin America Report No 31* (18 December 2009) 8.

<sup>49</sup> *Ibid.*

<sup>50</sup> E Posada-Carbo 'Colombia After Uribe' (2011) 22 *Journal of Democracy* 137, 138.

<sup>51</sup> International Crisis Group (note 48 above) 2.

of both the size and complexity of government.<sup>52</sup> Politics becomes not a matter of electoral contests for power but of connections to government. The ensuing clientelism, the organising of power to protect incumbent sinecure by dispensing state benefits and contracts to loyal followers, suffocates the opposition. Elections lose their quality of being choices among parties or ideologies, and instead become means of access to control of state resources, a battle in which incumbent authority is paramount. The concentration of executive power benefits those with connections to the state. The freedoms and ambitions unleashed by popular sovereignty ‘intensely politicise all areas of organised collective existence’ as connections to the state begin to define all means of social and economic advance.<sup>53</sup> The greater the scale of government enterprise the more it rewards those who can master its by-ways in a process that is non-transparent to the public and that resists either monitoring or accountability.

The mobilisation of the state under Uribe was the perfect medium for an elected president at the height of his popularity to pull up the gangplanks of electoral accountability. At the same time, in the Colombian situation, there was no escaping the fact that the constitutional reform allowing Uribe a third term was approved by a constitutional plebiscite and by the Congress, seemingly as mandated by the text of the Constitution itself. Given the continued citizen support for Uribe, the popular endorsement was hardly surprising. But the victory of Uribe was not simply a moment of popular approbation of the manifest improvement of daily life in Colombia. The ability of Uribe to mobilise popular support overwhelmed the opposition of the weak Congress. The prospect of a presidential third term was a painful confirmation of the failure of democratic restraints to have taken hold. Despite efforts to block the amendment legislatively, Congress did indeed succumb and passed this second constitutional amendment extending the time that Uribe could potentially serve as President.

Under these circumstances, the Court emerged as the sole check on the prospect of increasingly unilateral executive power. The difficulty is that the judiciary has no independent democratic mandate, particularly as compared to a popular ruler such as Uribe. Nor could the Constitutional Court intervene in the name of a narrow procedural limitation on governmental power; from a technical point of view, the procedures taken to permit a third term seemed unassailable. Instead, as David Landau sustains, any judicial intervention had to draw upon a more deep-rooted conception of the reconstitution of civilian rule after decades of violence: ‘[t]he public sees the Court, rather than the legislature, as the best embodiment of the transformative project of the 1991 constitution’.<sup>54</sup> While not a democratic mandate in the electoral sense of the term, the Court could assert itself as the guardian of a popularly accepted constitutional order which had to restrain the momentary desires of popular majorities, perhaps even if expressed in constitutional amendment. In one of its earliest decisions, the Court explained its constitutional role along these lines:

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<sup>52</sup> M Olson *The Rise and Decline of Nations* (1982) 69–71.

<sup>53</sup> PB Mehta *The Burden of Democracy* (2003) 6.

<sup>54</sup> Landau (note 45 above) at 344 (footnotes omitted).



The difficulties deriving from the overflowing power of the executive in our interventionist state and the loss of political leadership of the legislature should be compensated, in a constitutional democracy, with the strengthening of the judicial power, which is perfectly placed to control and defend the constitutional order. This is the only way to construct a true equilibrium and collaboration between the powers; otherwise, the executive will dominate.<sup>55</sup>

Claiming such broad authority to check the exercise of executive power put the Colombian Court in a situation outside the boundaries of immature constitutional courts. Although the German Federal Constitutional Court ('FCC') is heralded as the model for the subsequent establishment of comparable courts in other countries, its history actually shows tentative caution. Recall that the mandate of the FCC was primarily as a check against incipient forms of authoritarianism, defined by the Nazis in the past and by the Soviets to the East. The early watershed cases of the FCC involved either remnants of Nazi political organisations or the German Communist Party itself. In neither case was there a claim of a constitutional constraint being asserted against incumbent state authority in the name of the Court's constitutional mandate. Although the FCC is now renowned, famously so, for its sophisticated proportionality test in assessing the legitimacy of state conduct, this was not always so. As Niels Petersen has well chronicled, the proportionality form of review, weighing the significance of the state's objective against the private harm ensuing and the efficacy of the means chosen to realise that objective, developed slowly.<sup>56</sup> Early proportionality cases involved Constitutional

<sup>55</sup> Ibid at 346.

<sup>56</sup> N Petersen *The Rise of Balancing in German Fundamental Rights Adjudication* (unpublished manuscript) (on file with author). Conversely, the South African Constitutional Court, with clear textual direction designed to address the 'countermajoritarian problem', has employed robust limitations analysis, or a strong proportionality test, from its inception. See S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 34. Two-stage analysis (rights analysis and limitations analysis) appears in the Interim Constitution. Of greater interest, however, is the Constitutional Assembly's decision to adopt the Constitutional Court's substantially more expansive gloss on the limitations clause in *Makwanyane* when it recast the actual wording of the limitation clause in the Final Constitution. *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC) ('*Makwanyane*'). Over time, the judgments of the FCC and the SACC have shown a palpable degree of convergence with respect to both rights and limitations analysis. The Constitutional Court is often inclined to eschew giving discernible content to rights (by assuming for the sake of argument that a violation has occurred) and leaving hard questions as to whether the limitation of a law of general application is reasonable and justifiable in terms of broad criteria laid out in FC s 36(1). See, further, S Woolman 'The Right Consistency: *Beinash v Ernst & Young*' (1999) *South African Journal on Human Rights* 166. Proportionality and limitations analysis becomes a critical, if not optimal, backstop for robustly reasoned decisions.

However, the South African Constitutional Court, while not averse to substantive reason-giving for its decisions, also tends to avoid the direct application of substantive provisions of the Bill of Rights through the indirect development clause found in FC s 39(2) (Statutory provisions or rules of common law must be interpreted or developed in light of the general 'spirit, purport and object of the Bill of Rights'). On the Court's aversion to direct application, see I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138. On the problems that flow from the thinness associated with such avoidance, see *True Motives 84 (Pty) Ltd v Mabdi and Another* [2009] ZASCA 4, 2009 (4) SA 153 (SCA), 2009 (7) BCLR 712 (CC) citing S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Review* 762; (SCA raises directly problems associated with the thinness in the Constitutional Court's reasoning when addressing similar issues in subsequent cases). See also *Makhanya v University of Zululand* [2009] ZASCA 69, 2010 (1) SA 62 (SCA) at paras 81–88 (According to

Court review of adjudications between private parties in which the conduct at risk of constitutional overhaul was that of the ordinary judiciary, not the political branches. Indeed, in the famous *Liith*<sup>57</sup> case that heralded proportionality, the parties were a social critic seeking to denounce a filmmaker as a former Nazi, and the filmmaker seeking freedom of expression without condemnation – in other words, two private parties disputing the meaning of the Nazi legacy.

Moreover, as the FCC developed its jurisprudential moorings and its authority, the fate of Germany was never at issue. West Germany remained under the oversight of the Allied powers, whose sizeable military presence would quickly be brought to bear against any overt efforts to restore Nazism or invite occupation by the troops of the Warsaw Pact. The FCC was not going to be displaced through internal repudiation so long as the German constitutional order was patrolled by foreign troops. Moreover, those troops were also committed to the proposition that, regardless of the rulings of the German Court, neither the Nazis nor the followers of the Warsaw Pact were going to take control in West Germany.

This was not so in Colombia in 2009. The Colombian Court had no external allies and its confrontation with the executive put to the test the role of the self-proclaimed judicial power under the Constitution. With the approach of the end of Uribe's second term in 2010, the Court was called upon to review a second constitutional amendment allowing an extension of the presidential term of office, this one permitting Uribe a potential third term. In a surprisingly short opinion, the Court cited numerous procedural defects in the congressional vote and in the endorsing popular referendum. None of these defects alone was of sufficient magnitude to justify overturning what appeared a clear popular mandate. To its credit, the Court reached further and struck down as unconstitutional the proposed constitutional amendment on the basis of deeper commitments to the base requirements for democratic rule: 'The Court finds that [the proposed amendment] ignores some of the structural axes of the Political Constitution, such

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Nugent JA, the Constitutional Court had come to two 'mutually destructive findings' with respect to the content of the rule to be followed in lower courts and by other social actors because it had given no express statement as to the true ratio for its decisions.) Academic opinion supports the concerns of the Supreme Court of Appeal. See C Hoexter 'Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209; M Brassey 'Back Off, but Back Up: Administrative Law Rightly Yields to Labour Law' (2009) 2 *Constitutional Court Review* 209; J Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79. However, the thinness of (some) Constitutional Court judgments is, as Frank Michelman has noted, not to be confused with a flight from substance. See F Michelman 'On the Uses of Interpretive Charity: Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 term of the Constitutional Court' (2008) 1 *Constitutional Court Review* 1.

The resort to both balancing and indirect application bear a strong, family resemblance: and each strategy courts thinness, if not a flight from substance. See S Woolman 'Between Charity and Clarity: Kibitzing with Frank Michelman on How to Best Read the Constitutional Court' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy on the South African Constitution* (2012) 391. However, such strategies, grounded in the text, may be extremely useful in avoiding direct confrontations with decisions rendered by the executive and the legislature.

<sup>57</sup> *Liith* 7 BVerfGE 198 (1958) 215–219.

as the principle of separation of powers and the system of checks and balances, [and] the rule of alternation in office according to pre-established time periods.<sup>58</sup>

Despite his strong popular mandate, Uribe acceded to the Court's decision and immediately withdrew his candidacy for office, both to his great credit and to the benefits for the prospects of further democracy in Colombia. More problematic immediately is the paucity of reasoning in the opinion denying Uribe a third term. The principles of separation of powers and checks and balances may well be desirable, indeed indispensable, in a stable democracy. But much more work needs to be done before these translate into something as concrete as holding a particular reform unconstitutional. The United States well survived three terms and a fourth election of Franklin Roosevelt as president with its democracy intact, even strengthened, in the face of overwhelming military challenge. Subsequent United States constitutional amendment limited the presidential term of office, but no claim could be made that this particular amendment was mandated by deeper democratic requirements in the American context.

Perhaps the Colombian Court could have distinguished the affirmative step of amending the constitution to enshrine incumbent power from the use of already established pathways, as with Roosevelt's successful re-election bids in the absence of any constitutional prohibition. A court wary of incumbent abuse of power could perhaps address the capacity of 'abusive constitutionalism'<sup>59</sup> to thwart the democratic accountability of established political power. But such alternative claims would also require a deeper constitutional theory to justify the Court's legal intervention.

### C Toward a Theory of Judicial Constraints

Missing in the Colombian context was not only an account of the structural role of the Colombian Court in securing democratic governance, but the deeper jurisprudential wellsprings that would justify its role. While the immediate issue in Colombia was the process of constitutional amendment undermining democratic contestations of power, the broader issue goes well beyond simply the use of constitutional amendment to achieve this end.

The Colombian Constitutional Court could have looked to another apex court with a more robust account of the protection of democracy as falling within its mandate. Perhaps the best jurisprudential account is found in the work of the Supreme Court of India, whose democratic jurisprudence also extends to the striking down of constitutional amendments that threaten the basic underpinnings of democratic contestation.

A short review of Indian constitutional history may begin shortly after the 1950 ratification of the Constitution, when early populist governments sought to use legislative majorities to limit certain rights guarantees, most notably a limited

<sup>58</sup> Corte Constitucional de Colombia [C.C.] [Constitutional Court] Sentencia C-141/10 (26 February 2010) (Colombia) <<http://www.corteconstitucional.gov.co/comunicados/No.%2009%20Comunicado%2026%20de%20febrero%20de%202010.php>> (translation by author).

<sup>59</sup> The term comes from D Landau 'Abusive Constitutionalism' (2013) *UC Davis Law Review* (forthcoming) <<http://ssrn.com/abstract=2244629>>.



commitment to just compensation for expropriation of private property.<sup>60</sup> In a series of early cases, the Indian Supreme Court obstructed land redistributions without recompense to the owners, invoking its authority as guardian of constitutional commitments to individual rights. The Court's early property rights decisions thwarted efforts by the Nehru government to redistribute land to the broad mass of destitute Indians, but without any state obligation to compensate the prior owners. The Court's claimed authority prompted a confrontation in a 1967 property rights case, *Golak Nath v State of Punjab*, in which the Court declared that property, as a fundamental constitutional right, was immune from any amendment process.<sup>61</sup>

While the early property rights cases set up a significant confrontation with the government, they were limited in scope and the Indian Supreme Court did not attempt to interfere more broadly in the exercise of political power in the founding days of Indian democracy. As a result, the Court played a secondary role in the early years of Indian democracy and constitutional law had little independent traction in defining the political powers of India. In large part this reflected the Indian Court's inability to break from its jurisprudential attachment to the Westminster tradition of parliamentary supremacy and its concept of narrow procedural review of government action. But, in large part, the Indian Court operated in a world without strong traditions of judicial review of the political process, the American experience at that time being no exception.

This began to change when the Indian Court was faced with efforts to amend the Constitution of India to restrict constitutional commitments to property rights and judicial review. For all the inherited traditions of Westminster, the fact was that India operated under a written constitution with fairly specific guarantees to citizens and limitations on government. At the same time, under Article 368 of the Indian Constitution, a liberal amendment process requires only a majority vote in both houses of Parliament with two thirds of its members present and presidential agreement<sup>62</sup> – a comparatively easy standard internationally where the amendment process typically requires either a supermajority or concurrent majorities over successive sessions of the legislature.

The constitutional confrontation dates from the Supreme Court's ruling in 1967 that the Indian Parliament's power to amend the Constitution was limited, and that Parliament could not abridge any fundamental rights inherent in the substantive provisions of the Constitution.<sup>63</sup> In broad strokes, the emergence of a substantive doctrine of democratic protection allowed the Indian Supreme Court to break from its relatively deferential role in the development of Indian

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<sup>60</sup> N Robinson 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 *Washington University Global Studies Law Review* 1, 29–31.

<sup>61</sup> *Golak Nath v State of Punjab* (1967) SCR (2) 762, 819 ('*Golak Nath*').

<sup>62</sup> The Constitution of India, Art 368. Some provisions of the Constitution also require approval by the legislatures of more than half the states before presentment to the President.

<sup>63</sup> See *Golak Nath* (note 61 above). For a discussion of the limitations on amendment trenching on structural protections in the Indian Constitution, see M Khosla 'Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate' (2009) 32 *Hastings International and Comparative Law Review* 55, 93–94.

democracy after independence and through the increasing use of emergency decrees as the central form of governmental authority.<sup>64</sup>

With the rise of the Indira Gandhi government, the property cases prompted an early confrontation with an assertive expansion of executive authority. Indeed, the Indian Court's property rulings became major electoral issues which, in turn, strengthened the government's claimed authority for constitutional change. In a 1975 opinion reminiscent of the shrewd politics of Marshall CJ in declaring judicial review in the US Supreme Court case of *Marbury v Madison*,<sup>65</sup> a case upholding governmental conduct, the Indian Court refined its vision on constitutional limitations on even the amendment process. In a fractured opinion that ran more than 1,000 pages, the Indian Supreme Court overturned its own decision in *Golak Nath* and rejected the presumed inviolability of all constitutional rights guarantees, property included. The Court in *Kesavananda Bharati v State of Kerala* held that core rights, including property security, were amenable to constitutional amendment.<sup>66</sup> However, the Court reserved a category of the 'basic structure' of constitutional rule that stood apart from the normal legislative processes of constitutional amendment.

The critical moment came in the aftermath of the landslide victory by the Congress Party in 1971 when Indira Gandhi's party pushed through The Constitution (Twenty-fourth Amendment Act), 1971, purporting to vest constitutional supremacy in the legislature and eliminating the right of constitutional judicial review.<sup>67</sup> In one sense, this amendment was consistent with the English colonial tradition of parliamentary sovereignty and the absence of judicial review of legislation. At the same time, the Twenty-fourth Amendment was inseparable from the consolidation of increasingly unchecked government authority and the assertion of one-party political power that would ultimately lead to the state of emergency of 1975–1977.<sup>68</sup>

In the wake of this state of emergency, the modern Supreme Court of India emerged as a central force challenging the use of electoral majorities to consolidate one-party rule. The Court began to intercede much more heavily in the core organisation of the Indian political process, no doubt in response to its acquiescence to Indira Gandhi's broad use of emergency powers to shut down internal political opposition.<sup>69</sup> In response, and over a series of highly

<sup>64</sup> See SP Sathe 'Judicial Activism: The Indian Experience' (2001) 6 *Washington University Journal of Law and Policy* 29, 43–49.

<sup>65</sup> *Marbury v Madison* 5 US 137 (1803).

<sup>66</sup> *Kesavananda Bharati v State of Kerala* (1973) Supp SCR 1.

<sup>67</sup> See SP Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2002) 68.

<sup>68</sup> See LI Rudolph & S Hoeber Rudolph 'To the Brink and Back: Representation and the State in India' (1978) 18 *Asian Survey* 379, 397–399.

<sup>69</sup> As well formulated by Upendra Baxi, '[j]udicial populism was partly an aspect of post-emergency catharsis. Partly, it was an attempt to refurbish the image of the court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power.' U Baxi 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in R Dhavan et al (eds) *Judges and the Judicial Power* (1985) 289, 294. The emergence of the Indian Supreme Court, though no doubt a direct response to the emergency period, also corresponds to the increasing delegation of governmental authority outside the traditional division between courts, legislatures and the executive. See generally B Ackerman 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633,

controversial cases, the Supreme Court gave teeth to the doctrine of the ‘basic structure’ which served to limit even procedurally proper alterations to the Constitution to rein in the emergency decrees.<sup>70</sup>

In many ways the decisive moment came in *Minerva Mills Ltd & Others v Union of India & Others*. In *Minerva Mills* that the Court expressly struck down amendments attempting to curtail the judicial power of review.<sup>71</sup> At issue was a finding by a state agency acting under the aegis of the Sick Textile Undertakings (Nationalisation) Act, 1974, to determine that nationalisation was needed because the confiscated enterprise was ‘managed in a manner highly detrimental to the public interest’. Key to the Indian Court’s approach was the idea that even constitutional amendments could not alter the deeper commitment to democratic governance, including amendments that restricted the ambit of judicial review of the application of new legislation.<sup>72</sup> The concurring opinion of Bhagwati J expressly tied the idea of structural limitations on governmental power, existing beyond the formalities of the procedural requirements for constitutional amendment, to the role of judicial review in enforcing those limits.<sup>73</sup> According to Bhagwati J, ‘the limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure, for if the limited power of amendment was enlarged into an unlimited power the entire character of the Constitution would be changed’, and the result would be to ‘damage the basic structure of the Constitution because there are two essential features of the basic structure which would be violated, namely, the limited amending power of the Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers’.<sup>74</sup>

As Professor Mate well argues, the effect of the basic structure doctrine was to ‘entrench’ the Indian constitution as a blueprint for democratic governance: “Through the development and entrenchment of the basic structure doctrine, the Court helped assume a “guardian” role in protecting and preserving basic features of the Constitution from being altered by political majorities.”<sup>75</sup> The object is far different from Bruce Ackerman’s theory of American constitutional moments, in which a confluence of political demands unfolds a process of constitutional adaptation to new political realities, as with the rise of the modern administrative state. Instead, the Indian Court held itself out as a bulwark against excessive majoritarianism that threatens to overwhelm India’s fragile state institutions. That power of constitutional review by now extends to the amendment process

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688–690 (Puts forth the need for ‘functional specialization’ as part of the constitutionally constrained exercise of parliamentary authority).

<sup>70</sup> M Mate ‘Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective’ (2010) 12 *San Diego International Law Journal* 175, 185.

<sup>71</sup> *Minerva Mills Ltd & Others v Union of India & Others* (1981) 1 SCR 206 at paras 22, 59–61 (*‘Minerva Mills’*).

<sup>72</sup> See GJ Jacobsohn ‘An Unconstitutional Constitution?: A Comparative Perspective’ (2006) 4 *International Journal of Constitutional Law* 460, 483.

<sup>73</sup> *Minerva Mills* (Bhagwati J concurring in part and dissenting in part).

<sup>74</sup> Mate (note 70 above) 190.

<sup>75</sup> *Ibid.*

itself,<sup>76</sup> in effect recreating a Basic Law of democratic governance as has emerged in other countries, notably Germany and Israel.

A basic-structure approach, modelled on the Indian Supreme Court's doctrine, could potentially have provided the Colombian Constitutional Court a structural lever for evaluating the effect of a third term of office for President Uribe. Such a theoretical account would have given the Court a deeper doctrinal foundation for its otherwise compelling account of the vulnerability of Colombia's new democracy to descend into single-party political consolidation, if not outright single-person consolidation.

### III FURTHER CONTESTATION IN SOUTH AFRICA

A return to South African constitutional politics deepens our sense of the struggle faced by the Colombian Constitutional Court and heightens one's appreciation for the conceptual framework offered by the Indian Supreme Court. When the Colombian Court had to confront the proposed constitutional amendment the characteristic disabilities of uncontested rule, even when backed by elections, had become manifest. Without rotation in office, the three 'C's' of consolidated power take hold: clientelism, cronyism, and corruption. The Colombian courts stepped up to maintain democratic accountability even if compelled by a poorly elaborated theory of its constitutional mandate.

In South Africa, the floor-crossing case, while interesting jurisprudentially, proved not to be a watershed in terms of ANC consolidation of power; indeed, the entire experiment with trading parliamentary blocs was abandoned once it did not yield the desired results in party-raiding.<sup>77</sup> But if one is to judge by the cases that have reached the Constitutional Court in the past few years, the relation of consolidated one-party rule to the prospects for democracy continues to be present. Despite the limits of the empirical methodology, it is nonetheless striking that the Court has confronted attempts by the ANC either as a party, or as the government or through the executive to wall itself off from accountability and institutional constraints on its power.<sup>78</sup>

The comparison between Colombia and India returns us to the question of how a court is to fashion the divide between improper political judgments and necessary judgments about politics. Political dominance by a single party places inordinate pressure on any top court unable to carve out a space for judicial independence amid political uncertainty. Parties that have uncertain long-term

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<sup>76</sup> See, eg, *IR Coeblo v State of Tamil Nadu* (1999) 2 Supp SCR 394, 396–398.

<sup>77</sup> But see Choudhry (note 1 above) at 37–44 (Details the political backdrop and the Court's decision in *United Democratic Movement* and states that 'floor-crossing enhanced the ANC's dominant status at the national level and in all nine provinces').

<sup>78</sup> See *Ramakatsa* (note 6 above); *Oriani-Ambrosini, MP v Maxwell Vuyisile Sisulu, MP & Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC) ('*Oriani-Ambrosini*'); *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24, 2013 (1) SA 248 (CC) ('*Democratic Alliance*'); *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* [2012] ZACC 18, 2012 (6) SA 223 (CC) ('*National Treasury*'); *Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature & Others* [2011] ZACC 25, 2011 (6) SA 396 (CC) and [2012] ZACC 3, 2012 (4) SA 58 (CC) (*Limpopo I and II*); *Mazibuko v Sisulu & Another* [2013] ZACC 28, 2013 (6) SA 249 (CC); *Glenister v President of the Republic of South Africa* [2011] ZACC 6, 2011 (3) SA 347 (CC) ('*Glenister*').

horizons and fear of losing power to their rivals are less likely to confront the judiciary as an institution than is a confident dominant party for whom the hazy political legitimacy conferred by judicial independence is likely forsaken for the hard-and-fast claims to power from an electoral mandate.<sup>79</sup> While the one-party dominance of the ANC has commanded the attention of political scientists,<sup>80</sup> only recently has attention turned to the jurisprudential implications of one-party rule for constitutional oversight of the democratic process.<sup>81</sup>

Recent cases reveal that the South African Constitutional Court still confronts the question of how to evolve a structural jurisprudence directed at the concentration of power, and that a more critical jurisprudence is emerging than that which marked earlier watershed cases such as *United Democratic Movement*.<sup>82</sup> In *Democratic Alliance*, for example, the Court confronted what is clearly a matter of political appointment generally outside the bounds of judicial review in most if not all democratic countries.<sup>83</sup> The particular issue was the appointment of someone with a history of dishonesty to the post of National Director of Public Prosecutions. The Court lacked doctrinal mooring for assessing what seemed to be a power grab by the Executive, eroding one of the few checking sources on political power. The Court agonised over the standard of review, seeking guidance in cases such as *Affordable Medicines*. The *Affordable Medicines* Court stressed the importance of holding policy decisions to only a rational relations standard of review:

The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society.<sup>84</sup>

To an outside observer, the South African rational relations standard of review seems a poor institutional choice for addressing the distinct problems presented by the entrenchment of a dominant political party. The American version of rational relations review is designed to be deferential to the policy discretions of the modern administrative state. Although there have been some recent examples

<sup>79</sup> Sujit Choudhry advances this argument, and explores the pressures from electoral mandates on judicial autonomy based on claims to constitutional authority. See, generally, Choudhry (note 1 above) ('This reflects the Court's inadequate understanding of the concept of a dominant party democracy, its pathologies, the pressure it puts on what is otherwise a formally liberal democratic system because of the lack of alternation of power between political parties, and how this pressure is generating constitutional challenges.')

<sup>80</sup> See, eg, H Gilmore & C Simkins (eds) *The Awkward Embrace: One Party Domination and Democracy* (1999); R Southall 'Opposition in South Africa: Issues and Problems' (2001) 8 *Democratization* 1.

<sup>81</sup> See, eg, Choudhry (note 1 above) (Discusses the 'characteristic set of pathologies' present in 'dominant party democracies' and the effects of such on the Constitutional Court); Klug (note 7 above) (focusing on the problem of 'unipolar' democracy); Roux (note 36 above) at 334–364; Choudhry (note 1 above) at 32–34 ('[T]he domination of the ANC means that the Court cannot rely on the risk of losing power as a check on the abuse of public authority.')

<sup>82</sup> See *United Democratic Movement* (note 31 above) at 115–118.

<sup>83</sup> See generally *Democratic Alliance* (note 78 above).

<sup>84</sup> *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3, 2006 (3) SA 247 (CC) para 86 ('*Affordable Medicines*').



of rationality review being used to evaluate the substantive merits of congressional enactments,<sup>85</sup> the basic role of rational relations review is to provide a wide swath of governmental power without judicial intrusion.<sup>86</sup>

The South African version of rational relations review seems designed to interdict a different set of concerns over sectional legislation; that is, rewards to discrete groups of people that are disconnected from the broader aims of governmental policy. Hence, the South African case law imposes a higher burden of justification on legislative decision-making than the American version. But the justification requirement is designed to tease out impermissible benefits along classifications that could, in the American context, give rise to strict scrutiny as the predicate for judicial action. According to one well-known formulation of the South African test:

In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.<sup>87</sup>

The Court’s rational relations jurisprudence distinguished the aims of government from the classifications used to get there, with a much broader swath given to the former than the latter. As Roux observes, the latitude given to the ANC government to evolve in the policy domain was critical to not forcing the Court into a premature, and likely unwise, confrontation with the political branches.<sup>88</sup> This core approach continues in recent decisions that have steered clear of involvement in outwardly policy questions involving the discharge of conventional governmental authorities. For example, in *National Treasury & Others v Opposition to Urban Tolling Alliance & Others*,<sup>89</sup> a lower court injunction against the system of collecting highway tolls was reversed by the Constitutional Court because of the extent to which ‘the restraining order will probably intrude into the exclusive

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<sup>85</sup> See *United States v Windsor* 570 US 12 (2013), 133 S Ct 2675 (2013) (Supreme Court strikes down the Defense of Marriage Act); *Shelby County v Holder* 570 US (2013), 133 S Ct 2612 (2013) (Supreme Court strikes down the formula for administrative preclearance under s 4 of the Voting Rights Act).

<sup>86</sup> The rational relation standard of review begins with ‘a strong presumption of validity’ for governmental decision-making, including the use of classifications necessary for legislation or regulation: *Heller v Doe* 509 US 312 (1993) 319. The US Supreme Court has made clear that it does not hold the legislature to a standard of express fact-finding or clear articulation of a single legislative purpose; rather, any conceivable legislative purpose satisfying the lax standard of judicial review is sufficient to uphold challenged legislation. See *FCC v Beach Communications, Inc* 508 US 307 (1993) 313. On this standard, ‘judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted.’ *Vance v Bradley* 440 US 93 (1979) 97.

<sup>87</sup> *Prinsloo v Van der Linde* [1997] ZACC 5, 1997 (3) SA 1012 (CC) at para 25.

<sup>88</sup> Roux (note 36 above) at 3–11, 390–391, 392 (Notes that the Court was successful in ‘negotiating the law/politics tension to avoid political attack’ in part by ‘defer[ing] to the ANC’s primary policy-setting role’); and at 72–111 (Describes a conceptual framework to understand the political constraints on court systems in different kinds of democracies and the strategies used by judges to work within those political confines).

<sup>89</sup> *National Treasury* (note 78 above).

terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm.<sup>90</sup> As such, injunctive relief on clearly defined executive or legislative authority may be granted ‘only in the clearest of cases’.<sup>91</sup>

As a general matter, this is a wise principle, avoiding a propensity for constitutional courts to get drawn into political skirmishes.<sup>92</sup> The risk of imposing unpopular or elite values on a recalcitrant democracy is always present.<sup>93</sup> The pure Kelsenian model of centralised review<sup>94</sup> yields over time to greater and greater interplay between the political branches and a constitutional court,<sup>95</sup> as questions of appointments and independence become themselves political issues subject to democratic contestation. In practice, few constitutional courts are as rigid as the idealised Kelsenian model. Many perform functions other than reviewing the constitutionality of legislation, including supervising elections, enforcing criminal law against government officials, examining the validity of administrative decisions, and protecting individual complainants alleging violations of basic human rights. There is also variation in terms of which actors may initiate abstract review. It is typical for certain governmental actors to be given access, although which actors are given this power varies from country to country.<sup>96</sup> Some systems allow individual citizens access to abstract review in the form of *actio popularis* – in Hungary, for example, even non-citizens have the right to initiate this process.<sup>97</sup> Constitutional courts also create procedures other than ‘abstract review’ by which questions may come before a constitutional court, including ‘concrete review,’ whereby another court suspends proceedings and sends the constitutional question to the constitutional court,<sup>98</sup> and ‘constitutional complaint,’ which occurs when individuals think that one of their fundamental rights has been violated.<sup>99</sup> Finally, there is variation across countries in terms of

<sup>90</sup> Ibid at para 47.

<sup>91</sup> Ibid at para 65.

<sup>92</sup> See VF Comella ‘The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism’ (2004) 82 *Texas Law Review* 1705, 1707–1708.

<sup>93</sup> R Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

<sup>94</sup> A Stone Sweet ‘Constitutional Courts’ in *Oxford Handbook of Comparative Constitutional Law* (2012) 816. According to Stone Sweet, this comprises four distinct components. First, a constitutional court possesses a monopoly on the power to declare laws constitutional. Second, its jurisdiction is restricted to constitutional questions; it does not have the authority to preside over ordinary litigation. Victor Ferreres Comella refers to this feature of a constitutional court as its *purity*. Third, the constitutional court is formally detached from all other branches of the government. Finally, the constitutional court may review statutes ‘in the abstract’. Unlike in the United States, where cases must be brought before the Supreme Court in the context of a concrete ‘case or controversy’, a constitutional court may review a statute before it has been enforced. These third and fourth factors relate to Ferreres Comella’s concept of *autonomy*.

<sup>95</sup> S Wright Sheive ‘Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review’ (1995) 26 *Law and Policy in International Business* 1201, 1204–1208.

<sup>96</sup> W Sadurski *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2005) 5.

<sup>97</sup> Ibid at 6.

<sup>98</sup> Ibid at 5.

<sup>99</sup> Comella (note 92 above) at 1710.

the selection procedures for judges,<sup>100</sup> the binding effect of decisions,<sup>101</sup> and the times at which the courts may review a statute (*a priori vs a posteriori*).<sup>102</sup>

One of the striking features of modern constitutional courts is that they typically exercise their power outside the normal processes of adjudication. Most such courts do not serve as part of an adversarial process of adjudication, even allowing that most civil law systems are not as party-centred as the common-law systems inherited from English law. Even with that difference, European-inspired constitutional courts generally practise ‘abstract review’ of an issue, rather than attempt to resolve a legal question in the context of a dispute between litigants.<sup>103</sup> As a result, most constitutional courts have constrained forms of access with either the government itself or the parliamentary opposition having the unique power to seek resolution of a legal issue.<sup>104</sup>

Interestingly, where the transition to democracy includes active negotiations with the prior regime, there is a greater likelihood that there will be open access to more actors than just the government and the leading opposition. Thus, both South Africa and Hungary have courts that were the product of negotiations between an outgoing regime and an ascending opposition (the Round Table Talks of 1989 being the Hungarian equivalent of the Kempton Park accords),<sup>105</sup> and in both instances the transitional regimes were created by ordinary legislation of the prior government. In Hungary, for example, this resulted in the unusual power of *actio popularis*, a mechanism for direct petitions for constitutional review by private citizens,<sup>106</sup> and in turn led the Court into more immediate and more fateful confrontations with the government. As Donald Horowitz cautions, ‘judicial review initiated by political authorities is more apt to insert a constitutional court in politics than is judicial review that is initiated by litigants or by courts when the constitutional question is crucial to the determination of individual cases.’<sup>107</sup>

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<sup>100</sup> Wright Sheive (note 95 above) at 1215–1216; Sadurski (note 96 above) at 14–19.

<sup>101</sup> Wright Sheive (note 95 above) at 1214–1215; Sadurski (note 96 above) at 11–12.

<sup>102</sup> DL Horowitz ‘Constitutional Courts: A Primer for Decision Makers’ (2006) 17 *Journal of Democracy* 125, 128–129; Sadurski (note 96 above) at 74–79.

<sup>103</sup> Wright Sheive (note 95 above) at 1202–1203.

<sup>104</sup> See K Lane Scheppele ‘Parliamentary Supplements (Or Why Democracies Need More Than Parliaments)’ (2009) 89 *Boston University Law Review* 795, 812–818 (Scheppele notes that ‘[M]ost constitutional systems only allow certain political actors to ask for abstract review – for example, the president of the country, the head of either chamber of parliament, or a substantial fraction of the members of parliament ...’)

<sup>105</sup> J Bond ‘Concerning Constitutional Courts in Central and Eastern Europe’ (2006) 2 *International Public Policy Review* 11.

<sup>106</sup> *Ibid* at 11.

<sup>107</sup> DL Horowitz ‘Constitutional Courts: Opportunities and Pitfalls’ (2003) 5 <<http://www.constitutionnet.org/files/E24ConstitutionalCourtsOppsPitfallsHorowitz.pdf>>. Horowitz adds that over time, the propensity of these courts is to become ‘intrusive political actors’. Horowitz (note 102 above) at 128–129. See also Comella (note 92 above) at 1712–1722. But see J Ferejohn & P Pasquino ‘Constitutional Adjudication: Lessons from Europe’ (2004) 82 *Texas Law Review* 1671, 1692 (Authors argue that deliberative judicial decision-making in Europe may lessen interventionist tendencies.)



While Hungary may serve as a cautionary note, the role of constitutional courts necessitates nuance in the exercise of review.<sup>108</sup> It does not follow that courts owe a duty of deference across all political dimensions, even to legitimate constitutional governments. It is one thing to defer to the policy outputs of a government that is the result of a proper system of electoral choice and accountability. It is another to give deference to the powers that be over the mechanisms of how governments are selected and the powers they should hold while in office. In prior writings, I have looked to the law of corporate governance as clarifying the limits of policy deference. Under the laws of Delaware, the most developed corporate governance code in the US, the business judgment rule insulates from judicial review almost all economic decisions of a firm, absent fraud or some breach of fiduciary duties. At the same time, there is no such rule of deference given to the decisions of management about the organisation or selection of management itself. On this score, courts and regulators must be vigilant lest the insiders insulate themselves from challenge, familiarly known as a lock-up.<sup>109</sup>

Applied in the South African context, the question is whether the discrete problems presented by the risk of self-dealing by a dominant party are well addressed within the rational relations framework under the South African version of proportionality analysis.<sup>110</sup> Looked at from the vantage point of the Colombian engagement with excessive entrenchment of incumbent power, the Court is likely to have to articulate a theory of proper democratic politics in order to discharge a principled role in engaging political process failures that fall under its constitutional mandate.

The limitations of not having a robust theory of constitutional protection of democracy against democratic manipulation is perhaps best seen in the two recent Court cases having to do with independent prosecutorial or anti-corruption authority. Each of these cases addresses the problem of concentrated executive power, a power that is unlikely to be effectively constrained by a legislature controlled by the same dominant party. This is especially true given the unified executive in South Africa, in which the president is both head of state and head of government. Most critically, the South African President is elected by the National Assembly and thus is directly accountable only to the dominant legislative bloc, an unlikely source of strong limitations in the absence of parliamentary contestation.

In *Democratic Alliance* and again in *Glenister*, the issue before the Court was first the appointment of the National Director of Public Prosecutions and subsequently the independence of the Directorate of Special Operations, a specialised

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<sup>108</sup> For a fulsome defence of the Hungarian court as resisting excessive demands for austerity and other destabilising pressures from outside and inside the country, see K Lane Scheppele ‘Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)’ in W Sadurski et al (eds) *Rethinking the Rule of Law in Post Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses* (2005).

<sup>109</sup> S Issacharoff & RH Pildes ‘Politics as Markets: Partisan Lockups of the Democratic Process’ (1998) 50 *Stanford Law Review* 643.

<sup>110</sup> See, generally, S Woolman & H Botha ‘Limitations’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 34. For a broader account of the role of proportionality in guiding apex courts through fraught confrontations with politically charged cases, see A Barak *Proportionality: Constitutional Rights and Their Limitations* (2012).

prosecutor for political corruption cases better known as the Scorpions. In each case, the Court interceded to roll back executive conduct that would have further insulated the government from anticorruption checks on official misconduct. Strikingly, however, in each case the Court tried to employ the same restrictive rationality review for the structure of government as it had used for the broader policy objectives that are properly the province of Parliament.

In *Democratic Alliance*, the Court found that the President's decision to appoint a tainted candidate in the face of concerns over improprieties in earlier public charges was irrational. The Court found that, procedurally, the President's failure to consider *prima facie* evidence of dishonesty rendered the appointment invalid. *Glenister* is the more far-reaching and interesting decision with a more structural background as the National Prosecuting Authority Amendment Act 56 of 2008 abolished a critical part of the NPA and placed control of anticorruption prosecutions in the hands of the police, rather than the Scorpions.<sup>111</sup> The existence of institutional checks on the executive through the NPA remains an important constraint as political competition ebbs in the face of ANC hegemony.

The opinion, while ruling against the government, shows the ambivalence of the Court. The Court emphasised that the anticorruption unit need not be formally independent, only that it retain 'an adequate level of structural and operational autonomy'.<sup>112</sup> That, the Court found, was also a question of the reasonableness of the decision, and placing the unit within the Police Service was not *per se* unreasonable, nor was the decision to disband the Scorpions. Still, the Act was deficient both in failing to provide 'secure tenure' for the new Directorate of Priority Crime Investigation employees and in providing for 'direct political oversight of the entity's functioning'.<sup>113</sup> Previously, senior Scorpions personnel enjoyed considerable protection – once appointed, they could be removed only in limited circumstances by the President, who was subject to Parliamentary veto.<sup>114</sup> The Court argued that this provision placed 'significant power in the hands of senior political executives' who might 'themselves ... be the subject of anti-corruption investigations'.<sup>115</sup> This, the Court insisted, was 'impossible to square with the requirement of independence'.<sup>116</sup>

When charged with the source of authority for its holding, the Court peculiarly steered clear of the broader principles of democratic governance and instead the Court turned to the relationship between the domestic Constitution and international law. Section 39(1)(b) of the Constitution requires that courts 'consider international law' in interpreting the Bill of Rights.<sup>117</sup> Section 231(2) provides that a ratified international agreement 'binds the Republic'. Finally, s 7(2) 'implicitly demands' that steps taken to fulfill the state's obligation to promote the Bill of

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<sup>111</sup> On the manner in which the DSO, or 'Scorpions', in particular, and the Security Services, more generally, had or have had their independence undercut, see S Woolman 'Security Services' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 3, 2011) Chapter 23B.

<sup>112</sup> *Glenister* (note 78 above) at para 124.

<sup>113</sup> *Ibid* at para 213.

<sup>114</sup> *Ibid* at paras 225–226.

<sup>115</sup> *Ibid* at para 232.

<sup>116</sup> *Ibid* at para 236.

<sup>117</sup> *Ibid* at para 192.

Rights be ‘reasonable’.<sup>118</sup> Reading these provisions together, the Court concluded that an anti-corruption programme could not be constitutionally ‘reasonable’ if it failed to honour South Africa’s treaty obligations. South Africa is party to a number of international conventions which require member states to establish anti-corruption agencies that are ‘independent from undue intervention’ and political pressure.<sup>119</sup>

Placing responsibility for its decision on international law is an interesting judicial expedient. It has the effect of avoiding a direct confrontation with the constitutional underpinnings of democratic authority and turning attention to the commands of foreign engagements. Yet the purportedly compelling international commitments are far too abstract to carry the weight of the exact institutional framework for locating government anti-corruption officials, something which no doubt varies tremendously within the signatories to an international covenant, to the extent that it is not in fact honoured in the breach by most signatories.

On the other hand, when s 8(a) of the Judges’ Remuneration and Conditions of Employment Act 47 of 2001, which authorised the President to extend the Chief Justice’s term of office beyond the 12-year constitutionally prescribed term, was challenged before it, the Court did show it had to reach deeper to protect its own institutional integrity from executive overreach. In *Justice Alliance of South Africa v President of the Republic of South Africa*, the Court relied more heavily on first-order principles of controlling concentrated executive power. ‘The term or extension of the office of the highest judicial officer is a matter of great moment in our constitutional democracy,’ and by permitting the President to ask the Chief Justice to stay on for an additional term of years, ‘the Act threatened judicial independence by implying that the Chief Justice serves at least to some degree at the pleasure of the President, and is thus subject to Executive influence.’<sup>120</sup>

In other cases, the Court has come back to the concentration of legislative power in the hands of the ANC, the issue that previously came to the fore in *United Democratic Movement*. The most significant of these is *Oriani-Ambrosini*, a legislative challenge to an Assembly rule that no bill could be brought to the floor without the prior approval of the Speaker. In effect, the Rule could eliminate the ability of a minority party to even force debate on an issue that the ANC wished to keep off the political agenda, a legislative parallel to the shutting of internal party deliberations presented to the Court in *Ramakatsa*. The Court struck down the rule based upon ‘the principles of multi-party democracy, representative and participatory democracy, responsiveness, accountability and openness.’<sup>121</sup> While these principles are abstract, the Court came to the heart of the matter by stressing that forcing debate ‘facilitates meaningful deliberation on the significance and potential benefits of the proposed legislation’ and is ‘designed to ensure that even

<sup>118</sup> Ibid at para 194.

<sup>119</sup> Ibid at paras 184, 183–186.

<sup>120</sup> *Justice Alliance of South Africa v President of the Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC) at paras 65, 67–68.

<sup>121</sup> *Oriani-Ambrosini* (note 78 above) at para 46.

those of us who would, given a choice, have preferred not to entertain the views of the marginalised or powerless minorities, listen.<sup>122</sup>

Together, these and other cases addressing the concentration of power in the absence of political challenge appear to be defining a new agenda for the Constitutional Court. It is by no means an easy role for a court to engage concentrated political power if for no other reason than the inherent weakness of the judiciary before the political branches. The Indian Court developed its basic structures jurisprudence in the face of repeated Congress Party attacks on the judiciary, including using popular antipathy to the Supreme Court as part of the dominant party's electoral platform.<sup>123</sup> The same political backlash occurred in Hungary. The Indian Court survived and plays an important role in Indian democracy; the Hungarian Constitutional Court is, by contrast, a much weakened institution. Already there are ominous signs in South Africa of political attacks on the Constitutional Court as an institution, a disturbing trend no doubt.<sup>124</sup> But the Court remains the only significant institution not under direct ANC control and, for better or worse, that is beginning to define a significant part of its judicial role.

#### IV CONCLUSION

History rewards cautious judgments. Had this article been written a couple of decades earlier, at the height of enthusiasm over the fall of apartheid and the most heralded path to democracy of the post-Soviet era, a certain triumphalism would no doubt have accompanied the description of constitutionalism's role in facilitating the transfer of power to a democratic government.<sup>125</sup> Life moves on, however, and the commands of politics are unceasing. South Africa today is not the same body politic as it was when President Mandela took the helm and when

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<sup>122</sup> Ibid at paras 59, 43.

<sup>123</sup> See, eg, S Issacharoff 'Constitutional Courts' (note 5 above) at 999–1000 (Details aspects of the evolution of the Indian Supreme Court from independence through the 1977 state of emergency); Mate (note 70 above) at 179–186. See also Part II.C. above and accompanying notes.

<sup>124</sup> For more information on the pressure the ANC is directing toward the judiciary, see Anonymous 'Let's not be Beguiled by Zuma's Charm' *The Star* (Johannesburg) (2 October 2009) 11 ('[T]he ANC is manifestly manipulating the institutions of the constitution to subvert equality before the law in order for it to unscrupulously pursue its own political agenda'); P Mgwaba 'Skip the Charade and Just Appoint Them' *Sunday Tribune* (Durban) (11 September 2011) 22 (Discusses the appointment process of Judge Mogoeng Mogoeng and stating that the 'grand plan appears to be to appoint a compliant JSC, which in turn would endorse politically acceptable judges who could be relied on to rule in ANC's favour in legal disputes.'). C van der Westhuizen 'Murky Waters Lie Ahead for Judiciary' *Cape Times* (Cape Town) (14 May 2013) 9 (discussing the then-recent court decisions overruling key ANC party decisions, the ANC decision to review the courts, and the ANC recommendation that the Superior Courts Bill review and handle the court composition, structure, and jurisdiction). This also is a theme picked up by the political opposition, see H Zille 'ANC is hellbent on subverting the constitution' *Cape Times* (Cape Town) (4 February 2010) 9 (discussing the ANC's 'neutering of the National Prosecuting Authority' and the threatening of the judiciary).

<sup>125</sup> The main themes of *Constitutional Courts and Democratic Hedging* (note 5 above) turn on descriptions of the different roles, and the efficacy of constitutional courts playing these roles, in allowing the parties to negotiate an incompletely realised bargain for a new democratic order. See also A Stone Sweet *Governing with Judges: Constitutional Politics in Europe* (2000) 42–44 (Stone Sweet addresses the incomplete nature of the constitutional bargain in transitions to democracy).

the Court first confronted what limited democratic rule would look like under the Constitution. In the intervening years, and in the periods of constitutional maturation that I try to identify, the task before the Court has been to address the relationship between democratic vitality and the reality of one-party political domination. What one sees in the most recent cases is a renewed pushback against the ANC on a number of issues where governance threatens to collapse to the whim of the powerful. But, despite the need for renewed judicial assertion, the Court's doctrinal hesitation to explain clearly both the problem it faces and the theory underlying its response may ultimately hamper its success in resisting the entrenchment of unaccountable one-party rule. In the early years of the Republic, the South African Constitutional Court spoke more eloquently than any other Court on the task it confronted in democratic consolidation. The time has come for a return to that forthright spirit of public engagement with the problems of democracy under a dominant party.



# The South African Constitutional Court's Democratic Rights Jurisprudence

*Theunis Roux\**

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In five cases decided in 2011 and 2012, the Constitutional Court of South Africa (CCSA) enforced a series of what may broadly be termed democratic rights – rights, that is, to a well-functioning, competitive, multiparty democratic system, the operation of which is safeguarded by independent institutions staffed by persons of integrity. In the first such case, the Court struck down legislation that had dissolved a state agency centrally involved in the fight against corruption.<sup>1</sup> In the second, it held that Parliament had improperly delegated its power to the President to extend the Chief Justice's term of office.<sup>2</sup> In the third, it overturned a presidential decision appointing a new National Director of Public Prosecutions for disregarding findings made by a commission of inquiry about the appointee's reliability as a witness.<sup>3</sup> In the fourth, it held that certain parliamentary rules preventing members of minority parties from introducing bills in the lower house were unconstitutional.<sup>4</sup> And, finally, in the fifth, it set aside all the decisions taken at a provincial conference of the ruling African National Congress ('ANC') on the ground that the delegates to the conference had been improperly selected.<sup>5</sup> In his lead essay in this volume, Sam Issacharoff notes the emergence of this new phase in the CCSA's democratic rights jurisprudence, but is critical of the Court's overall record. In particular, he suggests that, by following the example of the Colombian Constitutional Court and the Indian Supreme Court, the CCSA might have done more to protect South Africa's democratic system from the adverse effects of the ANC's ongoing electoral dominance.<sup>6</sup> This response argues that the comparison Professor Issacharoff draws between these three courts is insufficiently attentive to the different political and institutional circumstances in which they find themselves. Once these differences are taken into account, the CCSA's democratic rights jurisprudence can be seen to be no less effective than that of the other two courts.

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<sup>1</sup> *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC).

<sup>2</sup> *Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of the Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of the Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC).

<sup>3</sup> *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24, 2013 (1) SA 248 (CC).

<sup>4</sup> *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC).

<sup>5</sup> *Ramakatsa & Others v Magashule & Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC).

<sup>6</sup> S Issacharoff 'The Democratic Risk to Democratic Transitions' (2013) 5 *Constitutional Court Review* 1.

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The argument is divided into three parts. In the next section, I review Issacharoff's account of the role of constitutional courts in enforcing democratic rights, not just in his lead essay but also in several other papers he has written over the past 15 years. While sympathetic to much of Issacharoff's analysis of the 'democratic hedging' phenomenon, that section suggests two qualifications: first, that in certain settings, as indicated by the South African literature on the ANC, a dominant party may temporarily support processes of democratic consolidation, and therefore that it might make sense for a constitutional court that finds itself in that situation to build a co-operative working relationship with the dominant party, at least during the initial period of democratic stabilisation; and, secondly, that there are other situations that require effective constitutional-design solutions before constitutional courts can be expected to play a role in enforcing democratic rights.

The second section of this response targets what I will argue is the main weakness in Issacharoff's account: his tendency to treat constitutional courts in new democracies as relatively autonomous from the political conditions they are trying to influence. Impressed by the forcefulness of some of these courts' decisions on democratic rights, Issacharoff implies that it is just other courts' lack of courage or creative constitutional imagination that prevents them from following suit. The cases that Issacharoff examines, however, are a particular subset of the whole, reflecting instances in which constitutional courts have been permitted by fortuitous political circumstances and comparatively weak legal constraints to play the forceful role he describes. Where these two variables register differently, a court will need to adapt its decision-making behaviour accordingly. To understand the phenomenon we are looking at in its entirety thus requires a different comparative method. Rather than piling up examples of successful intervention for other courts to follow, we need a theorisation of the phenomenon that pays more attention to the different institutional and political settings in which constitutional courts work.

The rest of this section introduces an alternative theorisation of this sort. Pivoting off the traditional account of constitutional courts as largely passive institutions, I argue that a proper theorisation of the role of such courts in democratic consolidation needs to explain both how judges might be able to adapt the implementation of their constitutional mandate to democratic pathologies as they emerge, and also how they might be able to take the institutional repercussions of their decisions into account. None of the existing theorisations meets these requirements. As soon as we break down the universe of all conceivable courts into a limited number of ideal types, however, it becomes possible to map a plausible democratic consolidation trajectory for each type and then to test such conjectures against real-world examples. In this way we might be able to build a theorisation of the role of constitutional courts in democratic consolidation that is both comprehensive and empirically informed.

The final section uses this insight to offer a more optimistic analysis of the CCSA's record in enforcing democratic rights. Two main points are made: first, that the three periods in that record that Issacharoff identifies track developments in the quality of South African democracy, and that this in itself tells us something about the context-sensitivity of that record; and, second, that the period through which the CCSA is currently passing, though less spectacular perhaps than the record of some of the other post-1989 constitutional courts, is well suited to the



situation in which it finds itself. For a constitutional court like the South African one, working in a relatively well-developed legal culture that favours firm textual bases for democratic rights and in a political context marked by an ever-present threat of populist attacks on the Constitution, the role it plays in democratic consolidation must necessarily be quite cautious. In particular, courts in this situation need continually to strike an optimal balance between the risk to their independence posed by a failure to protect the democratic system from dominant-party attack and the risk to their independence posed by over-zealous, legally unsupported enforcement of democratic rights. Measured against that standard, the CCSA's recent record, though not without flaws, is generally to be admired.

## I THE 'DEMOCRATIC HEDGING' PHENOMENON

Professor Issacharoff's lead essay in this volume is just the latest in a series of articles on the role of constitutional courts in enforcing democratic rights. Beginning with an interest in the 'law of democracy' in the United States,<sup>7</sup> Issacharoff has, over the past 10 years or so, broadened his research focus to include the role that constitutional courts in new or otherwise fragile democracies play in preventing elected majorities from using their democratic mandate permanently to entrench themselves in power.<sup>8</sup> South Africa has featured prominently in this body of work, with each treatment signalling a growing sense of unease on Issacharoff's part, not only about prospects for democratic consolidation in that country, but also about whether the CCSA is doing enough to prevent what he sees as an all-too-familiar slide back into authoritarianism, only this time under the ostensibly legitimating cover of democratic elections. Since much of the intellectual foundation for Issacharoff's argument in the lead essay is laid in this earlier body of work, it is necessary briefly to reflect on it before moving on to the lead essay itself.

The first paper in the series was co-authored with Richard Pildes in 1998.<sup>9</sup> On the surface, this paper, which concerns the legitimate role of the US Supreme Court in preventing 'partisan lockups' of the American democratic system, has nothing much to do with the problems facing new democracies. But the seeds of the later argument are sown here. In particular, the concentration in this paper on the way in which the Democratic and Republican parties have entrenched their dominant position in the United States foreshadows much of what follows in Issacharoff's later work on *one-party* dominant democracies in other parts of the world. We thus see here for the first time his interest in the analogy between political and economic markets, and the way in which dominant political parties can abuse their market power in a manner akin to dominant corporations, by closing down opportunities for other political players to enter the market and compete.<sup>10</sup> In its application to the American democratic system this analogy is used to justify greater curial intervention in the democratic

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<sup>7</sup> S Issacharoff, PS Karlan & RH Pildes *The Law of Democracy: Legal Regulation of the Political Process* (4th Edition, 2012).

<sup>8</sup> S Issacharoff 'Fragile Democracies' (2007) 120 *Harvard Law Review* 1405.

<sup>9</sup> S Issacharoff & RH Pildes 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643 ('the joint paper with Pildes' or 'Issacharoff & Pildes').

<sup>10</sup> *Ibid.* See also S Issacharoff 'Gerrymandering and Political Cartels' (2002) 116 *Harvard Law Review* 593.

process, on the model of anti-trust law.<sup>11</sup> In the same way that anti-trust doctrine is no longer preoccupied with enforcing first-order fiduciary duties, Issacharoff argues, the US Supreme Court should focus its attention on the ‘background markets in partisan control’ rather than first-order civil and political rights.<sup>12</sup> The thrust of the argument is decidedly normative: he is not describing what the US Supreme Court is already doing to enforce democratic rights, but arguing that the usual counter-majoritarian worry falls away when the Court is acting to safeguard the integrity of the democratic process. In this way, his work can be seen as an extension of the argument first made by John Hart Ely,<sup>13</sup> albeit in a more economic register and with greater emphasis placed on issues of background structure.

In 2004, Issacharoff turned his attention publicly for the first time to new democracies in a paper on ‘Constitutionalizing Democracy in Fractured Societies’.<sup>14</sup> As the title suggests, the focus of this piece is not so much the role of constitutional courts in enforcing democratic rights as the role of the constitution-making process in providing solutions to long-standing political animosities that have prevented the emergence of well-functioning democracies. Within this focus, Issacharoff’s particular concern is with the idea that ‘judicially enforced constitutionalism’ might provide a more durable solution than consociationalism to the problems facing politically divided societies.<sup>15</sup> By limiting majoritarian power, without constitutionally entrenching the ethnic, religious and other cleavages that have hitherto thwarted the emergence of democracy, he is inclined to argue, judicially enforced constitutionalism promises to promote the kind of well-functioning democratic system that may eventually lead to the decline in political importance of those cleavages. To this end, Issacharoff compares the South African constitution-making process, which he sees as exemplary of the constitutionalist approach, with the ethnic power-sharing arrangements agreed to as part of the Dayton Accords process in Bosnia. His analysis of the South African case, as was customary for most foreign commentators at the time, is positively glowing, with the Kempton Park multi-party negotiations process held up as a leading example of the way in which creative constitutional-design solutions may be used to induce an authoritarian regime to hand over power. He is also clearly impressed by the CCSA’s ‘majestic ruling’ in the *First Certification Judgment*,<sup>16</sup> and particularly its insistence, in the face of possible accusations of protecting minority privileges, that various constitutional safeguards against the abuse of majoritarian power be strengthened.<sup>17</sup> This paper, then, represents the high-water mark of Issacharoff’s positive assessment of the South African case.

After a brief detour into the question of what well-functioning democratic societies may legitimately do to protect themselves against anti-democratic groups that seek to use their democratic freedoms to promote their illiberal

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<sup>11</sup> Issacharoff & Pildes (note 9 above).

<sup>12</sup> *Ibid* at 648.

<sup>13</sup> JH Ely *Democracy and Distrust* (1980).

<sup>14</sup> S Issacharoff ‘Constitutionalizing Democracy in Fractured Societies’ (2004) 82 *Texas Law Review* 1861.

<sup>15</sup> *Ibid* 1865.

<sup>16</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) (*‘First Certification Judgment’*).

<sup>17</sup> Issacharoff (note 14 above) at 1868.

views,<sup>18</sup> Issacharoff addressed himself squarely to the question of the role of constitutional courts as ‘hedgies’ against democratic authoritarianism. (He first proffered this notion in a 2011 paper published in the *Georgetown Law Journal*.<sup>19</sup>) The Democratic Hedging paper provides the immediate backdrop to the lead essay, although many of the themes in it, as noted, had been circulating in his earlier work. The key idea, on my reading, is that there is a necessary conceptual (and perhaps even causal) link between the political rationale for the post-1989 turn to liberal constitutionalism and the relative success many post-1989 constitutional courts have enjoyed in enforcing democratic rights. As to the former, Issacharoff draws on the work of Tom Ginsburg and others to show that it is precisely the promise that there will be some limit on majoritarian power that has prompted the simultaneous turn to democracy and judicially enforced constitutionalism after the end of the Cold War.<sup>20</sup> What he adds to this is the idea that many post-1989 constitutional courts have been able to draw on this political rationale quickly to establish their authority, often taking decisions that the US Supreme Court took much longer to take, and which even now tend to trigger accusations of counter-majoritarianism. How is it, Issacharoff asks, that constitutional courts in countries as diverse as Ukraine,<sup>21</sup> Mexico,<sup>22</sup> Hungary,<sup>23</sup> Mongolia,<sup>24</sup> Bangladesh,<sup>25</sup> Albania,<sup>26</sup> the Czech Republic<sup>27</sup> and Romania<sup>28</sup> have moved so rapidly into the democracy-protection arena? The answer, he surmises, must lie in the fact that these courts were mandated to do precisely that – that there is some continuity of political rationale between the establishment of judicial review in these countries and the democracy-protecting role that their constitutional courts have been performing.<sup>29</sup>

As noted at the outset, this argument does not come out of nowhere but is a logical extension of arguments that Issacharoff has been developing for some time. In his joint paper with Richard Pildes, for example, he wrote that ‘[w]here there is an appropriately robust market in partisan competition, there is less justification for judicial intervention’.<sup>30</sup> The insight in the ‘Democratic Hedging paper’ is simply the flipside of this idea. New democracies, the argument runs, are by definition characterised by some measure of political-market dysfunctionality. It follows that judicial intervention to enforce democratic rights is more easily justified in such settings.

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<sup>18</sup> Issacharoff (note 8 above).

<sup>19</sup> S Issacharoff ‘Constitutional Courts and Democratic Hedging’ (2011) 99 *Georgetown Law Journal* 961 965 (hereafter, ‘the Democratic Hedging paper’).

<sup>20</sup> *Ibid* at 986 (citing T Ginsburg *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003)).

<sup>21</sup> *Ibid* at 969.

<sup>22</sup> *Ibid* at 969, 979.

<sup>23</sup> *Ibid* at 972–73.

<sup>24</sup> *Ibid* at 974–75.

<sup>25</sup> *Ibid* at 975.

<sup>26</sup> *Ibid* at 975–976.

<sup>27</sup> *Ibid* at 976.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid* at 986.

<sup>30</sup> Issacharoff & Pildes (note 9 above) at 648.

Left like that, the point is a normative one, and is not dissimilar, Issacharoff might be happy to concede,<sup>31</sup> from the point that his colleague Jeremy Waldron makes in his well-known treatment of this topic.<sup>32</sup> The novel contribution Issacharoff makes in the ‘Democratic Hedging paper’, however, is to give this normative point an explanatory inflection by arguing that the reason the post-1989 constitutional courts he discusses have been able to play such an effective role in enforcing democratic rights is that the moral objection to their playing this role is undercut by the democratic pathologies they are addressing. In new democracies – countries that are by definition emerging from sometimes intense political conflict, and which are often still characterised by ethnic and religious cleavages – constitutional courts have been established precisely for the purpose of preventing those cleavages from tearing the society apart. Their mandate, far more explicitly than was the case in the United States, is to police the terms of the constitutional commitment to multiparty democracy and to prevent any sliding back into authoritarianism, and especially the more pernicious kind of authoritarianism that proceeds under the legitimating cover of regular elections, but where in fact the democratic system is locked up in favour of a dominant political party.<sup>33</sup>

In the course of setting out this argument, South Africa is once again singled out for special attention as a ‘wonderful example of the process of constitutional formation’. On this occasion, however, Issacharoff immediately adds that the South African case also ‘provides ... perhaps a sobering cautionary note’.<sup>34</sup> After reiterating his positive assessment of the *First Certification Judgment*, Issacharoff gives a much more critical appraisal of the CCSA’s decision in *United Democratic Movement*,<sup>35</sup> arguing that the Court missed a vital opportunity in that case to assert its role as guarantor of the ‘structures of democracy’.<sup>36</sup> While recognising that the constitutional amendment to the anti-defection provision at issue did not directly contribute to South Africa’s growing one-partyism (given that the ANC itself later repealed the amendment), Issacharoff implies that the decision nevertheless damaged the Court’s reputation for bold decision-making, which in the end may be just as regrettable. The normative prescription underlying this critique, in other words, is that constitutional courts should take every opportunity given to them to assert their democracy-protecting role lest the salutary threat of their playing that role in future cases decline. This argument is further spelled out in an extended reference to the Indian Supreme Court’s ‘basic structure’ jurisprudence,<sup>37</sup> which Issacharoff suggests is the path that the CCSA ought to have followed. What he

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<sup>31</sup> Issacharoff (note 19 above) at 971 (Distinguishes his argument from Waldron’s position).

<sup>32</sup> J Waldron ‘The Core of the Case against Judicial Review’ (2006) 115 *Yale Law Journal* 1346 (Waldron argues that the force of the democratic objection to judicial review declines in settings where the democratic system is deficient in some way.)

<sup>33</sup> Issacharoff (note 19 above) at 980–993.

<sup>34</sup> *Ibid* at 994.

<sup>35</sup> *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) (No 1)* [2002] ZACC 21, 2003 (1) SA 495 (CC).

<sup>36</sup> Issacharoff (note 19 above) at 997.

<sup>37</sup> *Ibid* at 999–1001.

finds particularly disappointing in *United Democratic Movement*, this comparison makes clear, is that the 'Court retreated to a formalist account of the Constitution as guaranteeing primarily procedural norms and individual rights'<sup>38</sup> when, with a little more substantive reasoning, it might have justified a decision enforcing broader structural guarantees, as indeed it had done in its *First Certification Judgment*. 'Although floor crossing is no longer part of the political challenge to democracy in South Africa', Issacharoff concludes, 'the consequences of deference to a dominant party remain an act in progress'.<sup>39</sup>

The central thrust of this critique of the CCSA's democratic rights jurisprudence remains unchanged in Issacharoff's lead essay, save that on this occasion the Indian comparison is supplemented by a discussion of the Colombian Constitutional Court's record in resisting President Uribe's attempt to win a third term.<sup>40</sup> The point of this additional comparison seems to be to reinforce the idea that constitutional courts need to act boldly if they are to safeguard the democratic system, even to the extent of risking their reputation for legally motivated decision-making. While the Indian Supreme Court's jurisprudence is still preferred for its better reasoned, more substantive engagement with the democratic pathologies the Court was addressing, the Colombian Constitutional Court, we are told, at least grasped the fact that its status as the acknowledged guardian of the constitutional project was a powerful enough source of legitimacy to enable it to overcome the weakness of its decision in purely legal terms. This is evidently seen to be a particularly instructive example for South Africa because of the close parallels between Colombia and South Africa in two respects: the existence of a constitutional court charged with flying the flag of a new, post-authoritarian constitutional order and the threat posed to democracy by a popular President.

In addition to the extended Colombian example, the lead essay also contains a useful tripartite periodisation of the CCSA's democratic rights jurisprudence into an initial phase, typified by the *First Certification Judgment*, an intermediate phase, marked by the disappointment engendered by *United Democratic Movement*, and the current phase, in which the CCSA is once again actively enforcing democratic rights, albeit still not by way of the forceful, substantively reasoned judgments that Issacharoff would prefer. The periodisation accurately identifies the different stages in the Court's developing jurisprudence. Nevertheless, there is some ambiguity in the way the three periods are set out, which betrays what I shall argue is the main weakness in Issacharoff's argument. The ambiguity concerns whether the periods are in the end defined by Court-independent developments in the quality of South African democracy or whether the CCSA itself has defined them by deliberate changes in its adjudicative strategy. Thus, Issacharoff starts by saying that, in the first phase, 'the Court enshrined a period of ... "constrained democracy"',<sup>41</sup> suggesting that it was the Court that gave this phase its basic

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<sup>38</sup> Ibid at 998.

<sup>39</sup> Ibid at 1001.

<sup>40</sup> Issacharoff (note 6 above).

<sup>41</sup> Ibid at 1 (citing Bruce Ackerman 'Meritocracy v Democracy' *London Review of Books* (8 March 2007)).

character. In explaining the second phase, however, he notes that South Africa during this time ‘was a democratic state with the ANC a triumphant, strong party riding the crest of its mandate as the driver of the successful anti-apartheid struggle’.<sup>42</sup> The Court in this phase, we are told, ‘continued to exercise its role as protector of individual rights’, but was on the whole ‘relatively quiescent[ ] as to democratic governance’.<sup>43</sup> In this instance, therefore, the period is defined both by the ANC’s growing confidence as a governing party – a political development independent of the Court’s jurisprudence – and by the more deferential institutional role the CCSA adopted during this time. Finally, in the third phase, the CCSA is ‘confronting some of the efforts of the ANC government to place itself beyond customary forms of legal and democratic accountability’,<sup>44</sup> which again suggests that the periodisation is principally being driven by external events, to which the CCSA is merely responding.

This ambiguity about what really defines the periodisation – independent political developments or the Court’s own actions – affects the entire analysis, I think, so that in the end we are not entirely certain whether Issacharoff is arguing that *United Democratic Movement* was a unique opportunity for the CCSA forcefully to assert its role or whether he thinks that the Court’s more recent jurisprudence provides some hope of redemption. With Sujit Choudhry’s 2009 lead essay,<sup>45</sup> this is nevertheless an important contribution to the local South African debate about the CCSA’s role in democratic consolidation. That debate has been hamstrung for too long by a conversational divide between South African political scientists, who seldom write with any understanding about the Court, and legal academics, who are still cautious about bringing notionally extra-legal, political considerations into their analysis. In the case of legal academics, the situation has been exacerbated by Karl Klare’s influential article on transformative constitutionalism,<sup>46</sup> which has encouraged them to think that the CCSA necessarily has a central role to play in democratic consolidation, without thinking about whether the preconditions for the Court to play this role are satisfied. While Issacharoff’s account shares some of these problems, he at least draws attention to the need for the Court to enforce rights to the background structural conditions that make a well-functioning democracy possible. His lead essay is a very welcome addition to the literature from that point of view.

The second part of this response addresses the political realism point. In the rest of this section I want to make two smaller points that go to the delimitation of the issue we are discussing. The first has to do with a theme in the South African political science literature that suggests that the ANC’s dominance of South African politics has not always been antithetical to the goal of democratic consolidation, and the second with Issacharoff’s argument

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<sup>42</sup> *Ibid* at 2.

<sup>43</sup> *Ibid* at 2.

<sup>44</sup> *Ibid* at 3.

<sup>45</sup> S Choudhry ‘“He Had a Mandate”: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 1.

<sup>46</sup> KE Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 12 *South African Journal on Human Rights* 146.



in the 'Constitutionalizing Democracy' paper that the advantage judicially enforced constitutionalism has over consociationalism is that it provides a device for mediating political cleavages without entrenching those cleavages in the constitution itself.

There is now a vast comparative politics literature on political regimes that find themselves somewhere between the ideal of a well-functioning multiparty democracy, in which the rule of law and human rights are generally respected, and pure authoritarianism. Much of this literature has arisen in response to the 'third wave' of democracy, which began in the mid-1970s, but accelerated after 1989.<sup>47</sup> One of the main preoccupations of this literature has been to point out that the third wave has not been unilinear or monolithic – that different countries have travelled different paths to democracy and that there has been a lot of slipping back. While some claim to being democratic is now a condition for regime legitimacy almost everywhere in the world, that claim is bolstered in many different ways and has resulted in many different types of regime. Unfortunately, each theorist seems to have his or her own preferred way of carving up the space between authoritarianism and democracy, resulting in a bewildering proliferation of terms, from 'competitive authoritarianism'<sup>48</sup> to 'hybrid regimes',<sup>49</sup> 'electoral democracy',<sup>50</sup> 'electoral autocracy',<sup>51</sup> 'polyarchy',<sup>52</sup> and so on. Nevertheless, we now know vastly more than we previously did about the myriad ways in which countries can vacillate (even stabilise) at some point between out-and-out authoritarianism and fully competitive multiparty democracy.

While South Africa appears in some of these comparative studies,<sup>53</sup> the local literature, in the nature of things, has focused on the impact of the ANC's repeated electoral victories on the quality of democracy in South Africa. In a series of papers, Hermann Giliomee<sup>54</sup> and Roger Southall<sup>55</sup> have thus set out the case for treating South Africa as a dominant-party democracy, with all the pathologies this categorisation implies. This assessment has not gone uncontested, however.

<sup>47</sup> See SP Huntington *The Third Wave: Democratization in the Late Twentieth Century* (1991); L Diamond (ed) *Consolidating the Third Wave Democracies: Regional Challenges* (1997).

<sup>48</sup> N van de Walle 'Between Authoritarianism and Democracy' (2012) 23:1 *Journal of Democracy* 169 (Review of S Levitsky & LA Way *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (2010)).

<sup>49</sup> L Diamond 'Thinking about Hybrid Regimes' (2002) 13 *Journal of Democracy* 21.

<sup>50</sup> L Diamond 'Introduction: In Search of Consolidation' in Diamond (note 47 above) xiv.

<sup>51</sup> A Schedler 'The Logic of Electoral Authoritarianism' in A Schedler (ed) *Electoral Authoritarianism: The Dynamics of Unfree Competition* (2006) 1.

<sup>52</sup> Robert A Dahl *Democracy and its Critics* (1989) 233.

<sup>53</sup> See, for example, J Møller & S-E Skaaning 'Regime Types and Democratic Sequencing' (2013) 24 *Journal of Democracy* 142 at 148 (classifying South Africa as a 'polyarchy').

<sup>54</sup> H Giliomee & C Simkins (eds) *The Awkward Embrace: One-Party Domination and Democracy* (1999); H Giliomee, J Myburgh & L Schlemmer 'Dominant Party Rule, Opposition Parties and Minorities in South Africa' (2001) 8 *Democratization* 161.

<sup>55</sup> R Southall 'The Centralization and Fragmentation of South Africa's Dominant Party System' (1998) 97 *African Affairs* 443; R Southall 'Opposition in South Africa: Issues and Problems' (2001) 8 *Democratization* 1.



Heinz Klug,<sup>56</sup> Steven Friedman,<sup>57</sup> Anthony Butler,<sup>58</sup> Raymond Suttner<sup>59</sup> and Tom Lodge<sup>60</sup> have all in various ways either disputed the usefulness of the term ‘dominant-party democracy’ or the inevitability of its associated pathologies. Klug, for example, in his most recent book on South Africa constitutionalism,<sup>61</sup> has stated his preference for the term ‘unipolar’ democracy, while Butler has been forceful in arguing that the ANC has played a useful role in controlling South Africa’s ethnic cleavages and in pushing through necessary economic reforms, neither of which would have been possible under a more divided government.<sup>62</sup> These dissenting voices have become more muted as the ANC’s collapse into populism has progressed; however, Daryl Glaser,<sup>63</sup> for one, still warns against liberals getting all of what they wish for. In his view, the undoubted benefits in theory of a well-functioning, competitive, multiparty democracy must always be assessed against the actual effects of such a system in concrete political circumstances.

Issacharoff’s unstinting commitment to the value of competitive, multiparty democracy means that he misses this nuance in the South African debate. For him, there is no such thing as a beneficent or ‘better-the-devil-you-know’ dominant-party democracy. Dominant parties are inherently bad for democratic consolidation, period. It follows that there is only one thing that a constitutional court committed to democratic consolidation should do when confronted by such a party, and that is immediately and boldly to begin enforcing democratic rights. Far from supporting this argument, however, the South African case illustrates its uncertain generalisability. If the dissenting line in the local literature is right, or at least has some grain of truth in it, the immediate and bold enforcement of democratic rights may not have been the optimal strategy for the CCSA to have pursued. The ANC’s long history as a political movement in exile meant that it came to power representing a broad cross-section of the South African political spectrum, having successfully resisted attempts at various points to turn it into either an ethnic nationalist or radical socialist party. That political identity was tremendously useful to South Africa during the constitutional transition. For one, it meant that there were many in the ANC who were genuinely committed to the value of liberal constitutionalism, in addition to those who were prepared to support this form of political system as the compromise the ANC needed to make to drive the transition forward.<sup>64</sup> The ANC’s political history as an opposition movement also meant, as Butler in particular has argued, that it was able after

<sup>56</sup> H Klug *The Constitution of South Africa: A Contextual Analysis* (2010) 298.

<sup>57</sup> S Friedman ‘No Easy Stroll to Dominance: Part Dominance, Opposition and Civil Society in South Africa’ in H Giliomee & C Simkins (eds) *The Awkward Embrace: One-Party Domination and Democracy* (1999) 97.

<sup>58</sup> A Butler ‘Considerations on the Erosion of One-Party Dominance’ (2009) 45 *Representation* 159.

<sup>59</sup> R Suttner ‘Party Dominance “Theory”: Of What Value?’ 2006 (33) *Politikon* 277.

<sup>60</sup> T Lodge ‘The ANC and the Development of Party Politics in Modern South Africa’ (2004) 42 *Journal of Modern African Studies* 189.

<sup>61</sup> Klug (note 56 above).

<sup>62</sup> Butler (note 58 above).

<sup>63</sup> D Glaser ‘South Africa: Toward Authoritarian Populism?’ (2009) 1 *Johannesburg Salon* 9.

<sup>64</sup> See T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013) 152–161.

the transition to contain South Africa's ethnic and class cleavages within its own organisational structures, and in this way to stabilise the economy.<sup>65</sup> These were not inconsiderable benefits. More to the point: the original members of the CCSA, seeing these benefits, might reasonably have decided that the Court needed to play a different role than the one Issacharoff prescribes, at least initially. Provided there were materials in the Constitution that could later be drawn on to protect the democratic system from attack, their immediate task, the judges might justifiably have thought, was to build a co-operative working relationship with the ANC in the interests of cementing the transition to democracy.

The first general qualification I would place on Issacharoff's overarching thesis, then, is to suggest that there may be circumstances, particularly immediately after a transition, in which the wisest strategy for a constitutional court might be to enlist the dominant party's support in stabilising the democratic system. The second qualification is that there may be circumstances where active democratic rights enforcement is not and never will be a prophylactic against a slide into democratic authoritarianism absent a constitutional-design solution of the sort that Issacharoff appears reluctant to endorse. His original reason for admiring the South African solution, it will be recalled, was that the constitutional drafters deliberately avoided any kind of consociationalism. The reason for that in turn was the not unfounded fear that consociationalism simply entrenches the political cleavages that a democracy ultimately needs to overcome if it is to function properly. The counter to this argument, however, is that, in certain settings, constitutional courts, absent a constitutional settlement that takes certain issues off the table, cannot avoid becoming drawn into the political conflict they are trying to police. No one would suggest that the current Egyptian crisis, for example, could be resolved by enacting a liberal-democratic constitution in which a constitutional court enforced individual rights to religious freedom. The very nature of the Egyptian state as religious or secular is what is in dispute. Unless that issue is resolved through some sort of constitutionally guaranteed mutual veto, the Egyptian Constitutional Court will inevitably be drawn into the political conflict (as indeed it already has been, for other reasons). We might say the same about Palestine, where the proposal for the establishment of a Constitutional Court faltered after the initial political fallout between Fatah and Hamas.<sup>66</sup> Unless there is some kind of federalist solution in terms of which each of these parties is guaranteed a certain measure of autonomy in its respective geographic sphere of influence (the West Bank and Gaza), the Constitutional Court will never begin functioning properly, let alone contribute to democratic consolidation. What these examples indicate, in other words, is that some balance must be found between perpetuating political cleavages in the constitutional-design process and taking sufficient account of them so that a constitutional court can begin to play its appointed role. Where political cleavages run so deep that poor performance in government, even catastrophically poor economic performance does not

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<sup>65</sup> Butler (note 58 above).

<sup>66</sup> At the time of writing, the Palestinian Supreme Court was exercising constitutional jurisdiction pending the establishment of a Constitutional Court, but the three decisions it had handed down had all been rejected by Hamas as reflecting the partisan political leanings of the Fatah-appointed judges.

affect voter allegiance, then even the most activist constitutional court is not going to be able to contribute to democratic consolidation; however ‘unlocked’ the democratic system is, voters are still going to vote in line with the existing political cleavages. In turn, democracy will remain a system through which even a narrow majority is able to oppress its opponents. The best that could be hoped for in such a situation is that a constitutional court might keep the idea of a competitive, multiparty democracy alive pending a more durable constitutional solution.

To put the point in its positive form: any theorisation of the role of constitutional courts in democratic consolidation must start from some assumption about what sources of political conflict have been taken off the table by an adequate constitutional-design process. Similarly, any empirical investigation into examples of successful democratic rights enforcement by a constitutional court must take account of these constitutional design features, in addition to variations in political conditions that may account for different curial practices. The next section develops this argument in greater detail.

## II CLOSING THE FEEDBACK LOOP: A DYNAMIC THEORY OF CONSTITUTIONAL COURT AGENCY

In introducing his change of focus in the ‘Democratic Hedging paper’ to the new, post-1989 constitutional courts, Issacharoff says:

There is by now a recurring pattern through which courts in many different constitutional regimes have had to confront surprisingly similar issues, regardless of the precise constitutional regime at play. A simple example: most constitutional regimes at present – particularly those of recent vintage – have provisions for constitutional courts. By their nature, these are courts that stand apart from the ordinary appellate chain of the regular judiciary. They have no warrant for their existence save the need to subject the normal outputs of the political process to constitutional scrutiny by the judiciary. *Not surprisingly, these courts are little detained by concerns over the authority for judicial review or over the countermajoritarian consequences of constitutional challenge.*<sup>67</sup>

This passage struck me when I first read it as a strange thing for an American constitutional theorist to write, steeped as I take such theorists to be in a tradition of thinking about constitutional courts as essentially political institutions. The highlighted sentence, in particular, came across as quite formalist in its assertion that ‘concerns’ about constitutional courts’ ‘authority’ to intervene in democratic politics disappear where, as is the case with most of the post-1989 constitutional courts, the mandate for the exercise of their powers is clear. Having since read more of Issacharoff’s work, I now appreciate the *normative* insight on which this passage is based. Nevertheless, as a *descriptive* claim, the point still strikes me as somewhat forced.<sup>68</sup> While the express conferral of a power of judicial review on a court may well put the general existence of that power beyond doubt, there are

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<sup>67</sup> Issacharoff (note 19 above) at 963–964 (emphasis added and footnotes omitted).

<sup>68</sup> The only support Issacharoff supplies for this statement, apart from his normative argument, is a reference to W Sadurski *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2005) xiii (cited in Issacharoff (note 19 above) at 964 n 10).

invariably still complex questions about how far the power reaches and whether the judges have legitimately exercised it. In controversial cases especially, post-1989 constitutional courts (and certainly the CCSA) can work just as hard as the US Supreme Court to justify their intrusion into politics, with constant appeals both to the legitimacy of their interpretive methods and to the political neutrality of their institutional function. The best known instance of this in the CCSA's case law is *United Democratic Movement*, where the Court found it necessary, despite the clarity of its mandate, to remind South Africans of the distinctively legal nature of its role.<sup>69</sup> But this is just one of many such instances, both in the CCSA's jurisprudence and in that of the other new constitutional courts.<sup>70</sup> On a purely descriptive level, therefore, I would question the correctness of Issacharoff's assertion that 'these courts are little detained by concerns over the authority for judicial review'. On the contrary, those concerns are often real and pressing, and an appreciation for how post-1989 constitutional courts mediate them is crucial to a proper understanding of their capacity to act as a hedge against democratic authoritarianism.

As the first step in developing this argument, notice how the highlighted sentence, in addition to misstating the extent of the authority problem for new constitutional courts, also betrays a broader formalism that runs through the rest of the Democratic Hedging paper and, to a lesser extent, the lead essay as well. In both these pieces, it seems to me, constitutional courts are treated as relatively autonomous institutions, somewhat divorced from the political context in which they find themselves. To be sure, considerable attention is given to matters of context in setting out the democratic deficiencies these courts are addressing. But the courts themselves – their institutional power and their capacity to act – are depicted as relatively unaffected by that context. Instead, they are assumed to be in a position roughly equivalent to that of courts in mature democracies, with little threat to their independence and consequently free to focus their efforts on developing the required constitutional law doctrines. The problem with this assumption is that it ignores the fact that a constitutional court's capacity to act as a hedge against democratic authoritarianism may be inhibited by the same political conditions that interventions of this sort are aimed at addressing. Not just that, but a court's intervention to protect the democratic system necessarily has an effect, either positive or negative, on its capacity to intervene in future cases. The interaction we are discussing, in other words, is best depicted as a dynamic feedback loop, with a court's capacity to act first constrained by the political conditions it is trying to influence, and then by the repercussions for it as an institution of whatever action it takes. If wisely and astutely handled, the decision

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<sup>69</sup> *United Democratic Movement* (note 35 above) at para 11 ('This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court.')

<sup>70</sup> See, for example, *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC) at para 99 (Court defends 'intrusion into the domain of the executive' as 'an intrusion mandated by the Constitution itself'). On other new constitutional courts, see A Stone Sweet 'Constitutional Courts' in M Rosenfeld & A Sajó (eds) *Oxford Handbook of Comparative Constitutional Law* (2011) 816, 828 ('In every system in which a CC has been successful ... legitimacy questions have been raised.')

might well trigger a virtuous circle in terms of which each successive intervention progressively improves the conditions for future intervention. But equally, if mishandled, the attempted intervention might trigger a downward spiral in terms of which the court becomes progressively less and less capable of intervening to arrest the slide into democratic authoritarianism. By ignoring the dynamic nature of the law/politics interaction in these kinds of cases, Issacharoff's account is trapped at the level of observation, never progressing to offer a convincing theorisation of the circumstances in which a constitutional court might be able to sustainably contribute to democratic consolidation.

The source of this uncharacteristic formalism, I think, is the particular kind of comparative method that Issacharoff uses, one that concentrates on exhaustively documenting numerous examples of the phenomenon he identifies, but which necessarily proceeds at the expense of contextual detail. In their sheer proliferation, these examples are indeed noteworthy and, from an American perspective, even surprising, revealing as they do the capacity of some of the new constitutional courts to play an institutional role that it took the US Supreme Court, with its less explicit mandate, centuries to fashion. But the American perspective on these events, and the focus on the scale of the phenomenon rather than its detailed dynamics, is a little distorting. The rapid-fire summation of instances in which post-1989 constitutional courts have resisted attempts by dominant parties to lock up the democratic system tells us little about the underlying circumstances that made these sorts of intervention possible. More importantly, this method also leaves us none the wiser about the institutional repercussions for these courts of their actions.<sup>71</sup> In each instance there is thus likely both a complicated back-story to be told about how the court came to be able to take the action that it did, and an equally complicated sequel to be related about what happened to the court after it acted. But this sort of detail is left out. Instead, what we get is a piling-up of examples, each one indicative of the observed phenomenon but none presented in a richly textured enough way to give us a clear idea of what is going on.<sup>72</sup>

In this section I want to suggest that a different comparative method, one that concentrates on giving fewer but deeper accounts of these interventions, with full and sustained attention to the political context in which they occur, might help to provide both a more satisfactory explanation for the rise of the 'democratic hedging' phenomenon and a more powerful theorisation of its preconditions and modalities. In addition to its preference for depth over breadth, the alternative method is characterised by a particular view of the relationship between law and politics in constitutional adjudication, one that sees these two conceptual fields not as flipsides of the same judicial politics coin, but as mutually interacting social systems, susceptible to influence by the other, but each in the end subject to its own distinctive rationale. Scholars deploying this method thus resist the crude

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<sup>71</sup> Issacharoff's discussion of the Hungarian Constitutional Court in the 'Democratic paper', for example (Issacharoff (note 19 above) at 973) fails to take account of the Court's decline after the non-reappointment of its first President, László Sólyom.

<sup>72</sup> Issacharoff's lead essay, in focusing on Colombia and India, remedies the problem somewhat, but even here the treatment is focused on the respective courts' forcefulness rather than on the political conditions that allowed them to be forceful.



legal realist notion that, because each of the contending outcomes in politically controversial cases is typically amenable to legal rationalisation, law plays only an ex post justificatory role. Rather, law is seen as capable of shaping and constituting judicial preferences, and in this way acting both as a significant constraint on judicial decision-making and also as a source of legitimacy. In disciplinary terms, the method belongs to the so-called 'historical institutional' school in (comparative) judicial politics, the proponents of which take law seriously as an independent reason for judicial action, and conceive of court/political-branch interactions as having deep roots in a country's legal and political culture.<sup>73</sup>

From the perspective of this alternative method, the key to a better understanding of our topic is to develop a dynamic account of constitutional court agency – an account, that is not only of how constitutional courts come to be able to intervene in the democratic system and take the kinds of decisions Issacharoff describes, but also of how they are able to play this role over the long run, without suffering a debilitating attack on their independence. Is it in fact the case, as Issacharoff suggested in the spoken version of his lead essay, that constitutional courts are unlikely ever to be able to resist a sustained dominant-party assault on the democratic system, or is there something that judges who find themselves in this sort of situation can do to resist and eventually turn back even the most ferocious attack? What would motivate constitutional court judges in the first place to play this kind of role: only a noble vision of the rule of law and the value of multiparty democracy, or some less noble, but perhaps no less effective, motivation, such as a self-interested desire to build their court's institutional power?<sup>74</sup> If the latter, could a motivation of that sort be exploited by friends of the rule of law and multiparty democracy (public interest litigators, liberal opposition parties, human rights groups, and legal academics) to arrest a slide into democratic authoritarianism? How, finally, might the fate that Issacharoff hints at in his article – of the one-shot, two-shot, perhaps even three-shot-wonder court eventually succumbing to the political reality of its situation – be avoided?

That is a complex set of questions and we need to proceed cautiously if we are to answer them properly. The starting point, if only as a foil to get us going, might as well be the traditional account of constitutional courts as essentially passive institutions, deciding the cases that happen to be brought to them according to pre-existing law, with no capacity either to elicit certain types of case or to fashion the law in a way that would enhance their ability to intervene in future

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<sup>73</sup> See, for example, H Gillman 'The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-making' in CW Clayton & H Gillman (eds) *Supreme Court Decision-Making: New Institutional Approaches* (1999) 65; Ginsburg (note 20 above); KE Whittington *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (2007); B Friedman *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009); and G Silverstein *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (2009). Note that I am not suggesting that Issacharoff holds a crude legal realist view of law. In fact, his work is clearly sympathetic to the view I am advocating. It is just that he does not spell out the implications of that view for the 'democratic hedging' phenomenon.

<sup>74</sup> See A Trochev 'Under Pressure: How Post-Communist Judges Resist Political Interference' Paper presented at *Annual Meeting of the Law & Society Association* (Boston, 30 May 2013).

cases.<sup>75</sup> If we can unpack what is wrong or unconvincing or deficient with that account, we will be well on our way to articulating a more dynamic conception of the role of constitutional courts in democratic consolidation.

Beginning, then, with the passive account: On this view of things, a constitutional court's capacity to protect the democratic system is beholden to whatever set of democratic rights happens to have been constitutionalised, together with litigants' ability to frame cases in a way that allows the court to enforce those rights. It follows that, if the framers failed to foresee the particular problem with the democratic system that has emerged, there is nothing much the court can do about it. By definition, no case can be brought that would allow the court to intervene in a way that would be compatible with the Constitution's democratic vision. Should a case nevertheless be brought, and should the court choose to intervene, its decision would necessarily be seen as political – as impermissibly inventing democratic rights that the framers had not seen fit to include. The court would consequently be vulnerable to political attack,<sup>76</sup> and its capacity to intervene in future cases compromised. If, on the other hand, the framers *did* foresee the particular threat to the democratic system that has emerged, a plausible case could be brought and, in upholding it, the court would necessarily be seen to be acting according to law. Protected by the clarity of its mandate, the court need not fear that it might be drawn into the process it was trying to counteract.

On the passive account, then, everything depends on the wisdom of the constitutional framers in foreseeing potential problems with the democratic system and the resourcefulness of litigants in bringing the necessary cases to court. Constitutional judges themselves have no ability either to adapt the Constitution's conception of democracy to changing political conditions or to take account of the impact of their decisions on their court's continued capacity to perform its institutional role. Nor can the judges, by framing their doctrines in creative ways, invite particular types of litigation in defence of democratic rights that would not in any case already have been possible under the Constitution. For all these reasons, the court would lack agency: beholden on the one hand to the immutable content of its constitutional mandate and on the other to the cases that happened to come before it, it would not itself be able to influence the course of democratic consolidation or its own institutional fate. Like a clockwork mouse incapable of avoiding obstacles in its path, the framers would have set it up either for success or failure, but the court itself would have no particular control over the matter.

The obvious problem with this account is that it attributes too much importance to the formal content of a court's mandate and too little importance to constitutional judges' capacity to build support for an understanding of

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<sup>75</sup> There is a good (critical) summary of the traditional conception in D Samararatne 'A Provisional Evaluation of the Contribution of the Supreme Court to Political Reconciliation in Post-War Sri Lanka (May 2009 – August 2012)' *International Centre for Ethnic Studies*, Research Paper 5 (March 2013).

<sup>76</sup> By 'political attack', I simply mean an attack on the Court's institutional independence that undermines its capacity to decide future cases according to law. Typical examples embrace court-packing or amendments to the judicial appointments process that make it more likely that partisan-political judges will be appointed, and amendments to the Court's decision-making powers and jurisdiction.



their mandate different from (or perhaps just more specific than) the one constitutionally codified. The Indonesian Constitutional Court, for example, is generally agreed to have overstepped the parameters of its 'negative legislator' mandate in the first 10 years of its institutional life. Predictably, the Court's intervention in democratic politics triggered a backlash in the form of a 2011 legislative proposal for the pegging back of its jurisdiction to what had originally been envisaged.<sup>77</sup> Less predictably, however, the Court has been able thus far to resist this attempted attack, largely due to its overwhelming popular support in the aftermath of many decades of authoritarian rule.<sup>78</sup> Examples like this, and indeed the Colombian example Issacharoff gives in his lead essay, illustrate that at least some of the post-1989 constitutional courts have been able to build support for their role as protectors of the democratic system, and that they have been able to do this even where they have overstepped the strict terms of their mandate. The question is: can we build a general theory of the preconditions for such success and the strategies other post-1989 constitutional courts need to pursue if they are to emulate these examples?

To cure the problems with the passive account, any such general theory must explain how a constitutional court in a new or otherwise fragile democracy might be able to adapt the framers' vision of its institutional role in protecting the democratic system in two respects: (1) by creating new democratic rights to counteract unforeseen democratic pathologies as they emerge; and (2) by taking account of the potential impact of its decisions on its capacity to continue performing its institutional role. Both of these required adaptations implicate questions of 'authority' (in Issacharoff's terminology) or legitimacy (the term more commonly used in the literature). If the court moves beyond the clear terms of its constitutional mandate to protect the democratic system, this necessarily raises questions about the legal and moral legitimacy of what it is doing, which may impact on its institutional legitimacy more broadly. How might the court, our general theory would need to tell us, be able to adjust its existing democratic doctrines, or construct new ones, without falling victim to the charge of politicisation? Likewise, how might a court take account of the impact of its decisions on its future capacity to perform its institutional role? Is it ever constitutionally and morally legitimate for a court to do that? And how might a court do that without being accused of outcomes-based decision-making, the avoidance of which most commentators take to be a precondition for constitutional court legitimacy?

As soon as we discard the passive account, these questions reveal, the major challenge is to explain how constitutional courts overcome the legitimacy concerns associated with the two adaptive strategies required. As to the first, there has been an ongoing debate in the academic literature over the extent to which a constitutional court may legitimately depart from the precise terms of its mandate, with originalists holding that courts should stick closely to the historically discoverable meaning of the Constitution, and living-tree theorists

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<sup>77</sup> M Mietzner 'Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court' (2010) 10 *Journal of East Asian Studies* 397, 404.

<sup>78</sup> See S Butt & T Lindsey *The Constitution of Indonesia: A Contextual Analysis* (2012) 144–157.

allowing for some adaptation to changing circumstances.<sup>79</sup> Likewise, the extent to which a court may legitimately take the consequences of its decisions into account is disputed within liberal legal theory, with Posnerian pragmatists and legal positivists treating certain forms of consequentialist reasoning as legitimate policy reasoning,<sup>80</sup> and Dworkinians treating any consequentialist reasoning as per se anathema to the pursuit of constitutional principle.<sup>81</sup> Since the constitutional and moral legitimacy of what a court does must at some point influence its institutional legitimacy,<sup>82</sup> these concerns are more than just abstract legal-theoretical worries: they appear to present real challenges to a court committed to playing a sustainable role in democratic consolidation. If a court strays too far from a morally or constitutionally justifiable understanding of its mandate, we would expect this to undermine its ability to present its decisions as legally required, with knock-on consequences for its capacity to defend its independence. Similarly, if a court is too sensitive to the way its decisions might be perceived by powerful political actors, we would expect this to have knock-on consequences for its reputation as a legally motivated actor, and thus again for its capacity to resist political attack.

And yet, the empirical evidence suggests otherwise. As we have seen, the Indonesian case serves as an example of how a post-1989 court may be able to depart from the strict terms of its constitutional mandate to build a powerful role in the political system. Indeed, on some accounts, it was precisely the Indonesian Constitutional Court's capacity to depart from its mandate that was vital to its success.<sup>83</sup> The Colombian Constitutional Court, too, on Issacharoff's account, had little obvious legal backing for its decision to block President Uribe's attempt to amend the Constitution to win a third term. And yet it not only survived this confrontation, but grew stronger as a result. Other examples of courts in new or fragile democracies overstepping the strict terms of their mandate to play important roles in democratic consolidation include Estonia, where the Supreme Court has acted as a 'conduit' for democratic reform, not by enforcing the literal terms of the Constitution, but by using international democratic norms as a guide to the 'pathways' to be followed;<sup>84</sup> and Korea, where the Constitutional Court, '[t]hough expected by the constitutional drafters to be a relatively quiescent institution ... has become the embodiment of the new democratic constitutional order'.<sup>85</sup>

<sup>79</sup> Two representative examples are A Scalia *A Matter of Interpretation* (1996) and WJ Waluchow *A Common Law Theory of Judicial Review: The Living Tree* (2007).

<sup>80</sup> See, for example, RA Posner *Law, Pragmatism, and Democracy* (2003); J Raz 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' (1998) 4 *Legal Theory* 1.

<sup>81</sup> Dworkin does concede the practical need sometimes to make such 'adjustments' to constitutional principle to take account of the political community's capacity to live in the 'spirit of a community of principle'. R Dworkin *Law's Empire* (1986) 380–381.

<sup>82</sup> See RH Fallon, Jr 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787.

<sup>83</sup> Mietzner (note 77 above).

<sup>84</sup> N Maveety & A Grosskopf "'Constrained" Constitutional Courts as Conduits for Democratic Consolidation' (2004) 38 *Law & Society Review* 463.

<sup>85</sup> T Ginsburg 'The Constitutional Court and the Judicialization of Korean Politics' in A Harding & P Nicholson (eds) *New Courts in Asia* (2009) 113, 113.

What all these examples indicate is that at least some post-1989 constitutional courts have been able to sustainably assert their institutional role as protectors of the democratic system *notwithstanding doubts about the constitutional and moral legitimacy of what they are doing*. This is an anomaly that is worth exploring. Perhaps it simply means that our existing theorisations of the legitimacy of judicial review are inadequate? Perhaps when we take account of all relevant considerations, including the circumstances in which the post-1989 constitutional courts are operating, we will be able to see that there is in fact no divergence between the role that they are justified in performing and the role that they have in fact performed. Certainly it is true that normative constitutional theory tends not to be terribly well grounded in politically realistic accounts of the challenges confronting constitutional courts. Many comparative constitutional scholars, myself included, are thus sympathetic to Barry Friedman's call for some adjustment in this respect.<sup>86</sup> There is also Jeremy Waldron's well-known argument that the moral objection to judicial review weakens where the democratic system is dysfunctional in some way.<sup>87</sup> At a normative level, therefore, there is clearly work to be done to ensure that our theorisations of the role courts may legitimately perform in processes of democratic consolidation are appropriately sensitive to the political conditions in which they are operating. But this aspect of the theoretical challenge is not currently our concern. Our concern for the moment is simply to sketch an *explanatory* theory of how courts have, in fact, adapted the implementation of their mandate in the two aforementioned ways and, in so doing, answer the following two-part question: what is it about the environments in which they have worked that has allowed them, (1) not only to get away with these departures from the strict terms of their mandate, (2) but also to use such departures to build their institutional power?

Are there any existing attempts (apart from Issacharoff's insufficiently contextualised account) to provide such a theory? There is certainly a vast and sprawling literature on the role of constitutional courts in democratic consolidation. Few contributions to date, however, attempt anything like a general theorisation of this issue, and there are none that address the two specific adaptive strategies that our examination of the passive account suggested are necessary. Of those accounts that rise above a purely descriptive level to offer some explanation of what is going on, almost all are single-country studies whose authors (perhaps wisely) do not attempt to extrapolate their findings beyond the particular case they are considering.<sup>88</sup> The difficulty with these accounts is thus the reverse of the problem with Issacharoff's account. While offering rich explanations

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<sup>86</sup> B Friedman 'The Politics of Judicial Review' (2005) 84 *Texas Law Review* 257.

<sup>87</sup> Waldron (note 32 above). As we have seen, this is the precisely the point that Issacharoff develops in his account. But the problem with his argument is that it assumes that constitutional courts in new democracies are unconstrained, both by institutionalised norms of legal reasoning conditioning how they should go about responding to their mandate, and by the political context in which they are working. As a consequence, the examples that he cites only fit one particular type of institutional and political setting: the situation of the Unconstrained Court. I develop this account more fully below.

<sup>88</sup> See, for example, Maveety & Grosskopf (note 84 above); Ginsburg (note 85 above); C J Walker 'Toward Democratic Consolidation: The Argentine Supreme Court, Judicial Independence, and the Rule of Law' (2008) 4 *High Court Quarterly Review* 54.

of individual cases, they do not progress to offer a general theorisation of the circumstances in which constitutional courts might be able sustainably to play a role in democratic consolidation.

The most studied individual instance of the role of constitutional courts in democratic consolidation, of course, is that of the US Supreme Court. Martin Shapiro, in particular, has been industrious in drawing out the lessons that the American experience has to teach scholars in other countries.<sup>89</sup> While useful in suggesting general pathways and possibilities, however, Shapiro's work on this topic is too piecemeal and suggestive to be of much use. Of the many other explanatory accounts of the US experience, few are self-consciously offered as comparative lessons. Keith Whittington's account of the political foundations for judicial supremacy in the United States is thus instructive,<sup>90</sup> as is Barry Friedman's legal-historical study showing that the US Supreme Court's opinions have never diverged too far from public opinion, and that this has been central to its capacity to build a 'constituency' for judicial review.<sup>91</sup> But neither of these accounts is intended as, nor easily translatable into, a general theory of the role of constitutional courts in democratic consolidation. Of all the American theorisations, the most generalisable, perhaps, is Alexander Bickel's account of the US Supreme Court as an essentially prudential institution that has always been careful to calibrate its decisions to the political temperature of cases.<sup>92</sup> While again instructive, the problem with this account when applied comparatively is that it does not explain the precociousness of some of the post-1989 courts' capacity to protect the democratic system. Whereas Bickel's explanation for the US Supreme Court's success points to the need for careful judicial statesmanship, some of the most successful post-1989 constitutional courts have been anything but careful. And yet they have been all the more effective for that reason.

Outside the United States, accounts of how constitutional courts in other *mature* democracies have built their institutional power (in Europe, Australia and Canada) are hamstrung by the fact that they perforce take up the explanation in a context where a political culture of respect for judicial independence had already been established by the time the courts began their work. Alec Stone Sweet's otherwise path-breaking account of the process of the judicialisation of politics in four European countries (Germany, France, Italy and Spain) and in the European Union itself is affected by this drawback,<sup>93</sup> as is Brian Galligan's insufficiently recognised study explaining how the Australian High Court pursued a self-

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<sup>89</sup> See, for example, M Shapiro 'Some Conditions for the Success of Constitutional Courts: Lessons from the U.S. Experience' in W Sadurski (ed) *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (2002) 37; M Shapiro 'Judicial Review in Developed Democracies' in S Gloppen, R Gargarella and E Skaar (eds) *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (2004) 7.

<sup>90</sup> Whittington (note 73 above).

<sup>91</sup> Friedman (note 73 above).

<sup>92</sup> AM Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2ed, 1986). See also RG McCloskey *The American Supreme Court* (1960).

<sup>93</sup> A Stone Sweet *Governing with Judges: Constitutional Politics in Europe* (2000). Stone's account is at once too abstract (dealing as it does with the legitimacy of 'triadic' decision-making generally) and too specific (applying the general theory only to the European case).

consciously legalist path to independence over the course of the last century.<sup>94</sup> The same is true of the various Canadian accounts, most of which are in any event aimed at providing a normative justification of the particular practice of judicial review in that country.<sup>95</sup>

In all the literature, the only two attempts, as far as I am aware, to build a general theorisation of post-1989 constitutional courts' role in democratic consolidation are Epstein, Knight and Shvetsova's account of the Russian Constitutional Court's suspension by President Boris Yeltsin and Tom Ginsburg's chapter on 'building judicial power' in his comparative study of three Asian constitutional courts.<sup>96</sup> According to both these theorisations, what constitutional courts need to do in order to build their institutional power is to ensure that every decision they take falls within the political branches' 'tolerance interval' for the case, by which is meant the range of decisions in two-dimensional policy space that powerful political actors are likely to respect. By acting in this way, these theorisations contend, courts can ensure that all their decisions are enforced, which in turn may help to build their institutional legitimacy (understood as diffuse public support) to the point where they have the power to decide a wide range of cases.

Attractive as it is, the problem with the 'tolerance interval' theory is that a court that pursues the recommended strategy could only ever hope to build a reputation as a politically shrewd actor. However powerful it becomes, it could never acquire the sort of reputation for legally motivated decision-making that most commentators agree is integral to a court's capacity to play an enduring role in democratic politics. While this theorisation might thus work quite well in settings where law has never established its autonomy from politics, and where courts are therefore not expected to be anything but shrewd political actors, it works less well in settings where a court's institutional legitimacy depends on its capacity to build or maintain a reputation as a legal actor.<sup>97</sup> In such settings, constitutional courts that pursue the kind of political strategy that this theorisation recommends are likely to incur significant legal legitimacy costs, which may undermine whatever beneficial impact on the court's institutional independence such a strategy confers. In any case, judges socialised in a legal culture in which

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<sup>94</sup> B Galligan *The Politics of the High Court* (1987).

<sup>95</sup> See, for example, DM Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Law* (1990); PW Hogg & AA Bushell 'The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgood Hall Law Journal* 76; Waluchow (note 79 above).

<sup>96</sup> L Epstein, J Knight & O Shvetsova 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117; Ginsburg (note 20 above) 65–89. Epstein and Knight had earlier applied their theorisation to the US Supreme Court at its founding in J Knight & L Epstein 'On the Struggle for Judicial Supremacy' (1996) 30 *Law & Society Review* 87.

<sup>97</sup> The Indonesian case, for example, where decisions have been thinly reasoned, but where the Court can count on its reputation as one of the few incorrupt governmental institutions, fits Epstein, Knight and Shvetsova's framework quite well. But their framework does not explain instances like Chile or South Africa, where long histories of legal institutionalisation have imposed greater legal constraints on constitutional courts' room for manoeuvre. In these sorts of settings, it matters a great deal whether the court is seen to be acting politically, since any departure from law entails legal legitimacy costs for a court.



law matters are unlikely ever to find such purely political strategies attractive. Even in countries with less developed legal cultures, a constitutional court that pursues the kind of strategy this theorisation advocates must eventually convert politically acquired institutional capital into more durable legal-reputational capital, lest the political conditions that support its independence turn against it.

To be sure, the US Supreme Court – the most successful and (until recently) powerful of all constitutional courts – no longer finds its institutional independence on a reputation for legally constrained decision-making.<sup>98</sup> But this situation has come to pass after a long period of political and legal-cultural development. The influence of ideology on the US Supreme Court’s decision-making record (as captured in the so-called ‘attitudinal model’<sup>99</sup>) is thus a sign of its peculiar institutional strength – some would say, of its late-stage decadence – rather than an example for constitutional courts in new democracies to follow. In less developed democracies, where there is a societal commitment to the separation of law and politics, but where judicial review has not been as long institutionalised, constitutional courts first need to build a reputation as a legally constrained actor before they can confidently assert their institutional role. In this sense, constitutional courts in countries where there has been a longer history of legal institutionalisation paradoxically face a more complex set of challenges than courts in countries like Indonesia, where it is the judges’ reputation for incorruptibility, rather than the legal legitimacy of their reasoning processes, that matters.<sup>100</sup>

All of this suggests that, if we are to offer a general theory of the role of constitutional courts in democratic consolidation, we need to pay attention to the dynamic interaction of law and politics in constitutional adjudication, and to the varieties of political and institutional setting in which that interaction is played out. In countries where a commitment to decision-making according to law is weakly institutionalised, constitutional courts may well be able to pursue a purely political path to institutional independence and thus to a powerful role as protector of the democratic system. On the other hand, where a commitment to decision-making according to law is well institutionalised, constitutional courts will have to mediate any political strategy with attention to the requirements of law. Similarly, variations in the external political conditions for judicial independence will have an impact on any strategy pursued. Where courts are insulated from attack by fortuitous political conditions, they obviously have far greater room for manoeuvre than where this is not the case.

In previous work, I have suggested that the dynamic interaction between law and politics in constitutional adjudication is best conceived as two competing sets of constraints, each of which may be either strongly or weakly registered.<sup>101</sup> A court might thus work in a legal culture in which law really matters and where legal norms are experienced as a socialised constraint on judicial action – both

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<sup>98</sup> JL Gibson & GA Caldeira ‘Has Legal Realism Damaged the Legitimacy of the US Supreme Court?’ (2011) 45 *Law & Society Review* 195.

<sup>99</sup> JA Segal and HJ Spaeth *The Supreme Court and the Attitudinal Model Revisited* (2002).

<sup>100</sup> I am grateful to Fritz Siregar, one of my PhD students at UNSW Law, for this insight.

<sup>101</sup> Roux (note 64 above).

internally, in the subjective consciousness of the judges, and externally, in as much as deviating from conventionally accepted methods of legal reasoning entails legal legitimacy costs for the court. Likewise, political constraints may be strongly or weakly registered. For a whole host of reasons, some long-term institutional, others just short-term strategic, courts may be more or less exposed to political attack – more or less free, that is, to get on with the business of judging, whether motivated by law or personal policy preferences. Depending on these factors – on how strongly or weakly the political and legal constraints impacting on the court are registered – its capacity to contribute to democratic consolidation is going to be vastly different. Any theorisation of this issue must thus start there – with an understanding of the different institutional and political circumstances in which courts in new or fragile democracies find themselves and the different trajectories open to them.<sup>102</sup>

For comparative purposes, four main types of constitutional court may be identified: a *Principled Court*, operating in circumstances where a strong political culture of respect for judicial independence together with a well-developed legal-cultural commitment to adjudication according to law not only allows, but also requires it to pursue a morally and constitutionally principled understanding of its mandate; a *Political Court*, operating in circumstances of weak legal institutionalisation and comparatively high exposure to political attack, where the only strategy open to the court is to build its institutional independence in the manner suggested by the ‘tolerance interval’ theory; a *Constrained Court*, operating in a well-developed legal culture but exposed by a rapid transition to a new and uncertain constitutional order to a relatively serious risk of political attack, and where the court must thus constantly mediate the demands of law and politics; and an *Unconstrained Court*, operating in a legal culture that has either lost faith in the tenability of the law/politics distinction or in which a commitment to that distinction has yet to develop, but which is relatively well insulated from political attack, either by fortuitous political circumstances or because the political culture in the country concerned has developed to tolerate a situation in which constitutional judges take decisions relatively unconstrained by law.<sup>103</sup>

The advantage of this conceptualisation is that it allows us to tie our theorisation of the role of constitutional courts in democratic consolidation to four ideal-typical situations that capture the different kinds of political and institutional setting in which courts work. This approach thus provides a basis for theorising the role of these courts that is somewhere between the particularism of the individual country accounts and the sweeping generalisation of accounts that fail to take these varying circumstances into account. In addition, the conceptual logic of each ideal-typical situation may be used to drive an empirically testable conjecture

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<sup>102</sup> This approach thus parallels the currently dominant approach in democratic consolidation theory more generally. See JJ Linz & A Stepan *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (1996) 38 (Linz and Stepan contend that there are different pathways to democratic consolidation depending on the situation a country finds itself in, and that the analysis of this issue must therefore start with an analysis of the ‘prior [nondemocratic] regime type’)

<sup>103</sup> For more on these ideal types, see Roux (note 64 above) at Chapter 2.



about the democratic consolidation strategy open to courts approximating the ideal type. By typifying a court according to its proximity to one of the above four ideal types, it becomes possible to see whether the conjecture is empirically supported and, if not, how it might be refined.

This is not the place to provide (and empirically test) a fully reasoned conjecture for each ideal type.<sup>104</sup> In the remainder of this section I want simply to provide a brief illustration of what each ideal-typical conjecture looks like, giving more attention to the ideal type that the CCSA fits. In the final section of this paper, I will then preliminarily test the plausibility of that conjecture against the CCSA's record to date.

Courts approximating the Principled Court ideal type are by definition already working in a democratic system that is well consolidated. Their challenge is thus not so much to contribute to democratic consolidation as to further enhance the quality of democracy, notably by developing doctrines aimed at enabling minority and other marginalised groups to more effectively participate in the democratic system. Issacharoff's and Richard Pildes' work on the US Supreme Court's role in opening out the two-party American democratic system addresses this type of situation,<sup>105</sup> although the US Supreme Court is probably best classified as an Unconstrained rather than a Principled Court in terms of the above typology.<sup>106</sup> A better example of a Principled Court attempting to improve the quality of democracy is the Australian High Court's effort in the 1980s to develop a hitherto unrecognised 'implied freedom of political communication'. One of the original justifications given for the implied freedom was that it was necessary to ensure that a system for the regulation of political broadcasting did not lock up democratic politics to the exclusion of minority parties.<sup>107</sup> In inferring the existence of this freedom from the system of representative and responsible government established under Australia's 1901 Constitution, the responsible High Court judges encountered significant resistance from judges who felt that the justificatory arguments used ran contrary to Australian legal culture's traditional dislike of substantive political theorising. The majority judges were thus eventually required to reformulate their arguments so as to ground them more firmly in the 'text and structure' of the Constitution.<sup>108</sup> Nevertheless, the content of the resulting implied freedom of political communication remained largely unchanged and has since been used to review the constitutionality of numerous statutes.

The Political Court ideal type covers courts in countries like Russia and Argentina, where law has never fully established its autonomy from politics, and where political conditions do not support assertive judicial decision-making. Courts in this situation may in theory pursue the consolidation strategy mapped out by 'tolerance interval' theory. The empirical evidence, however, suggests that

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<sup>104</sup> I hope to present a fuller version of the argument at the University of Oxford African Studies Conference on *Twenty Years of South African Democracy* in April 2014.

<sup>105</sup> Issacharoff & Pildes (note 9 above).

<sup>106</sup> The arguments for this classification are given in Roux (note 64 above) at Chapter 2.

<sup>107</sup> *Australian Capital Television PTY Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>108</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

propitious changes in the political environment for judicial review might also be required.<sup>109</sup> Ginsburg's own study of the Korean Constitutional Court, for example, argues that one of the main reasons for its success was 'the particular political configuration of Korean democratization, with a military intent on withdrawal from active politics and three major civilian political forces more or less evenly balanced'.<sup>110</sup> Ginsburg's nuanced analysis of this environment suggests that courts that succeed in building their institutional independence by pursuing a politically shrewd, tolerance-interval-respecting strategy are often assisted by propitious background political factors, making their classification as 'Political' or 'Unconstrained' Courts uncertain.

Unlike the other ideal types, the Unconstrained Court has two different empirical manifestations: the constitutional court in a mature democracy, like the United States, where the legal culture has lost faith in the tenability of the law/politics distinction and where the political culture has adjusted to tolerate a relatively high degree of legally unconstrained, 'attitudinal' decision-making; and the constitutional court in a new democracy, like Indonesia or Colombia, where fortuitous political circumstances (in the Indonesian case – popular distrust of other governmental institutions, in the Colombian case – the identification of the court in the popular mind with the constitutionally-driven democratic transformation project) help to insulate the court from political attack. The potential role of this first variant of this type in enhancing the quality of democracy has already been briefly touched on in relation to the US example. In the case of the second variant, the court's fortuitous insulation from political attack allows it to play a precociously strong role in democratic consolidation, going beyond the literal or at any rate envisaged terms of the court's constitutional mandate. At the same time, the absence of a developed legal culture means that the court is able to engage freely in both of the adaptive strategies earlier described: (1) creating new democratic rights as unforeseen pathologies emerge (the Indonesian Court's policing of electoral politics; the Colombian Court's novel doctrine to block President Uribe's popular, but democracy-threatening attempt at a third term) and (2) adjusting decisions to take account of the likely institutional repercussions for the court (in both the Indonesian and Colombia cases, the judges correctly assessing that a forceful decision would only enhance their court's power).

This sort of bold strategy, however, is not necessarily optimal for courts that approximate the Constrained Court ideal type. Inhibited as these courts are by legal-cultural expectations about how their decisions ought to be justified and by political conditions that do not generally support a robust assertion of their institutional role,<sup>111</sup> they must continually seek out an optimal balance between the institutional-independence-enhancing effects of robust protection of the democratic system and the institutional-independence-damaging effects of overstepping their constitutional mandate. Their democratic consolidation

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<sup>109</sup> See, for example, Walker (note 88 above) at 65 (Walker offers reasons for hope in Argentina).

<sup>110</sup> Ginsburg (note 20 above) at 207.

<sup>111</sup> There may be exceptions of course, where the micro-politics of a case mean that the court is fairly well insulated in relation to a particular decision. See, *infra*, the discussion of *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC).

strategy is thus likely to be much more cautious than that for courts resembling the Unconstrained Court type. Working as these courts do in a legal culture in which law matters, their ability to protect the democratic system while maintaining their institutional independence depends on their capacity to always present their decisions as legally justified. This means that the two adaptive strategies that courts committed to democratic consolidation are required to pursue present complicated challenges for courts approximating this ideal type: creating new democratic rights requires careful justificatory work, and taking account of the institutional repercussions of decisions must occur within a general justificatory framework antithetical to outcomes-based decision-making.

As soon as the peculiar challenges confronting the Constrained Court are acknowledged, the problem with Issacharoff's suggestion that the CCSA should follow the Colombian Constitutional Court's or the Indian Supreme Court's example becomes apparent. The strategy that worked in those countries will not necessarily work in South Africa. If the CCSA most resembles the Constrained Court ideal type, as I have argued elsewhere it does,<sup>112</sup> its strategy for contributing to democratic consolidation must take account of the need to transform legal-cultural expectations about the court's appropriate role in democratic politics even as it asserts that role to keep open the space for political competition. Since the focus of this symposium is on the CCSA, it is worth fleshing out the dynamics of this required strategy a little more before turning to assess the CCSA's record.

As noted, a court approximating the Constrained Court ideal type must progressively build support for its institutional role by managing legal-cultural expectations of what its legitimate role is. The court's mandate to protect the democratic system may in general terms be clear and thus of some assistance to the court, but the case-by-case working out of the democratic rights required to give effect to this mandate may be subject to something like a legal-cultural lag-effect – to resistance from within the legal culture, that is, to the court's playing the required role. The court must thus seek in its initial decisions on democratic rights carefully to explain its new institutional role in terms which take account of the new constitutional order while at the same time resonating with previously authoritative forms of argument. A new constitutional court operating in a previously formalist legal culture, for example, might seek to justify its decisions in less substantive political terms than a court accustomed to reasoning in this way.<sup>113</sup> The court might thus say that 'section so and so of the Constitution grounds this democratic right' rather than saying 'current democratic pathologies require the court to act in this way'. To outside observers (and Americans in particular), this sort of reasoning will come across as formalistic: on the one hand unconvincingly claiming to deduce the democratic right from the posited constitutional provision by semantic reasoning alone, and on the other hand failing fully to embrace the

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<sup>112</sup> Roux (note 64 above).

<sup>113</sup> Note that this might be a matter not only of caution on the part of the judges in bringing the legal culture around, but also a matter of their own legal-professional socialisation, which initially inhibits them from being able to present more substantively reasoned reasons.

justificatory possibilities opened up by the new Constitution.<sup>114</sup> But this is just the distorted view of the kind of comparative constitutional law scholarship that fails to take account of the different institutional and political settings in which constitutional courts work. From the perspective of the situation in which the court actually finds itself, the more cautious strategy makes perfect sense.

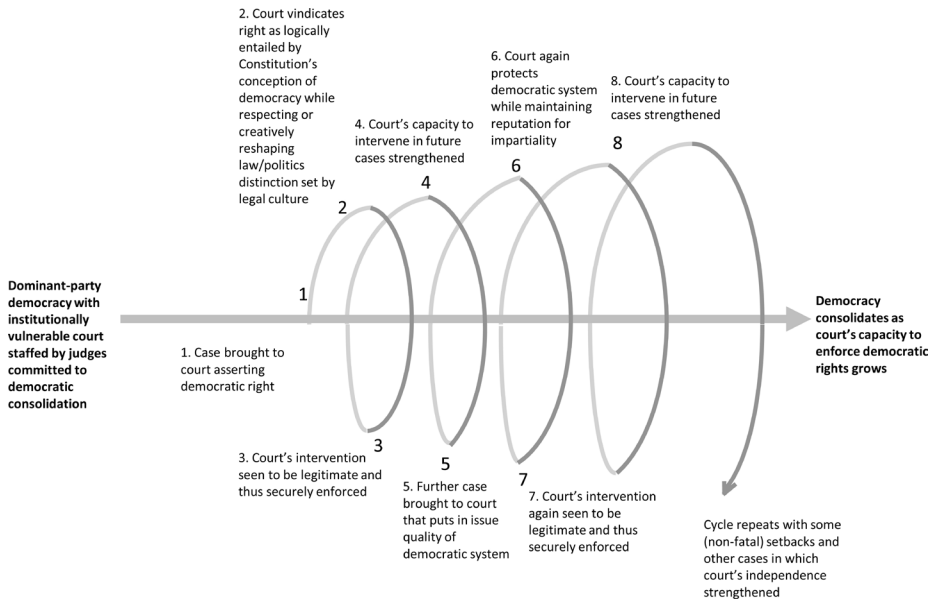
None of this really matters, of course, if the democratic system does not come under attack. But when it does, the Constrained Court's task is further complicated by the heightened political controversy surrounding its decisions on democratic rights. In addition to managing legal-cultural expectations of how it might legitimately derive democratic rights, the court will need to take account of the likely impact of its decisions on its capacity to continue playing its constitutionally prescribed role. Fortunately, the court might here be helped by something like the politico-legal dynamic that develops in the second variant of the Unconstrained Court case. As the pathologies with the democratic system become more obvious, the very dysfunctionality of the system might drive popular support for more robust judicial intervention. The domain of law, in other words, might expand in line with the collapse of democratic politics, thus assisting the Court to intrude ever further into that arena under the guise of implementing its constitutional mandate. As corruption increases, for example, the Court might find it easier to justify interventions specifically targeted at this pathology. This does not guarantee that the Court's intervention will be successful, of course – and there is in the end little solace in the thought that law's domain expands as democratic politics becomes more dysfunctional – but the theoretical logic at least suggests that the court's institutional power to intervene in the democratic system may be enhanced as the pathologies emerge. Whether that ultimately means that the democratic system can be saved depends on other actors, particularly civil society groups capable of partnering the court, and ultimately the people themselves, exercising their court-enforced democratic rights.

The virtuous circle a constitutional court in the position of the Constrained Court needs to trigger is thus one in which each successive intervention in the democratic system enhances the conditions for future intervention in a very specific sense: viz by transforming legal-cultural expectations about the appropriateness of the court's playing the asserted role. To be sure, actual democratic consolidation depends in the end on the democratic system's being opened up to greater competition. But that is not something the court can control. The feedback loop we are talking about is not: decision protecting openness of democratic system → democratic system opened up → greater electoral competition → enhanced curial power to protect openness of democratic system. Rather, the loop is: legally justifiable decision protecting openness of democratic system → transformed legal-cultural expectations about court's legitimate role in protecting openness of democratic system → enhanced curial power to protect openness of democratic system. Assuming there are no exogenous attacks on the court's independence,

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<sup>114</sup> Karl Klare's intervention in the South African debate is beset by this sort of problem. See Klare (note 46 above).

the virtuous circle triggered by such a decision-making record may be depicted as follows:



**Figure 1: Virtuous circle triggered by curial strategy aimed at managing legal-cultural expectations about court's legitimate role in enforcing democratic rights**

As noted, the virtuous circle depicted in Figure 1 assumes there are no exogenous political developments affecting the court's independence. Whatever a court resembling the Constrained Court ideal type does to manage legal-cultural expectations about its appropriate role in enforcing the democratic system, political conditions for independent judicial review can deteriorate for reasons beyond its control. Factional struggles within the dominant party, for example, might see the rise of a grouping less committed to judicial independence than the one it deposed. It is also conceivable that a case might be brought to the court that required it to protect the openness of the democratic system before it had built the necessary legal basis for the decision. In that situation, the court would be faced with a 'damned-if-you-do, damned-if-you-don't' choice between protecting the openness of the democratic system at the risk of exposing itself to political attack and refraining from acting at the risk of missing a crucial opportunity to protect the system. There is accordingly no guarantee that a court resembling the Constrained Court ideal type will be able to resist a determined dominant-party assault on the democratic system, only a theoretically possible trajectory, the following of which is dependent on willing judges with the requisite insight and a certain amount of luck.

How plausible in fact is the posited scenario? Do we have any evidence of a constitutional court actually following this trajectory? The next section argues

that this is more or less how we should understand the CCSA's democratic rights jurisprudence over the past two decades.

### III AN ALTERNATIVE READING OF THE CCSA'S DEMOCRATIC RIGHTS JURISPRUDENCE

This response began by listing five decisions handed down by the CCSA in 2011 and 2012. At face value, they portray a Court that is deeply involved in the enforcement of democratic rights. Indeed, in his lead essay, Issacharoff acknowledges that one of these decisions – *Democratic Alliance*<sup>115</sup> – involved ‘what [was] clearly a matter of political appointment generally outside the bounds of judicial review in most if not all democratic countries’.<sup>116</sup> And yet, his assessment of the Court's record is lukewarm. The judges are getting the outcomes mostly right, we are told, but have yet to develop an adequate doctrinal basis for their decisions. Issacharoff is particularly disappointed with the rational basis review standard adopted in *Democratic Alliance* and the Court's recourse to international law in *Glenister*.<sup>117</sup> What was required of the Court in both of these cases, he thinks, was ‘to articulate a theory of proper democratic politics in order to discharge a principled role in engaging political process failures that fall under its constitutional mandate’.<sup>118</sup> While *Justice Alliance*<sup>119</sup> and *Oriani-Ambrosini*<sup>120</sup> show that the Court can ‘reach deeper’ when it wants to,<sup>121</sup> we are left with the impression that the judges are only just beginning to grasp what is required of them.

This critique is driven by more than just Issacharoff's typically American preference for substantively reasoned decisions. The strength of his comparative analysis is that he shows that there are real issues at stake – that much can depend on whether a constitutional court adequately theorises its institutional role in enforcing democratic rights. Notwithstanding his scepticism about whether constitutional courts in new democracies can withstand a determined assault on their independence, therefore, he does think that there are things that such courts can do more or less well. If it is to stand any chance of preventing a slide back into authoritarianism, a court must act forcefully and quickly, while the memory of why the Constitution was adopted and why the court was given the powers that were given to it, is still fresh in the public mind. Any hesitation, Issacharoff's adverse reading of *United Democratic Movement* implies, could be fatal to its later capacity to fulfil its mandate. His work in this way makes an important and novel contribution to the literature on the role of constitutional courts in democratic consolidation.

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<sup>115</sup> *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24, 2013 (1) SA 248 (CC).

<sup>116</sup> Issacharoff (note 6 above) 23.

<sup>117</sup> *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC).

<sup>118</sup> Issacharoff (note 6 above) 27.

<sup>119</sup> *Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of the Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of the Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC).

<sup>120</sup> *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC).

<sup>121</sup> Issacharoff (note 6 above).



Nevertheless, the previous section argued, there is a crucial weakness in Issacharoff's account. That weakness has to do with his inattention to the variety of political and institutional settings in which constitutional courts in new democracies work. Not all such courts operate in circumstances where they are free to assert their powers without fear of political attack, and not all such courts are unconstrained by background legal-cultural expectations about how they should go about enforcing democratic rights. When we put these two variables back into the equation, Issacharoff's normative prescription that constitutional courts should always act forcefully, justifying their decisions by recourse to substantively reasoned theorisations of the democratic pathologies they are addressing, appears somewhat inflexible. What we need, therefore, is a more context-sensitive theorisation, one whose starting point is to acknowledge that some constitutional courts may need to go about contributing to democratic consolidation in a different way.

It is not possible conclusively to establish the superiority of the more context-sensitive theorisation in this response. Even if it effectively explains what the CCSA has been doing, it may still be the case that the Court, and South African democracy more generally, would have been better off had the judges pursued the approach that Issacharoff advocates. Since the ultimate force of his critique depends on a counterfactual, we cannot be certain. There is also the apples-and-pears problem of comparing what is essentially a normative prescription for what the Court should have done with an explanatory account of what it has in fact done. While the explanatory account can be given a normative inflection – while we could say that this is why the CCSA did what it did *and it is a good thing too* – we would still need to agree the overarching terms by which the Court's record should be assessed. What is more important: the sophistication and subtlety of its jurisprudence, the outcomes it reached, or the fact that it safeguarded its institutional independence? And what causal connection between these three things would we in any case be able to establish?

The aim of this final section is thus not to try to settle which of the two theorisations is the more powerful. Rather, the aim is to offer an alternative, less disappointed reading of the CCSA's democratic rights jurisprudence, and to show how this alternative reading is facilitated by the theoretical and methodological approach outlined in the previous section. If this alternative reading is plausible, we will have cast some doubt on the force of Issacharoff's critique and thus the generalisability of his normative prescription. At the same time, we will have demonstrated the explanatory usefulness of the more context-sensitive approach.

The alternative reading of the CCSA's democratic rights jurisprudence hinges on its classification as a Constrained Court. The argument in support of that classification is complex and cannot be set out here. In previous work, however, I have explained why the CCSA should be regarded as a court that is, in comparative terms, both quite strongly constrained by law and easily exposed to political attack.<sup>122</sup> That analysis, which allowed for an initial window period when the Court was briefly insulated by the terms of the negotiated settlement,

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<sup>122</sup> Roux (note 64 above).



was directed at the first 10 years of the CCSA's institutional life. Since Arthur Chaskalson's retirement as Chief Justice in 2005, however, little has happened to suggest that the Court's classification should be fundamentally revised. Indeed, if anything, the Court has become more constrained along both dimensions: it is still working in a relatively formalist legal culture that disfavors textually unsupported theorizations of its mandate, and the external political environment for judicial review has, by most accounts, deteriorated. As a result, the Court is more exposed than ever before to the risk of independence-threatening political attack. The only thing that has clearly changed over the past eight years is that the ANC has lost much of its moral stature. While it still enjoys a considerable amount of popular support, proven allegations of corruption, maladministration and nepotism have permanently damaged the ANC's reputation for good governance. According to the conjecture set out in the previous section, this suggests that we should expect to see the Court expanding law's domain into areas of democratic politics directly affected by the ANC's reputation decline – including, for example, standards of integrity for those in public office – albeit still with careful attention to the textual basis for its decisions.

To make the full case for the alternative reading would require a comprehensive assessment of the CCSA's democratic rights record over the past 20 years. There is insufficient space to do that here.<sup>123</sup> Happily, however, Issacharoff's tripartite periodisation provides the basis for a truncated version of the argument. His first phase of the CCSA's democratic rights jurisprudence thus corresponds to the initial window period to which reference has just been made. As noted, the Court was temporarily insulated from political attack during this period by the terms of the negotiated settlement, and in particular by the fact that the ANC needed an independent court to legitimise the transition from apartheid to black majority rule. After the end of this window period, marked by the *First Certification Judgment*, South African politics entered a period of heady optimism, during which it was thought by many that the ANC would exploit its international support and accumulated reputational capital to fundamentally transform the country through law, using the 1996 Constitution as a kind of programmatic guideline. During this time the Court became increasingly exposed to political attack: with each successive election, the ANC's reliance on the Court to legitimate its social transformation project declined. Nevertheless, the Court was able to work out a *modus vivendi* with the ANC by carefully positioning itself as a partner in the achievement of the ANC's main policy objectives, which the judges were plausibly able to show were consonant with the 1996 Constitution's vision for social transformation. From around 2005 or so, however, triggered by the events leading up to Jacob Zuma's dismissal as Deputy President, the shine came off the ANC's constitutionally limited democratic transformation project, and the current period of unabashed populism was ushered in. During this time, the Court has come under increasing (albeit thus far still unsuccessful) political attack: the aborted 2005 Constitution

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<sup>123</sup> See T Roux 'The Constitutional Court and Democratic Consolidation in South Africa: Past Lessons and Future Possibilities' paper will be presented at the African Studies Centre Conference on *Twenty Years of South African Democracy* (Oxford, April 2014).

Fourteenth Amendment Bill threatened to remove its jurisdiction to review the constitutionality of bills before enactment;<sup>124</sup> in 2008, ANC Secretary-General, Gwede Mantashe, accused the Court of being a ‘counter-revolutionary force’ in South African politics;<sup>125</sup> and some of the appointments to the Court have begun to look more partisan in the sense that ideological loyalty to the President has been valued more highly than the candidates’ legal-professional seniority or commitment to the 1996 Constitution’s values (as evidenced by prior decision-making).<sup>126</sup>

In this way, Issacharoff’s tripartite periodisation matches what I would argue are significant shifts in the institutional and political context in which the CCSA has been working. What separates our respective accounts is how we go about assessing the way the Court has operated in this changing environment. Whereas Issacharoff criticises the Court for not playing a uniformly bold and assertive role, my theorisation endorses the Court’s more careful approach, not only as the approach that we should have expected given the circumstances in which it has been working, but also as an approach that is normatively justified from the point of view of the ideal democratic consolidation strategy open to it.

Consider, for example, the CCSA’s decision in the *First Certification Judgment*.<sup>127</sup> As we saw in section I of this response, it was this decision that prompted Issacharoff’s interest in South Africa, providing as it did a leading example of the sort of forceful decision that his normative theorisation suggested was required. Here was a Court, Issacharoff argued,<sup>128</sup> that was using its express constitutional mandate to protect the democratic system and strike an early blow against a draft Constitution that would have tilted the balance too far in favour of one-partyism. How and why was the Court able to do this? On Issacharoff’s account, it was because the usual democratic objection to a court’s playing this kind of role was absent. The CCSA, after all, had been expressly asked to perform this function. The authority problem, in this sense, had fallen away. Like so many other courts Issacharoff had been observing, albeit in a very explicit and extraordinary way, the Court was free to construct the rules of future democratic politics.

Is this an adequate explanation? It certainly adds something to existing discussions.<sup>129</sup> And yet it does not quite account for the unusual forthrightness of the *First Certification Judgment*. Why in this *particular* decision, and not in any of the others, did the Court reach for a robust theorisation of the potential problems attendant on South Africa’s dominant-party democracy? On Issacharoff’s

<sup>124</sup> Constitution Fourteenth Amendment Bill (GN 2023 in GG 28334 of 14 December 2005).

<sup>125</sup> The comments were reported in the *Mail & Guardian* (4 July 2008) at <http://www.mg.co.za>.

<sup>126</sup> The current Chief Justice, Mogoeng Mogoeng, was controversially appointed in September 2011 amidst allegations of insensitivity to the 1996 Constitution’s values and a lack of seniority on the Court. As a Supreme Court of Appeal judge, he had handed down several judgments in sexual violence cases that suggested that he did not appreciate the extent of this problem in South Africa. In addition, at the time of his appointment, Chief Justice Mogoeng had served only two years on the Constitutional Court, far less than several of the other judges. To record these things is not to take sides in the debate over the wisdom of his appointment. The point is simply that Chief Justice Mogoeng’s appointment may mark the beginning of a shift in the ideological composition of the Court from liberal to conservative.

<sup>127</sup> Note 16 above.

<sup>128</sup> Issacharoff (note 14 above).

<sup>129</sup> Cf Klug (note 56 above) at 243–245.

account, the *First Certification Judgment* looks aberrational. The Court complied with his normative prescription and thus he was full of praise for it. But later, when the Court declined to do the same in *United Democratic Movement*, he could only express disappointment. The same goes for all the later decisions, including those in the current phase, when the Court is still not doing exactly what he wants it to. If the judges knew what was required of them right at the beginning, why did they go astray in the later cases? Issacharoff's account is both one-dimensional and incomplete to this extent: one-dimensional because his praise or disapproval turns on a single issue and incomplete because he cannot explain the change in the Court's approach.

It is only when we place the *First Certification Judgment* in its full institutional and political context – when we consider exactly what the Court's mandate was, in what sort of legal tradition it was working, what alignments of past and future political power the judges must have had in mind, and the character of the ANC and its leadership at the time the decision was taken – that we can begin fully to explain, not just this decision, but also how it fits into the Court's democratic rights jurisprudence as a whole. On this view of things, the bold and forceful approach in the *First Certification Judgment* was driven by the fact that the outcome of the case affected the very text and structure of the 1996 Constitution and thus the legal materials available to the Court in future cases to prevent any slide back into authoritarianism. Faced by that prospect, the judges did everything in their power to preserve the 1996 Constitution's capacity to be used as a check on the abuse of majority power. But they were at the same time assisted by the propitious political conditions then pertaining – the fact that the decision was handed down during the brief window period in the immediate aftermath of the transition to democracy during which the ANC had not yet taken full control of the levers of political power and in which it still needed minority party support for untrammelled passage of the 1996 Constitution. It was not just that the ordinary objection to judicial review had fallen away. It was that the ANC required the Court to display its independence – to reassure both minority parties and the international community of the sincerity of its commitment to the new constitutional order, and of its willingness to be disciplined by the judges it, after all, had chosen for this task.

The first phase of the CCSA's democratic rights jurisprudence may thus be seen to be a function not just of the Court's assertiveness, but also of the underlying institutional and political conditions that allowed it to be assertive. During the second phase, as Issacharoff acknowledges, the ANC had consolidated its control of South African politics. But it was at this stage also playing the largely constructive role that the more optimistic line in the South African dominant-party democracy literature identifies.<sup>130</sup> Rather than dangerously deferential, the CCSA's jurisprudence during this time may be understood as having been driven by an appreciation for the contribution the ANC was making, if not to democratic consolidation, then at least to stabilisation of South African democracy, which the judges might reasonably have thought was a precondition for the former. To be

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<sup>130</sup> See the discussion at the end of section I above.

sure, *United Democratic Movement*, like the *First Certification Judgment*, concerned an amendment to the text of the Constitution, and therefore to the legal materials on which the Court might later need to draw. But the applicant's case required the Court expressly to identify the ANC as a threat to the democratic process, when everything that had gone before suggested that it had been the principal agent of the democratic transition. A positive answer to the legal question posed by the case also required the Court to theorise the meaning of democracy in South African constitutional law.<sup>131</sup> While the judges had done that in the *First Certification Judgment*, the heightened political controversy surrounding the *United Democratic Movement* case arguably did not favour the degree of creative legal argument that would have been required to justify upholding the claim. At any rate, the judges seem to have calculated that the benefits to the Court's long-term institutional independence of blocking further concentration of political power in the hands of the ANC were outweighed by the potential damage to the Court's independence of a decision that might have been plausibly justified, but which was certainly not legally compelled.<sup>132</sup>

As noted, the watershed moment in the move to the third phase of the Court's democratic rights jurisprudence was the political battle between Thabo Mbeki and Jacob Zuma in 2005–2007. Even before this time, however, certain downsides to the otherwise stabilising effects of the ANC's electoral dominance had started to become apparent. These were particularly manifest in the ongoing debate over South Africa's HIV/AIDS policy, in the course of which Mbeki's technocratic centralism, which in other areas had been understood as a necessary push for policy coherence,<sup>133</sup> had taken on a more autocratic cast. It is no coincidence, then, that the first decision in which the CCSA deviated from its co-operative working relationship approach was *Treatment Action Campaign*.<sup>134</sup> At the time this decision was handed down, few would have said that the case was centrally about the health of South Africa's democracy, but with hindsight it is possible to read it that way. As Mark Heywood has powerfully shown,<sup>135</sup> what lent this case its distinctive character was the way the applicant ran it from inside the ANC, as a case that concerned Mbeki's leadership style and his capacity to enforce his idiosyncratic views on HIV/AIDS over the objections of leaders more in touch with the ANC's rank and file. The Treatment Action Campaign (TAC) was thus careful to enlist the support of COSATU, South Africa's umbrella trade union organisation and one of the three members (with the ANC and the South African

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<sup>131</sup> See T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 10.

<sup>132</sup> This conclusion does not mean that *United Democratic Movement* cannot be criticised on legal grounds – only that there may have been prudential factors in play that explain why the Court did not give a fully principled answer.

<sup>133</sup> See R Calland *Anatomy of South Africa: Who Holds the Power?* (2006) 43.

<sup>134</sup> *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC).

<sup>135</sup> M Heywood 'Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health' (2004) 19 *South African Journal on Human Rights* 278.

Communist Party) of the so-called 'Tripartite Alliance'.<sup>136</sup> By running the case in this way, the TAC skilfully managed to present its demand for antiretroviral treatment for pregnant mothers as a demand that emanated from within the ANC itself rather than from an opposition group making expedient use of the Constitution to win a policy battle it could not win through the ballot box. In this sense, the successful outcome of the case is attributable less to the CCSA's judicial statesmanship and more to the applicant's skill as a public impact litigator. But the Court was not an entirely passive actor in the drama. As more fully explained in the next paragraph, its carefully articulated reasonableness review standard in *Grootboom*<sup>137</sup> had facilitated the TAC's strategy, and the diplomatic way Chief Justice Chaskalson worded the Court's decision did much to ease its passage. If Mbeki had felt politically isolated before the *Treatment Action Campaign* case, his polite and respectful treatment by the Court allowed him to accept defeat with some measure of dignity.

As Anthony Butler has argued, the significance of the *Treatment Action Campaign* case to South African democracy is thus the way it provided the Court with an opportunity 'to address critically the actions of the executive in a context in which policy debate was stifled and the ruling party caucus in an ANC-dominated legislature prevented effective legislature oversight'.<sup>138</sup> Indeed, it is easy to forget that, at the height of Mbeki's reign, it was impossible for even fairly senior government Ministers to say anything about the ANC's HIV/AIDS policy without first consulting the President. This is no longer the situation, largely in consequence of *Treatment Action Campaign*, and this aspect of South Africa's democratic politics, at least, is less authoritarian to that extent. At the same time, *Treatment Action Campaign* illustrates that constitutional courts, even those that work in a fairly formalist legal culture, do possess some measure of agency. As much as it depended on the skill of the social movement in question, the litigation strategy pursued by the TAC was facilitated by the Court's decision in *Grootboom*. In particular, the reasonableness review standard adopted in that case, which many commentators at the time, myself included,<sup>139</sup> thought was overly deferential, was the very review standard that the TAC was able to exploit. Without directly theorising the pathologies associated with the centralisation of power in the hands of the ANC, the Court in *Grootboom* shaped the law in a way that allowed an admittedly well-resourced litigant to bring rational, scientifically informed arguments to bear on a policy issue that had been influenced for too long by a single set of eccentric views. The emphasis in *Grootboom* on the need for government at 'all levels'<sup>140</sup> to play a role in realising socio-economic rights likewise allowed the ANC's provincial leadership to contest Mbeki's stranglehold

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<sup>136</sup> COSATU, along with the ANC and the South African Communist Party, form the Tripartite Alliance.

<sup>137</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46 (CC) ('*Grootboom*').

<sup>138</sup> A Butler 'The Negative and Positive Impacts of HIV/AIDS on Democracy in South Africa' (2005) 23 *Journal of Contemporary African Studies* 3, 13.

<sup>139</sup> T Roux 'Understanding *Grootboom*: A Response to Cass R Sunstein' (2002) 12 *Constitutional Forum* 41

<sup>140</sup> *Grootboom* (note 137 above).



on the formulation of HIV/AIDS policy.<sup>141</sup> Far from occupying a marginal place in the CCSA's democratic rights jurisprudence, therefore, *Grootboom* and *Treatment Action Campaign* should be placed front and centre – as powerful examples of the way the Court has been able to exploit aspects of its institutional and political environment to unblock policy logjams and oil the wheels of the ruling party's internal democratic processes.

The CCSA's socio-economic rights jurisprudence, viewed in this manner, casts doubt on Issacharoff's thesis that, for a Court in a dominant-party democracy to play an effective role in democratic consolidation, it must necessarily theorise the pathologies of one-party dominance and justify its decisions as emanating from its general constitutional mandate to protect the democratic system. While that approach may work in certain settings, in a developed and still fairly formalist legal culture like the South African, the Court's interventions in democratic politics, for good reason, will tend to be grounded in the text and structure of the Constitution. Importantly, this does not mean that the Court will never engage in substantive theorising. What it means is that any such theorising will proceed from the text and structure, paying closer attention to the problems the Constitution was intended to remedy than the problems the country is currently facing. The rhetorical effect that the judges will continually try to produce, in other words, is not that *they* think that the actions of the dominant party threaten the Constitution's democratic vision and therefore need to be counteracted, but that the Constitution's democratic vision is such and such, and that the particular democratic right asserted by the constitutional claimant is consonant with that vision. This may seem like a subtle difference, but in South Africa's legal culture (and similar cultures elsewhere) it marks the boundary between permissible legal reasoning and illegitimate political theorising.

In *Grootboom* and *Treatment Action Campaign* the CCSA's principal concern was with elaborating its role in the enforcement of socio-economic rights. The Court's articulation of the principle of democracy underlying the 1996 Constitution was in this sense incidental to its main task of justifying its intervention in this controversial area of democratic politics. In two other cases decided during the transition period from Mbeki to Zuma, however, the Court did have occasion directly to theorise the 1996 South African Constitution's conception of democracy. In *Doctors for Life*,<sup>142</sup> the Court's majority judgment, written by Chief Justice Sandile Ngcobo, went to some length in articulating the extent to which the Constitution could be said to promote the value of participation in democratic politics. In the face of two strong dissents,<sup>143</sup> the Court rejected the argument that Parliament should be in sole charge of deciding the content of its constitutional obligation to facilitate public involvement in its processes. This decision was followed shortly after by *Matatiele II*.<sup>144</sup> Like *United Democratic Movement, Matatiele*

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<sup>141</sup> Heywood (note 135 above).

<sup>142</sup> *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC).

<sup>143</sup> *Ibid* (Justices Van der Westhuizen and Yacoob dissenting).

<sup>144</sup> *Matatiele Municipality & Others v President of the Republic of South African & Others* [2006] ZACC 12, 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC).

*II* involved a constitutional amendment. In this instance, however, the Court was assisted by the fact that the case revolved around the provision on public involvement in parliamentary processes that it had already interpreted in *Doctors for Life*. Backed by clear constitutional language and the precedential force of its earlier decision, the Court in *Matatiele II* overturned the amendment, once again without identifying the government action in question as indicative of some more general pathology.

All of the Court's decisions during the second phase of its democratic rights jurisprudence can be seen in this way to have cleaved quite closely to the text and structure of the 1996 Constitution. After Zuma's confirmation as ANC President in 2009, there has been a distinct change in the *type of case* that has come to the Court. This change, together with the ANC's shift to a more populist mode of governance, justifies Issacharoff's identification of the Court's post-2009 jurisprudence as comprising a new phase. The Court's basic interpretive methodology, however, has remained essentially unchanged. The judges still pepper their decisions with references to the constitutional text and the reasons for its adoption, and still avoid describing the ANC's dominance of South African politics as the central threat to the constitutionally prescribed democratic system. All that has happened is that the judges have begun applying this tried and tested interpretive methodology to a new type of case.

As exemplified by *Justice Alliance*, *Glenister* and *Democratic Alliance*, the new type of case concerns the standards that need to be respected when making appointments to, or organisationally restructuring, independent institutions established under, or necessarily required by, the Constitution to protect the integrity of South Africa's democracy. The Court has entertained similar kinds of cases previously.<sup>145</sup> What marks the new type out as different, however, is the extent to which the Court's attention has been directed at the conduct of *particular* individuals and the taking of *particular* political-branch decisions. Thus, in *Justice Alliance*, the issue was whether Parliament could delegate to the President its power to extend the term of the Chief Justice, not just in the abstract, but in relation to the actual purported extension of the term of the sitting Chief Justice, Sandile Ngcobo. Making extensive reference to the relevant constitutional provisions, the reason for their adoption, and their place in the overall constitutional scheme, the Court unanimously held that Parliament had acted improperly.<sup>146</sup> In *Glenister*, the most controversial of the three decisions, a narrow majority relied on a fairly convoluted reading of the constitutional text and South Africa's international legal obligations to invalidate the attempted restructuring of the Scorpions, an elite corruption-fighting unit.<sup>147</sup> The controversy surrounding the case had to do both with its political salience (there were allegations that the unit was being

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<sup>145</sup> See, eg, *S & Others v Van Rooyen & Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8, 2002 (5) SA 246 (CC) (Court considered the criteria governing the independence of the magistrates' court system.)

<sup>146</sup> *Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of the Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of the Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC).

<sup>147</sup> *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC).



closed down as punishment for its investigation of President Zuma) and also with the less than convincing legal basis for the majority's decision (as to which, more below). In *Democratic Alliance*, the Court unanimously rescinded the appointment of Advocate Menzi Simelane as National Director of Public Prosecutions. It based its decision on the constitutional specifications for the position and on incidental findings made by a Commission of Inquiry about Advocate Simelane's reliability as a witness.<sup>148</sup>

All three of these cases turned on whether the criteria supporting the independence of constitutional institutions established, or impliedly required, to support South Africa's unique form of constitutional democracy, had been accorded due respect. The other two cases in the series are slightly different. In *Ramakatsa*,<sup>149</sup> the issue was whether the ANC had respected its own internal procedural rules for the selection of delegates to a provincial congress. The Court's decision effectively held that first-order rights to political participation may be violated by background irregularities of this sort. Finally, in *Oriani-Ambrosini*,<sup>150</sup> the Court was asked to review the constitutionality of parliamentary rules governing the initiation of bills by minority political parties. This case was thus, quite similar to *Doctors for Life* and *Matatiele II*<sup>151</sup> in as much as it concerned itself with the question of whether the Court or Parliament was the appropriate standard-setting institution. Unsurprisingly, given its decisions in the two previous decisions, the *Oriani-Ambrosini* Court held that it did have jurisdiction to entertain the matter, and that the 1996 Constitution's commitment to multiparty democracy meant that the right to initiate a bill could not be conditioned on the approval of an office (the Speaker) that the majority party controlled.

In vindicating all of these claims the CCSA was, of course, simply responding to the cases that happened to have been brought before it. The actual driver for these cases, it may be thought, was not the Court's jurisprudence but the changing nature of South African politics. As the ANC has entrenched itself in power, and as what Issacharoff calls the three Cs of one-partyism (clientelism, cronyism and corruption) have inevitably followed,<sup>152</sup> so, too, has the nature of the cases brought to the Court changed. A closer look at the sequence of cases, however, reveals that the Court is driving much of the action. Thus, the latest democratic rights case to be brought to the Court (at time of writing in August 2013) again concerns the office of the National Director of Public Prosecutions (NDPP). On this occasion, the applicant, the Council for the Advancement of the South African Constitution (CASAC), is requesting an order compelling President Jacob Zuma to exercise his powers under the 1996 Constitution to appoint a permanent

<sup>148</sup> *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24, 2013 (1) SA 248 (CC).

<sup>149</sup> *Ramakatsa & Others v Magashule & Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC).

<sup>150</sup> *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC).

<sup>151</sup> *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC); *Matatiele Municipality & Others v President of the Republic of South Africa & Others* [2006] ZACC 12, 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC).

<sup>152</sup> Issacharoff (note 6 above).

NDPP.<sup>153</sup> Significantly, CASAC's application would not have been necessary but for Advocate Simelane's court-enforced removal from office in November 2011 and the fact that the Acting NDPP appointed in his stead, Ms Nomgcobo Jiba, was deemed unsuitable for permanent appointment according to the standards set by the CCSA in *Democratic Alliance*. Significantly, too, President Zuma, after initially failing to respond to CASAC's letter of demand requesting that he exercise his constitutional powers to appoint a permanent NDPP, revealed, in an answering affidavit to CASAC's Constitutional Court application, that the process of appointing a permanent NDPP was far advanced, and would be finalised by the end of August 2013. The mere threat of litigation, in other words, has produced the outcome sought. Such a response suggests that the constitutional standards at issue are being institutionalised.

The CCSA has achieved this result without significantly altering the textualist, minimally theorised interpretive approach it used during the second phase of its democratic rights jurisprudence. To be sure, there were some minor adaptations. In *Democratic Alliance*, it used repeated quotations from the transcript of Advocate Simelane's evidence in the Ginwala Commission of Inquiry so that his inappropriateness for appointment as NDPP could speak for itself. In *Glenister* the Court stretched the bounds of legal plausibility by arguing that unincorporated international legal norms supported an understanding of the required degree of independence that was not supported by the constitutional text itself. But on the whole the Court stuck closely to the constitutional text and never once suggested that the problems it was asked to address were symptomatic of some more general breakdown in the ANC's capacity to govern associated with its ongoing dominance of South African politics.

Importantly, too, only one of the cases (*Ramakatsa*) had to do with first-order political rights. Of the other four, as we have seen, three concerned whether standards safeguarding the independence of institutions supporting democracy were being respected and the fourth with the protection of the 1996 Constitution's commitment to multiparty democracy in the functioning of Parliament itself. These four cases are thus exactly the sort of case that Issacharoff argues constitutional courts in new democracies ought to be encouraging and deciding. His complaint about the cases therefore cannot be that the CCSA is formalistically obsessed with enforcing first-order political rights (the charge directed against its decision in *United Democratic Movement*). The critique must now be limited to a single failing: the absence in the Court's reasoning of a fully worked out theorisation of the pathologies attendant on South Africa's dominant-party democracy and the development of doctrines *explicitly* directed at addressing those pathologies.<sup>154</sup>

Is this a fair criticism? Would South African democracy, and South Africans themselves, have been better off had the Court justified its decisions in these five cases in the way Issacharoff prefers? As noted already, the answer to this question

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<sup>153</sup> See G Underhill 'CASAC: Zuma Failed in his Constitutional Obligation' *Mail & Guardian* (4 July 2013) at <http://www.mg.co.za>.

<sup>154</sup> In this way, Issacharoff's position may be seen to be very similar (as one would expect, given their similar departure points) to the position taken by Sujit Choudhry in his 2009 lead essay in this volume. See Choudhry (note 45 above).

depends on a counterfactual, and thus we cannot be certain. But now, with some of the institutional and political context filled in, we have reason to doubt the force of his critique. At least, we can see the rationale behind what the Court has been doing. In each of the five most recent democratic right cases to come before them, the judges have been careful to present their decisions as legally required – as motivated not by their own analysis of the problems attendant on South Africa’s dominant-party democracy but as simple applications of the constitutional provisions at issue. In *Glenister*, that claim was somewhat forced, but in the other four cases it was more than plausibly supported by the admittedly quite unexciting, even fairly plodding, arguments used. That assessment depends on my own subjective assessment of the decisions, of course. But it is also borne out by certain empirical facts: all the decisions have been obeyed, none has attracted very much legal-professional or broader public criticism and none appears as yet to have triggered an attack on the Court’s independence. The key to the CCSA’s effective extension of its democratic rights jurisprudence in this new phase, it is therefore at least worth considering, may be precisely the feature of these decisions that Issacharoff finds disappointing – the absence of any substantive theorisation of the pathologies attendant on South Africa’s dominant-party democracy. The Court has succeeded in asserting its institutional role, in effectively policing the most serious of the pathologies emerging from South Africa’s dominant democracy, without ever once conveying the impression that the democratic rights it has been enforcing were not always already there in the text and structure of the Constitution.

Living in Australia, as I now do, I cannot help but see the parallels between this adjudicative strategy and the strategy that the Australian High Court relentlessly pursued over the course of the last century. As famously articulated in Sir Owen Dixon’s speech on the occasion of his swearing-in as Chief Justice in 1952: ‘There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.’<sup>155</sup> This quote can be understood in a number of different ways, of course. On the one hand, it might mean that Dixon really did believe that law (however that term is defined) is capable of constraining judicial choice, and that he committed himself to this conception of his institutional role. On the other, it might simply mean that he thought it politically prudent to depict the Court’s decision-making practices in that way. The High Court’s most perceptive interpreter, Brian Galligan, certainly thinks that this stance and that of the Court over much of the last century should be understood as a noble lie.<sup>156</sup> Nevertheless, the strategy proved tremendously effective in insulating the High Court from attack and in allowing it on occasion to take important, political-deadlock-breaking decisions, including decisions on the two most delicate Australian political issues: indigenous land rights and the rights of asylum-seekers.

In South Africa, as in Australia, this strategy has come in for considerable criticism. The CCSA needs to be candid, Karl Klare famously argued, about the

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<sup>155</sup> (1952) 85 CLR xi (as quoted in T Blackshield & G Williams *Australian Constitutional Law and Theory: Commentary and Materials* (5ed, 2010) 271).

<sup>156</sup> Galligan (note 94 above).

political nature of its function, and win South Africans' trust on that basis.<sup>157</sup> But it is not at all clear that such a strategy would work under South African conditions. Judicial candour requires a certain level of legal-cultural maturity, or perhaps just cynicism. In the United States it may well be acceptable to justify decisions by reference to the judges' personal assessment of the social and political problems facing the country. In South Africa, such an approach runs the risk of exposing the Court to the charge of opposing the 'national democratic revolution'.<sup>158</sup> The judges must thus continually seek refuge in the clear terms of their mandate, even if that approach on occasion, as it did in *Glenister*, leads to strained, formalistic reasoning. The noblest instantiation of the rule-of-law ideal may well be one in which judges own up to every last legal, political, ideological and plain fear-driven influence on their decision-making practices – to say in *Glenister*, for example, that the reason to keep the Scorpions alive is that the ANC cannot be trusted to police itself. However, that version of the rule-of-law ideal has to be carefully constructed, and any too sudden move towards it, as Phillippe Nonet and Philip Selznick argued,<sup>159</sup> runs the risk of triggering a reversion back to a purely instrumental or political conception.

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<sup>157</sup> Klare (note 46 above).

<sup>158</sup> The ANC uses this term to describe its democratic social transformation project.

<sup>159</sup> P Nonet & P Selznick *Towards Responsive Law: Law and Society in Transition* (1978).

# What About the Rule of Law?

Martin Krygier\*

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Unlike Professor Issacharoff, I am not a constitutional lawyer. Unlike Professor Roux I know little about South Africa. If, nevertheless, I allow myself to participate in this symposium, it is not merely because I was asked. For Issacharoff's article raises issues that go well beyond questions of South African constitutional law. Among these are where challenges to an emerging constitutional democracy might lie, what some of them might be, what might be at stake, and how a constitutional court might respond to them. In this brief response to that wide-ranging article, I will touch on a few such challenges, relaxed in the knowledge that my more learned partners in this exchange have comprehensively dealt with every question that needs to be asked and answered about the constitutional law of this Republic.

## I THE ARGUMENT

Issacharoff draws on a line of argument he has elaborated elsewhere, both alone and with Richard Pildes. In some writings he has also applied it to constitutional courts in well-established democracies, including the United States. However, he believes it is particularly important where democratic institutions are nascent and weak, more particularly still where they are challenged by the rise of 'dominant party democracy'.<sup>1</sup>

Such systems typically have a basic feature that many take to be defining of democracies: formally free and fair elections. That said, the quality of the democracy is rendered vulnerable by the fact that one party continues to win those elections. Whatever the reasons for that fact, Issacharoff believes, one-party dominance is likely to spawn manifold, predictable institutional consequences: however innocently – maybe even honourably – the party's hegemony has arisen, incontestability is almost bound, sooner or later, to cause trouble.

The people's representatives rule, in the sense that the people elected them, but they do so in ways increasingly unhampered either by the reality or prospect of competition from realistic alternative rulers, or by contestation from sources of power, checks and balances, anchored in agencies and institutions independent

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<sup>1</sup> See, eg, S Choudhry "'He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1; H Klug 'Finding the Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in the Court's Decision-making' (2010) 3 *Constitutional Court Review* 1; T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106; T Roux *The Politics of Principle: The Constitutional Court of South Africa, 1995 – 2005* (2013).

of the ruling party. Indeed, such independent sources of competition, check, and balance are likely to be progressively colonised by the dominant party in such states. That in turn has predictable consequences for the vitality of democratic competition and popular engagement in politics. Issacharoff thinks constitutional courts need to take these consequences into account.

The way to do so, he argues, is to look beneath and beyond the constitutionality of what he and Pildes elsewhere call ‘first order’ decisions, specific legislative acts, interference with constitutionally enshrined rights, and so on, which might all be formally unexceptionable. It is necessary also to explore what is happening to underlying ‘second order’ structural conditions, ‘basic structures’. If what dominant parties do threatens the basic conditions of constitutional democracy then, whatever the apparent legal tidiness of their measures, the Constitutional Court should be alert to safeguarding such conditions. Among them are institutional structures and practices that enable and secure the independence of important agencies from dominant party control, such as ‘arm’s length’ conditions of appointment, tenure and dismissal of their members; or ones whose tendency is to encourage, rather than suffocate real political contestation, for example floor-crossing rules, electoral arrangements and so on. In short, constitutional courts should be open to tending the democracy-generative qualities of the ‘basic structure’ of the democracy in which they are key agencies, and weeding out democracy-degenerative ones, even if such consequences are not immediately apparent on the formalistic legal face of things.

In this article, Issacharoff focuses his larger argument on South Africa. He distinguishes three phases in the Court’s developing jurisprudence. In the first moments after liberation, the Constitutional Court was on the money, as shown in the *First Certification Judgment* (1996),<sup>2</sup> that ‘had been noteworthy precisely for its attentiveness to the problem of structural limitations on the exercise of political power.’<sup>3</sup> In the second phase, unfortunately, the Court came to ignore basic structural issues for more formal, superficial, ‘first order’ ones: it ‘retreated to a formalist account of the Constitution as guaranteeing primarily procedural norms and individual rights’.<sup>4</sup> Put in question by the Court’s ‘second phase’ judgments, was ‘whether the Court would continue to use the democracy-promoting metric as the analytic foundation for evaluating efforts by the ANC to consolidate power’.<sup>5</sup>

In its current, third, phase, the Court appears to have become aware of some of the dangers involved, as the ANC continues to consolidate its control. The problem is that the Court brings to bear on these dangers an inadequately furnished theoretical understanding of their nature and character. It thus finds it hard to transcend ‘[t]he limitations of not having a robust theory of constitutional protection of democracy against democratic manipulation’.<sup>6</sup> Its heart, it appears,

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<sup>2</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) (‘*First Certification Judgment*’).

<sup>3</sup> S Issacharoff ‘The Democratic Risk to Democratic Transitions’ (2013) 5 *Constitutional Court Review* 1, 7.

<sup>4</sup> *Ibid* at 8.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid* at 29.



is returning to the right place, but its head is not yet full of the right ideas. Thus, whereas ‘In the early years of the Republic, the South African Constitutional Court spoke more eloquently than any other Court on the task it confronted in democratic consolidation,<sup>7</sup> [t]he recent cases reveal that the South African Constitutional Court still confronts the question of how to evolve a structural jurisprudence directed at the concentration of power’.<sup>8</sup>

What sort of jurisprudence would that be? It would have two key elements. First, it would concern itself with ‘basic structures’. And second, the test of these structures would be the extent to which they are, or are not, democracy-generative. This is what the Colombian Court did, in ‘the greatest constitutional confrontation in Colombia’s history,’<sup>9</sup> when it rejected President Uribe’s attempt to amend the constitution to allow a referendum to approve his running for a third term. The court struck down the amendment, not on formal or procedural grounds (which did not stand in its way), but on ‘the basis of deeper commitments to the base requirements for democratic rule’.<sup>10</sup>

Issacharoff praises the Colombian Court’s decision, warmly but faintly. The problem with it was not its tendency, which was correct, but its intellectual grounding which was too thin. He complains of ‘the paucity of reasoning in the opinion denying Uribe a third term’.<sup>11</sup> More particularly, the Court failed to draw on proper or adequate theoretical resources; ‘Missing in the Colombian context was not only an account of the structural role of the Colombian Court in securing democratic governance, but the deeper jurisprudential wellsprings that would justify its role’.<sup>12</sup>

Such wellsprings could be tapped, Issacharoff suggests, were both the Colombian and the South African Courts to draw upon a theoretically richer model of the sort elaborated by the Indian Supreme Court, ‘whose democratic jurisprudence extends as well to the striking down of constitutional amendments that threaten the basic underpinnings of democratic contestation’.<sup>13</sup> The Indian Court’s great accomplishment was that it ‘gave teeth to the doctrine of the “basic structure” which served to limit even procedurally proper alterations to the Constitution to rein in the emergency decrees’.<sup>14</sup> As a result of these judgments, ‘even constitutional amendments could not alter the deeper commitment to democratic governance, including amendments that restricted the ambit of judicial review of the application of new legislation’.<sup>15</sup> The Court ‘held itself out as a bulwark against excessive majoritarianism that threatens to overwhelm India’s fragile state institutions’.<sup>16</sup>

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<sup>7</sup> Ibid at 32.

<sup>8</sup> Ibid at 24.

<sup>9</sup> Ibid at 16.

<sup>10</sup> Ibid at 18.

<sup>11</sup> Ibid at 18–19.

<sup>12</sup> Ibid at 19.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid at 21.

<sup>15</sup> Ibid at 22.

<sup>16</sup> Ibid.



Issacharoff's argument raises issues of judicial competence and policy, both in the round and in the specific context of South Africa, many of which are addressed in Theunis Roux's response. It also draws attention to questions, less strategic than ontological, of the existence and character of challenges to constitutional democracies in one-party-dominant states. I address two of these latter matters. They are ontological in the sense that they focus, first, on whether problems of the structural sort Issacharoff describes are likely to be found in one-party-dominant states and, second, what the specific nature of such problems is.

First, then, does Issacharoff draw attention to a significant kind of problem, specifically one that occurs at the underlying structural levels that he indicates, and that might be missed by exclusive act/rights court scrutiny? Secondly, what *kind* of problem is it? Or, if there is more than one problem, what kinds of problems are they?

## II BASIC STRUCTURES

As to the first question, it seems to me clear that to think of political power *without* recognising the sorts of underlying structural levels Issacharoff addresses is truly to stage Hamlet without the Prince of Denmark. More accurately still, it is to stage it without *Denmark*, that is without the specific shaping context that frames whatever goes on within. This is merely to echo a point about power made a very long time ago. Power has at least 'two faces'. One is what is done, day to day: what is decided, who wins, who loses. In a competitive encounter, who prevails? However, in all but the most utopian of circumstances, none of this happens on a level playing field, and some fields are more uneven than others. There are always deeper structures that have systematic and systemic influence on who the major players are, what resources are available to them, whose issues come up for decision, what matters don't need to be decided because they're already pre-empted, what doesn't get to be decided because dominant interests want to let them lie, who is in a position to compete for power, and if in position, who is advantaged, who is handicapped, and so on. This was a point made a long time ago by the political scientists, Bachrach and Baratz, in their critique of American pluralist students of community power, who concentrated 'not on the sources of power but on its exercise'. Bachrach and Baratz recommended a recalibration of attention:

Of course power is exercised when A participates in the making of decisions that affect B. But power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A. To the extent that A succeeds in doing this, B is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolution be seriously detrimental to A's set of preferences.<sup>17</sup>

If one person or group or institution can alter the basic frames of interaction, so that underlying constraints on their power become progressively weaker, formally

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<sup>17</sup> P Bachrach & MS Baratz 'Two Faces of Power' (1962) 56 *American Political Science Review* 948.

competitive elections are decreasingly so, discretions are less and less reviewable, and the independence of institutions from incumbents is ground down, then we have structural issues of the sort to which Issacharoff's argument alerts us. Public acts, and the ways they manifestly exercise powers from time to time, might appear, or indeed be, pure as the driven snow, and yet something is deeply awry from the point of view of constitutional democracy and the rule of law.

Should this concern a constitutional court? In principle, yes. Of course, a court is not there to remake the world. However, to the extent that what political leaders and organisations do reshapes and moulds the structures within which power is exercised, in ways designed to perpetuate that power irrespective of opposition and contestation, and in ways that violate fundamental constitutional values, then there is a public interest in overseeing such reshapings and remouldings. It is arguable, though of course it needs arguing, that independent constitutional courts might be well placed to exercise such oversight. According to Issacharoff, when it comes to the structural conditions of electoral democracy, the South African Constitutional Court does not exercise enough of that. Were it furnished with a richer 'democratic jurisprudence', it could do more.

This is not something I am in a position to assess, but I wonder whether, if the ambition is 'a structural jurisprudence directed at the concentration of power',<sup>18</sup> there might already be resources closer at hand, in the Court's existing 'rule of law jurisprudence', about which Issacharoff has nothing to say, than in carryovers from the Indian Court. After all, here we are not asking for anything outlandish. The Constitution enshrines 'supremacy of the constitution and the rule of law' among the founding values of the Republic, and the Court has made of it a justiciable principle.<sup>19</sup> The derivative tests of rationality and reasonableness are supposed to serve it. Many of the considerations Issacharoff raises could be addressed with this principle and those tests. In section III below I will suggest some substantive reasons of political principle to encourage looking in that direction, and not only to matters of electoral democracy. Another good reason is that the Court already looks there.<sup>20</sup> What I don't address here is how best they, or other institutions, might develop means of useful oversight. That must depend on the substantial matters of specific competence, context, circumstance, and strategic response on which Roux's contribution elaborates.

This might all appear too abstract, maybe speculative. So let me enlist a cautionary contemporary parallel, perhaps parable, to illustrate the significance of the themes Issacharoff raises. One cannot of course draw directly on such parallels to show that if there, then here. As Roux emphasises, contexts are too variable for such automatic transference to be persuasive. However, one can draw on similarities that occur in diverse conditions as alerts to immanent institutional

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<sup>18</sup> Issacharoff (note 3 above) at 25.

<sup>19</sup> See FI Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2008) Chapter 11.

<sup>20</sup> I have been instructed in these matters by one of the anonymous reviewers of this article, and by the exchange between Michael Bishop and Alistair Price on rationality in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 1–74.

logics. Thus, in his classic, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy*,<sup>21</sup> Robert Michels drew primarily on a study of the German Social Democratic Party of the late nineteenth and early twentieth century, to identify one such logic, which he called the ‘iron law of oligarchy’, and which he predicted would be found in all ostensibly democratic organisations. Michels was wrong to think of pressures to oligarchy as law-like; they can be resisted.<sup>22</sup> But he was right to explore what institutional conditions generated such pressures, because in many conditions they can be counted on to occur. It is important to be aware of such conditions and pressures.

Reflection on parallels can reveal immanent logics and tendencies, then, though rarely laws. Specific behaviours are never the results of such logics standing alone because in reality they never do stand alone. Institutions are embedded in particular histories and societies, always encountered in particular circumstances, are offered specific and variable opportunities, and meet with specific and variable obstacles. What actually happens is a result of the combination of logic and circumstances, which often include other, frequently contending, logics and many varied circumstances. And yet to say that a party-dominant democracy generates pressures and possibilities harder to find in established multi-party democracies with strong independent institutions, and likely to be hard to resist, is to point to something significant.

My example comes from post-communist Hungary. It is an instance of what David Landau has called ‘abusive constitutionalism’, a modern technique of white-anting constitutional restraint by constitutional means, whereby actors ‘rework the constitutional order with subtle changes in order to make themselves difficult to dislodge and to disable or pack courts and other accountability institutions’.<sup>23</sup> Hungary is a particularly poignant example, since her constitutional jurisprudence after 1989 was, for a time, the talk of the constitutional world. It is again, but for different reasons.

From 1989 to 2012, the Hungarians were governed, not under a wholly new constitutional text, but by the old Stalinist constitution of 1949, subject to numerous post-1989 amendments which transformed it from a communist constitution to a strongly democratic one. The new polity included an array of independent checks and balances, including four Ombudsmen, and a slew of significant and significantly independent institutions: an independent central bank, state audit office, prosecutor-general’s office, national election commission and media board. The showpiece of all this unprecedented independent scrutiny was the new Constitutional Court.

Like all its neighbours, Hungary got a constitutional court after the collapse of communism. There were only two in the region before, in Yugoslavia and Poland, and they had nothing much to do. Now every post-communist state has one, and some are quite busy. But Hungary’s was special, at least for the first nine

<sup>21</sup> R Michels *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (1911) (trans 1962).

<sup>22</sup> The best commentator on such matters remains Philip Selznick. See P Selznick *The Moral Commonwealth* (1992) 244–250 and M Krygier *Philip Selznick: Ideals in the World* (2012) Chapter 1.

<sup>23</sup> D Landau ‘Abusive Constitutionalism’ (2012) 47 *UC Davis Law Review* 189.

years of its life. If the Colombian Court was, as Issacharoff tells us, one of the strongest courts in the world, then the first Hungarian Court, under its powerful President, László Sólyom, was a very close rival. It could be approached by *anyone*, through the *actio popularis* that Issacharoff mentions (but that no longer exists), which allowed any person, including non-citizens, to petition the Court. It struck down an enormous amount of legislation, developed an impressive jurisprudence and, novelty of novelty in that part of the world, governments obeyed it, if often unhappily. The Court was famous, for its boldness and creative, constructive constitutional imagination, throughout the constitutional world.

True, it became somewhat less adventurous after its first nine-year term when, though Sólyom made it plain he was keen to serve a second term, a vengeful government failed to reappoint even *one* of the members of the first court. Still, it probably remained true, as Issacharoff wrote in 2011, that:

Even among the active Eastern European constitutional courts, the leader is probably the Hungarian Constitutional Court, which has also been among the most receptive to emerging international standards of democratic intervention. The Hungarian Court was one of the first to begin work and has been handing down important decisions since the early 1990s. And, having had an early start, it has been unusually successful in gaining widespread legitimacy, despite (or perhaps as a result of) striking down one third of all legislation passed between 1989 and 1995.<sup>24</sup>

That was then, this is now. It's been a long two years. From 1989–2010, Hungary had a relatively stable, routinely oscillating, multi-party government. In 2010, the nationalist authoritarian Fidesz Party, under the leadership of the charismatic and supremely ambitious Viktor Orbán, won 53 per cent of votes cast. Owing to the peculiarities of the Hungarian electoral system, this gave them 68 per cent of parliamentary seats. That is more than the two thirds needed to amend the Hungarian Constitution. The rest unfortunately is history. The new government does not see itself as simply one entrant into the revolving door of democratic politics. On the contrary, as one Hungarian political scientist has observed:

Orbán's notion of a 'central arena of power' eliminates the idea of competition endorsed during the transition to democracy. He wants to create a system based on the monopolization of the most important elements of political power. Orbán does not need economic, cultural and political alternatives; he strives to establish a unitary, dominant system of values (ie, his own system of values).<sup>25</sup>

To my knowledge, the term 'dominant party democracy' is not used in East Central Europe, but there is a place for it: Budapest. For while there might be controversies over the *democratic* character of what Orbán has done since 2010, given his two thirds majority and a quite parcellised and ineffectual opposition, there can be none over his dominance. Kim Lane Scheppele records the institutional set-up now largely dismantled:

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<sup>24</sup> S Issacharoff 'Constitutional Courts and Democratic Hedging' (2011) 99 *Georgetown Law Journal* 961, 972–973.

<sup>25</sup> A Bozóki 'The Crisis of Democracy in Hungary 2012' *Deliberately Considered* (3 February 2013) available at <<http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>>.

There were so many different checks instituted after 1989 on the power of the prime minister and his parliamentary majority that the post-1989 constitutional system worked reliably to ensure that the operation of majoritarian political power didn't ride roughshod over democratic guarantees and constitutional limitations. By contrast with this robust system of complementary powers, however, the new 'Fidesz constitution' has removed virtually all of the checks added to the prior communist constitution after 1989.<sup>26</sup>

An important central tool in this programme has been constitutional transformation. It's been a busy time, as Scheppele deftly summarises:

In its first three years in office, Fidesz has used its reliable two-thirds vote in the Parliament to amend the old constitution 12 times, mostly to remove obstacles to what it had planned to do next, which was to enact a wholly new constitution [which, since it came into force in 2012, it has already amended four times] designed to keep the party in power for the foreseeable future. And over three years, it enacted more than 600 new laws, changing everything from the civil code to the criminal code to the law on virtually everything else. In three years, Fidesz launched a legal revolution, less charitably described as a constitutional coup.<sup>27</sup>

This was all done, as Scheppele also emphasises, in a legally unimpeachable, or at least legally arguable, manner. In fact this turned out to be inevitably so, because whenever anyone, including the Constitutional Court, had a thought to impeach it, say on constitutional grounds, the government re-enacted, by constitutional amendment, laws formerly declared unconstitutional by the Court.<sup>28</sup> This, said the Venice Commission Draft Report on the Fourth Amendment to the current constitution, has been a 'systematic approach' of this government.<sup>29</sup> So much so, that the Tavares Report to the European Parliament, on 'the situation of fundamental rights: standards and practices in Hungary', concludes that 'in light of the systematic amending of the Fundamental Law at political will, the Constitutional Court can no longer fulfil its role as the supreme body of constitutional protection, especially since the Fourth Amendment explicitly

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<sup>26</sup> KL Scheppele 'All's Not Quiet on the Eastern Front' (Paper at panel on Law and Development after the Financial Crisis, Law and Society Conference, Boston, 2013). Professor Scheppele's collection of blogs, articles, translations and documents are available at <<http://lapa.princeton.edu/newsdetail.php?ID=63>>. Of course, Scheppele's account is not accepted by partisans of the Hungarian government. But I have not seen credible evidence to refute it. See also M Bánkuti, G Halmay, & KL Scheppele 'Hungary's Illiberal Turn. Disabling the Constitution' (2012) 23 *Journal of Democracy* 138; K Kovács & GA Tóth 'Hungary's Constitutional Transformation' (2011) 7 *European Constitutional Law Review* 183; AJ & P Sonnevend 'Continuity with Deficiencies: The New Basic Law of Hungary' (2013) 9 *European Constitutional Law Review* 102.

<sup>27</sup> Scheppele (note 26 above) at 13.

<sup>28</sup> Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe 'Request for the Opening of a Monitoring Procedure in Respect of Hungary (Opinion)' (2013) 21–22 available at <[http://www.assembly.coe.int/Communication/amondoc08\\_2013.pdf](http://www.assembly.coe.int/Communication/amondoc08_2013.pdf)>.

<sup>29</sup> European Commission for Democracy Through Law (Venice Commission) 'Draft Opinion on the Fourth Amendment to the Fundamental Law of Hungary' (2012) available at <<http://www.scribd.com/doc/145369295/Venice-Commission-draft-opinion-on-Hungary-s-fourth-constitutional-amendment>>.

prohibits the Court from reviewing constitutional amendments that contradict other constitutional requirements and principles.<sup>30</sup>

The rash of laws passed in the contemporary parliament is protected on the way in and on the way out. Many are formally introduced by private members so as to avoid the scrutiny required of government bills. And then many of them are rendered not just unimpeachable but, because it is very unlikely any time soon that any other party will gain a two thirds majority, they are virtually unamendable, unless by this government itself. And this applies not merely to the Constitution itself, but also to many so-called ‘Cardinal’ Acts, and cardinal provisions of normal Acts used, in the word of the Venice Commission, to ‘cement’ the government’s policies. Cardinal laws require a two thirds majority to change, and before Fidesz, only one post-communist Hungarian government has had that. Such laws are designed to structure the future when and if, despite all, the present government is ever voted out of office.

I won’t track all the changes here, but they are many, various and substantial. They have hit the major independent agencies, among them the ordinary courts, the ombudsmen (now ombudsman – reduced from four to one), the central bank, the media, the electoral commission, the senior judiciary, and electoral system. Many members of the old elites have been purged, not in old-fashioned coercive ways, but by sacking – some of it wholesale – and/or non-reappointment. In their place, as the ANC might put it, cadres are being systematically deployed throughout the country. Imposition of new (lower) retirement ages for senior judges effectively cleaned out a swathe of them from their former positions; notwithstanding their formally successful subsequent protests, few could return to their reoccupied positions.

These are not just momentary events. As the Monitoring Committee to the Parliamentary Assembly of the Council of Europe put it, the changes ‘will allow the current ruling majority to exert *de facto* control over, *inter alia*, the media regulator, the central bank, the budgetary council, the judiciary, the ombudsman, after its current mandate has ended, as well as the constitutional court.<sup>31</sup> Particularly the Constitutional Court.

A key instrument of the new regime is the new constitution. The government – not the parliament, but the government – drafted the Basic Law, which came into force on 1 January 2012. It is a highly ideological document, and it is one party’s ideology, since the opposition had no part in composing it, or even voting for it. According to the monitoring committee, the procedure by which the Constitution and Cardinal Acts were adopted ‘was opaque, disrespected proper democratic procedure and was not based on wide consensus between, and consultation with, the widest possible range of political forces in the Hungarian society’.<sup>32</sup>

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<sup>30</sup> European Parliament Committee on Civil Liberties, Justice and Home Affairs ‘Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012’ (2013), available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0229+0+DOC+PDF+V0//EN>>.

<sup>31</sup> Monitoring Committee to the Parliamentary Assembly of the Council of Europe (note 28 above) at 34.

<sup>32</sup> *Ibid.*



Ostensibly guardian of the new Constitution, as of the old, is the Constitutional Court. However, perhaps someone in the government read Issacharoff's 2011 article extolling the virtues of constitutional courts as 'democratic hedges,' because almost immediately they began to trim their hedge. Whereas Constitutional Court judges used to be nominated by a committee drawn from members of each parliamentary faction in a procedure that sought to generate intra-party consensus, then elected by two thirds of the Parliament, now committee members are nominated by parties according to their share in parliament, with no provision for multiparty agreement. In present circumstances that means they are government appointees. The number of members of the Court has been raised from 11 to 15, to allow immediate dilution of the existing court. Nine of the current 15 judges now on the court are Fidesz appointees. The *actio popularis* has been abolished, and the agents that can apply to the court narrowed. The Court's jurisdiction over financial, tax and budgetary matters has also been drastically limited.

The enduring legal effect of all the Court's case law before the coming into force of the 2012 Basic Law is annulled, even where provisions are unchanged; its immediate effect stands but it has no further legal significance. And if the Court thinks to respond to any of this with Issacharoff's and Choudhry's<sup>33</sup> Indian solution, the Fourth Amendment to the new constitution, of March this year, got there first: the Court cannot void a constitutional amendment for conflict with substantive constitutional principles, only for procedural irregularities. And this Amendment paved the way, since several of its provisions are reinstated ones that the Court had earlier declared unconstitutional.

This has all happened under the close and unhappy scrutiny of several European agencies, with a remit unparalleled anywhere else in the world.<sup>34</sup> In April 2013, the Monitoring Committee recommended that the Parliamentary Assembly of the Council of Europe establish a monitoring procedure in relation to Hungary. Had the Assembly agreed, that would be the first time an established member of the European Union (EU) had ever been subject to such a procedure. The Assembly listed many concerns, of which it said:

[Art. 13] The Assembly considers that each of the concerns outlined above is inherently serious in terms of democracy, the rule of law and respect for human rights. Taken separately, they would already warrant close scrutiny by the Assembly. In the present case, however, what is striking is the sheer accumulation of reforms that aim to establish political control of most key institutions while in parallel weakening the system of checks and balances.<sup>35</sup>

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<sup>33</sup> S Choudhry "‘He Had a Mandate’: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" (2009) 2 *Constitutional Court Review* 1.

<sup>34</sup> See European Parliament Committee on Civil Liberties, Justice and Home Affairs 'Working Document 5: On the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the EP resolution of 16 February 2012)' (2013) available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-508.190%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>>.

<sup>35</sup> Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe 'Request for the opening of a monitoring procedure in respect of Hungary (Report)' (2013) 5 available at <<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19777&Language=en>>.

The Assembly concluded that these developments have ‘raised serious and sustained concerns about the extent to which the country is still complying with these obligations’. In the event, they resolved not to take the humiliating step of opening a monitoring procedure in respect of Hungary but resolved ‘to closely follow the situation in Hungary and to take stock of the progress achieved in the implementation of this resolution’.<sup>36</sup>

More recently still, and unprecedentedly, on 3 July 2013, the Parliament of the European Union voted by a considerable margin (370 to 248 with 82 abstentions) to endorse recommendations of the report of its Committee on Civil Liberties, Justice and Home Affairs, on ‘the situation of fundamental rights: standards and practices in Hungary’ (‘Tavares Report’).<sup>37</sup> This report listed in detail the ways in which the Hungarian government over the past three years had failed to meet European values and recommended that the Parliament set up a monitoring procedure. To the vociferous protests of the Hungarian parliament,<sup>38</sup> the European Parliament endorsed the recommendations of the report.

Because of the substantial benefits of EU membership, the Hungarian government is keen to placate or hoodwink European officials, though it is not above abusing them and determined not to bow to them. So far the government’s momentum has not been stopped – giving a bit here, trading a bit there, but progressively and substantially tightening their institutional hold. It will be interesting to see if anything has changed with this latest, and apparently most determined, European development.

Despite its membership in such institutions as the African Union or the South African Development Community, South Africa is unlikely, any time soon, to have the regional oversight that Hungary currently ‘enjoys’. So what does this tell those of us persuaded that dominant party democracy presents challenges to constitutional democracy? That the Constitutional Court should ignore Issacharoff and pull its head in, lest it be chopped off? It might be argued that the earlier boldness of the first Hungarian court gave hostages to fortune, that are now being punished, or that clashes between the Hungarian court and earlier governments made the present one determined to clip its wings. But then it has clipped many other wings as well. It is hard to blame the Constitutional Court for what has happened to the media or the Ombudsman, for example.

Moreover, an independent court can still be a significant institution even in a dominant party democracy, harder in normal circumstances to emasculate than many institutions, and in any event of potentially enormous symbolic significance. This appears to be the case in Hungary more recently, where even as it is being emasculated it has recently begun to emit noble yelps from time to

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<sup>36</sup> Ibid.

<sup>37</sup> European Parliament Committee on Civil Liberties, Justice and Home Affairs (note 30 above).

<sup>38</sup> See V Gulyas ‘Hungary Resolution Slams European Parliament Criticism’ *The Wall Street Journal* (4 July 2013) available at <[http://blogs.wsj.com/emergingurope/2013/07/04/hungary-resolution-slams-european-parliament-criticism/?mod=WSJ\\_LatestHeadlines](http://blogs.wsj.com/emergingurope/2013/07/04/hungary-resolution-slams-european-parliament-criticism/?mod=WSJ_LatestHeadlines)>.

time,<sup>39</sup> which are taken up by supporters of constitutional democracy within and without Hungary.

The Hungarian story does suggest, however, that even a strong and determined constitutional court, with a tradition of alertness to ‘basic structures’ might face challenges from an ascendant and determined dominant party that it is institutionally unable to overcome head-on. Thus, perhaps some of the variable and dynamically-oriented strategies of what might be called honourable indirection, that Roux commends, might in particular circumstances have better purchase than the direct engagement with issues of basic structure.

Issacharoff is, then, right to stress that the prospects for constitutional democracy depend in considerable measure on what happens at the level and in the kinds of structures, to which he directs attention. Whether that automatically implies that a constitutional court should be the agency of choice to monitor the problem, and even if so, how it should respond, are as Roux argues, complex questions to which answers might vary from one legal order to another, and over time. But as is often the case in matters of design, identifying the *source* of problems is a necessary condition for, even if not a sufficient means to, solving them.

### III WHAT IS AT STAKE?

I agree, then, with Issacharoff’s *location* of important challenges to constitutional democracy in party dominant systems at the level of basic political and legal structures. I am, however, less persuaded by his *characterisation* of them purely in terms of conditions of electoral democracy. For identifying *where* problems arise is not always the same as identifying what sort of problems they are. And here I think Issacharoff has cast his net too narrowly. Indeed, it’s not a net; more a spear. It has one target: conditions of democracy, where that in turn is conceived of primarily in terms of conditions for political contestability. His concern, as he makes repeatedly plain, is ‘the relation between democratic vitality and the fact of one-party political domination’.<sup>40</sup> The issue is ‘the basic underpinnings of democratic contestation’,<sup>41</sup> ‘the relation of consolidated one-party rule to the prospects for democracy’,<sup>42</sup> and ‘the broader principles of democratic governance’.<sup>43</sup> The problem is one of ‘not having a robust theory of constitutional protection of democracy against democratic manipulation’,<sup>44</sup> and so on. Not just in this article but in his several writings on these themes we are left in no doubt what the goal is: the preservation of the conditions for democracy, conceived of primarily in terms of securing the conditions in which competition for votes can be real. As Issacharoff and Pildes term it elsewhere, the issue is ‘the proper construction

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<sup>39</sup> See R Uitz ‘The Return of the Hungarian Constitutional Court’ *Verfassungsblog on Matters Constitutional* (15 July 2013) available at <<http://www.verfassungsblog.de/en/the-return-of-the-hungarian-constitutional-court/#.UICV8ySnpYk>>.

<sup>40</sup> Issacharoff (note 3 above) at 32.

<sup>41</sup> *Ibid* at 19.

<sup>42</sup> *Ibid* at 23.

<sup>43</sup> *Ibid* at 30.

<sup>44</sup> *Ibid* at 29.

of background “markets for control” in the area of democratic politics’,<sup>45</sup> ‘the architecture of democratic institutions’.<sup>46</sup> In all matters, the Court is urged ‘to use *the democracy-promoting metric* as the analytic foundation for evaluating efforts by the ANC to consolidate power’.<sup>47</sup>

Democracy is an important thing, to be sure, and it is a good thing too. However, it is not the only good thing that one party dominant democracy threatens. It also threatens another value, often more directly, which also has complex and underminable structural conditions and is also enshrined in s 1 as one of the fundamental values of the South African Constitution: the rule of law.

A lot has been written about the rule of law, particularly over the past 20 years, and it has not made the term clearer. Like democracy and other important public values, what precisely is meant by the term is deeply, perhaps essentially, contested. And yet, though I do not want to engage in a disquisition on the rule of law here,<sup>48</sup> I think it is fairly uncontroversial that, whatever else one wants to say about it, one of the central antitheses to the rule of law is arbitrary exercise of power. That is what the rule of law is supposed, perhaps not solely but perhaps above all, to guard us against. The contrast between rule of law and arbitrariness is relatively uncontroversial, and it is key. Partisans of the rule of law are hostile to arbitrary power. Rule of law traditions seek ways of institutionalising that hostility.

So too of course, does Issacharoff. Though he explicitly invokes the rule of law only once in his article, this value is central to his argument. Thus he notes that in ‘the democratic surge in South America’, like ‘the broader expansion in Eastern Europe and Asia following the fall of the Soviet Union’:

In each case, central to the desired democratic restoration was the idea of constraint in the exercise of state authority. Authoritarian rule allowed the direct translation of political power into the raw exercise of arbitrary and repressive governmental conduct. In response, the democratic revival sought both to restore civilian authority and to enshrine the primacy of a rule of law.<sup>49</sup>

This is accurate, both as description and diagnosis, but note how ‘constraint in the exercise of state authority’, ‘the primacy of a rule of law’, figure in the argument. Within the conceptual repertoire that Issacharoff deploys, arbitrary power is objectionable because and to the extent that it undermines *democracy*, which, I should add, it does. However, to understand dangers to the rule of law as important, only insofar as they affect the availability of democratic contestation, can misdirect us, for at least two reasons.

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<sup>45</sup> S Issacharoff & RH Pildes ‘Politics as Markets: Partisan Lockups of the Democratic Process’ (1998) 50 *Stanford Law Review* 643.

<sup>46</sup> *Ibid* at 650.

<sup>47</sup> Issacharoff (note 3 above) at 8.

<sup>48</sup> I have tried to do so elsewhere. See, eg, M Krygier ‘The Rule of Law: Teleology, Sociology, and Legality’ in G Palombella & N Walker (eds) *Relocating the Rule of Law* (2009) 45; M Krygier ‘Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?’ in JE Fleming (ed) *Getting to the Rule of Law* (2011) 64; M Krygier ‘The Rule of Law’ M Rosenfeld & A Sajó (eds) *Oxford Handbook of Comparative Constitutional Law* (2012) 233; and M Krygier ‘Why the Rule of Law is ‘Too Important’ To Be Left to Lawyers’ (2012) 2 *Pravo I Więź [Law and Social Bonds]* 30.

<sup>49</sup> Issacharoff (note 3 above) at 8, 11–12.

## A The Rule of Law

First of all, the rule of law is an institutional accomplishment distinct from democracy, and it serves values other than, and as well as, that of ensuring democratic contestability. It is an old notion, known and to some extent instantiated in many polities that were not democratic, indeed were anti-democratic. There was more of it, for example, in Britain than in Russia at any time you want to name since, say, the thirteenth century. Still is. But Britain only became democratic yesterday, or thereabouts.

Many political philosophers who were suspicious of democracy, or not especially interested in it, still had positive things to say about the rule of law. Aristotle did, so did Montesquieu, and as for the long English tradition of the rule of law, democracy was a late afterthought. As Fareed Zakaria has emphasised, '[d]emocracy is one public virtue, not the only one, and the relation of democracy to other public virtues and vices can only be understood if democracy is clearly distinguished from the other characteristics of political systems.'<sup>50</sup> As he points out, there have been liberal autocracies, just as there have been – and increasingly are – illiberal democracies. The adjective is independent of the noun.

Well, maybe not independent. Zakaria makes things easy for himself by using a minimalist definition of democracy, which allows it to be satisfied by the most dominant of dominant party democracies. I believe that in contemporary conditions Juergen Habermas is right to argue that the two flourish together rather than apart, and so there's something wrong in saying democracy can *thrive*, though it might exist, without the rule of law. Nevertheless the concepts are analytically distinct, their histories and incarnations have followed different paths, and their specific virtues are not the same. To put it crudely, adapting Isaiah Berlin's (already over-simple) distinction between positive and negative liberty,<sup>51</sup> democracy has to do, at least in the first instance, with *who* governs us, while the rule of law is concerned with *how* we are governed. And what matters greatly for the rule of law is that, whoever governs us, they do so, as Montesquieu emphasised, *moderately*. That's not all you want from power, but the systematic, institutionalised moderation of power, its *tempering*, is a precious thing in its own right. And one of the great threats to the likelihood of stable, reliable moderation in the exercise of power is the existence of conditions that free it to be exercised arbitrarily.

Arbitrary power is not an unambiguous notion. It can refer to power at its *source* – to what extent is the power of the power-wielder subject, as Philip Pettit puts it, 'just to the *arbitrium*, the decision or judgement of the [power-wielding] agent; the agent was in a position to choose it or not choose it, at their pleasure?'<sup>52</sup> We also speak of power being exercised arbitrarily where it is *received*, if those subject to it have no way of knowing how or when or why it will hit them, or with what. It is the job of rule-of-law institutions, among others, to diminish *arbitrium* in the exercise of power, at both ends.

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<sup>50</sup> F Zakaria 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Affairs* 22, 25.

<sup>51</sup> I Berlin 'Two Concepts of Liberty' in I Berlin *Four Essays on Liberty* (1969).

<sup>52</sup> P Pettit *Republicanism: A Theory of Freedom and Government* (1997) 55.

Opposition to arbitrariness in the exercise of power motivates regard for the rule of law and associated attempts to institutionalise ways of reducing the possibility of such exercise. The rule of law is in relatively good order insofar as some possible behaviours, central among them the exercise of political, social, and economic power, are effectively constrained and channelled, so that non-arbitrary exercises of such powers are relatively routine, while other sorts, such as lawless, capricious, wilful exercises of power routinely occur less. The role of law in the rule of law is to contribute to this state of affairs.

Not only is anti-arbitrariness a central rule of law value; it is an *immanent* value, I would argue, internal to the rule of law itself. It is common today to claim all sorts of goods as flowing from the rule of law – economic development, human rights, and of course democracy. These claims are the lifeblood of the international rule of law promotion industry. But I’m not talking about those external, purported, blessings allegedly bestowed by the rule of law. Perhaps it is good for all these things, though the claims so popular in international circles today can be debated.<sup>53</sup> But if it is, it is because of what it *does* immanently, as a conceptual matter as it were, and my claim is that what it does is diminish the possibility of arbitrary power. To the extent that citizens are routinely at risk of arbitrary exercise of power, they lack the rule of law. Simple as that. If their economy is flailing, the rule of law might have something to do with it or not. We’ll have to have a look.

Thus, one might argue, as Max Weber did, that ‘sober bourgeois capitalism’ is likelier to get off the ground and stay up there if power is exercised in non-arbitrary ways, but that is a sociological claim about what the reduction of arbitrariness might facilitate. It is not itself a quality of the rule of law itself. Nor are democracy, human rights and other things it is now fashionable to attribute to the rule of law. There are intuitively plausible reasons, and some evidence, to support the belief that lessening the possibility of arbitrary power might support those further good things. But if it were shown that, in an order where the rule of law in the sense sketched here was strongly in evidence, the economy had tanked, this would not be in itself a reason to conclude that there was no rule of law nor that it was worthless.

Arbitrariness is a specific and obnoxious vice when added to power. No one should have to live in circumstances where significant power can be exercised over them in an arbitrary manner. There are many other vices which depend on the *substance* of the law, but arbitrary power is vicious enough even without them and moreover can be vicious even were the substance to be fine. It is true that the more arbitrary the power, the less likely it is that the substance will be fine, but that is a different (and arguable)<sup>54</sup> point. Arbitrary power is a free-standing vice, as it were, to be regarded with suspicion wherever it occurs.

Where arbitrariness is linked with significant power, it tends to: threaten the *liberty* of anyone subject to it; generate reasonable and enduring *fear* among them;

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<sup>53</sup> See, eg, S Haggard & L Tiede ‘The Rule of Law and Economic Growth: Where are We?’ (2010) 39 *World Development* 673.

<sup>54</sup> Lon Fuller argued for the connection; HLA Hart was more sceptical.



and deprive citizens of reliable sources of expectations of, and *coordination* with, each other and with the state. And as Lon Fuller and Jeremy Waldron<sup>55</sup> have emphasised, it threatens the *dignity* of all who find themselves mere objects of power exercisable at the whim or caprice of another. More can be said about all of this,<sup>56</sup> but not here.

These are four good reasons to value reduction of the possibility of arbitrary exercise of power. To the extent that the rule of law can help deliver such reductions, this is reason to value it. This is not, of course, merely a negative matter of removing evils, but can be expressed positively. A society in which law contributes to securing freedom, confidence, coordination and dignity, is some great and positive distance from many available alternatives. There are other things we want from law, and many more things we might want in a good society, but ways of serving these values are goods immeasurably harder to attain without institutionalising constraints on arbitrariness in the exercise of power.

And sure, where power can be exercised arbitrarily, that is likely to prove hostile at least to civilised peaceable political contestation. But even were that not the case, the possibility of arbitrary exercise of power would be important to discourage.

## **B Courts and the Rule of Law**

There is a second reason to focus on challenges to the rule of law in their own terms, and particularly for a constitutional court to do so, rather than merely as subordinate aspects of challenges to democracy. As Issacharoff is fully aware, the democratic credentials of any court – and particularly a constitutional court – are controversial, in ways typically inversely related to those of a dominant party in a democracy. The arguments are competitive. Those who deny courts the warrant to override democratically elected politicians deny the democratic legitimacy of the former and emphasise that of the latter. Such arguments, while not persuasive to everyone, are not obviously spurious. Issacharoff himself acknowledges some of their force in relation to Colombia. Uribe was elected twice. The whole problem was that if his amendment were to be recognised as valid, he was almost certain to be elected a third time. That might be a bad thing, but it's not absurd to consider it democratic. That's precisely the problem. As Issacharoff explains:

Under these circumstances, the Court emerged as the sole check on the prospect of increasingly unilateral executive power. The difficulty is that the judiciary has no independent democratic mandate, particularly as compared to a popular ruler such as Uribe. Nor could the Constitutional Court intervene in the name of a narrow procedural limitation on governmental power; from a technical point of view, the procedures taken to permit a third term seemed unassailable.<sup>57</sup>

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<sup>55</sup> L Fuller & J Waldron *The Morality of Law* (2nd Edition, 1969); J Waldron 'The Rule of Law and the Importance of Procedure' in J Fleming (ed) *Getting to the Rule of Law* (2012).

<sup>56</sup> I discuss these four reasons more extensively in 'Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?' (note 48 above) at 78–81.

<sup>57</sup> Issacharoff (note 3 above) at 17.

Issacharoff's solution responds to and seeks to override these arguments, but they are not necessarily frivolous. Democracy *does* have a lot to do with elections, and winning them is not a small democratic credential, particularly in comparison with those of a bunch of unelected lawyers sitting on an elevated bench, isolated and insulated from democratic pressures. If there were no other way to defend the position, I would still side with Issacharoff; indeed I do anyway. But there is also another route to this end. Perhaps Uribe has stronger democratic credentials than the Court, anyway significant ones. But his credentials as guardian of the rule of law are no greater than theirs; indeed, since he is effectively judging in his own cause and interest, and since courts are charged – in South Africa, specifically and explicitly, constitutionally, charged – with defending the rule of law, decidedly less than theirs. That is precisely for these reasons that Issacharoff gives:

While not a democratic mandate in the electoral sense of the term, the Court could assert itself as the guardian of a popularly accepted constitutional order which had to restrain the momentary desires of popular majorities, perhaps even if expressed in constitutional amendment.<sup>58</sup>

So, for reasons both intrinsic and tactical, that might be something worth stressing in its own right.

To say one is opposed to 'the concentration of power' because the rule of law is good for democracy and concentration of power threatens the former and therefore in turn the latter, is more complicated than saying: it is bad for the rule of law. But it is. It would remain so, and should therefore be resisted, even if it were not also bad for democracy. Unfortunately, it is that too. That's an important but distinct point – worth making but not at the risk of occluding the specific value of, and threat to, the rule of law itself. Particularly since this route to undermining electoral democracy depends upon first undermining the rule of law. And if people disagree on the democracy question, as Victor Orbán undoubtedly does and perhaps Jacob Zuma does too, it will remain harder for them to say that the emasculation of independent institutions is good for the rule of law.

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<sup>58</sup> Ibid.

# Articles



# Courage of Principle: Reflections on the 30th Anniversary of the Assassination of Ruth First

*Dikgang Moseneke\**

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‘While the legislature is the will of the majority, the Court must always remain the conscience of the society’

– Anon.

## I INTRODUCTION: RUTH HELOISE FIRST

On Tuesday 17 August 1982, Ruth Heloise First was killed by a letter bomb in her office at the Centre for African Studies at the Eduardo Mondlane University in Maputo. There she was collaborating with a team of Marxist academics to assist the Frelimo government of the recently liberated Mozambique to fashion a new socialist order. Like her 13 *Umkhonto we Sizwe* compatriots,<sup>1</sup> who were murdered by the apartheid army a year earlier at the Matola massacre,<sup>2</sup> every activist knew that the mad securocrats of Pretoria had assassinated Ruth First. Our gut feeling was well-versed and we did not have to await validation. As day will follow night 15 years later, apartheid state agents Gerry Raven and Craig Williamson grovelled

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\* Deputy Chief Justice, Constitutional Court of South Africa. The address was first presented on Friday 17 August 2012, Wits Art Museum, University of the Witwatersrand. The Ruth First Committee invited me to be part of a colloquium to mark the 30th anniversary of the assassination of Ruth First. I want to thank the Wits University School of Journalism and, in particular, Professor Anton Harber, who never relented when I claimed that my judicial obligations threatened my possible participation in the colloquium. I was also urged on by reading the preceding memorial lectures delivered by Mr Zwelinzima Vavi and Deputy President Motlanthe. Both paid a thoughtful and evocative tribute to someone as critical to our struggle for liberation as Ruth First.

<sup>1</sup> Umkhonto we Sizwe (‘Spear of the Nation’), or ‘MK’ as it was more commonly known, was launched on 16 December 1961. See: <http://www.anc.org.za/themes.php?t=Umkhonto+we+Sizwe>

<sup>2</sup> ‘Most of the comrades who were massacred in Matola belonged to what was then known as the Natal Underground Machinery, a unit of our erstwhile People’s Army Umkhonto We Sizwe. They had come to Maputo for consultations with the underground leadership of our movement, the African National Congress. Virtually the entire machinery was wiped out.’ Minister Dlamini – Zuma’s Address, Commemoration of the Matola Raid (14 February 2009), [http://www.link2media.co.za/index.php?option=com\\_content&task=view&id=1027&Itemid=12](http://www.link2media.co.za/index.php?option=com_content&task=view&id=1027&Itemid=12) (accessed on 3 March 2014).

before the Truth and Reconciliation Commission<sup>3</sup> and made the predictable confession of the unspeakable slaying of Ruth First. Both were granted amnesty and, together with their principals, escaped their feet being held to the fire for the dastardly deed that robbed our country of a leader and revolutionary of immeasurable pedigree.

Her life is well documented and needs little padding here. She was born into a family of radical socialists, the daughter of Tilly and Julius First, who helped form the Communist Party of South Africa in the 1920s. Like many Johannesburg girls of her time, she went to Jeppe High School for Girls and later attended the University of the Witwatersrand. At Wits, she became very active in non-racial student politics. After graduation, Ruth First turned to journalism: first as editor of the left-wing newspaper, the *Guardian* and later, the *New Age*. These newspapers changed their names regularly over the next decade as, in the 1950s, the minority state acted against and banned the Communist Party and censored progressive media.

Ruth First wrote profusely despite the adverse and repressive setting. Her investigative and courageous journalism laid bare the evils of post-colonial apartheid and its deleterious effects on the lives of black South Africans. Being an inveterate socialist, she exposed the nature of racialised capitalism and brought into sharp focus the exploitative role assumed by the state in that struggle between labour and capital. She authored some of the finest social and labour journalism well animated by her Marxist disposition and wide internationalism.

When I was barely seven years of age in the 1950s and had just started reading newspapers, I remember reading the serial articles she wrote in the *New Age* on the exploitation of prison labour by Bethal potato farmers. People detained under pass laws were channelled to potato farms where they lived in virtual slavery and had to harvest potatoes out of the ground with their bare and festering fingers. Ruth's journalistic exposé of this human horror jolted many middle class white people out of their racial apathy and triggered the potato boycott of the mid 1950s called by the African National Congress on the heels of the Defiance Campaign of 1952.<sup>4</sup>

Ruth later married Joe Slovo, a fellow communist and activist and an advocate at the Johannesburg Bar. Together they played a leading role in the ever more militant protests in the 1950s. In 1953, both Ruth First and Joe Slovo helped

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<sup>3</sup> In July 1995 South Africa's new parliament passed a law authorising the formation of the Truth and Reconciliation Commission. The Commission, chaired by Archbishop Desmond Tutu, was appointed in December 1995. The central purpose of the Commission was to promote reconciliation and forgiveness among perpetrators and victims of apartheid by the full disclosure of truth. The Commission was charged with three specific tasks: to discover the causes and nature of human rights violations in South Africa between 1960 and 1994; to identify victims with a view to paying reparations; and to allow amnesty to those who fully disclosed their involvement in politically motivated human rights violations. Available at <http://www.apartheidmuseum.org/truth-and-reconciliation-commission-trc> (accessed on 3 March 2014).

<sup>4</sup> The Defiance Campaign against Unjust Laws was launched on 26 June 1952 by the ANC together with the South African Indian Congress. More than 8,500 volunteers or 'defiers' were imprisoned for peacefully refusing to obey the apartheid laws. The campaign, which carried into 1953, attracted thousands into political activity. Available at <http://www.anc.org.za/campaigns.php?t=The+Defiance+Campaign> (accessed on 4 March 2014).



found the South African Congress of Democrats, a close ally of the African National Congress (ANC). She had more than a passing connection with the Freedom Charter. She served on its drafting committee. But, as she was banned, she missed its adoption at the Congress of the People in Kliptown, Johannesburg on 25 June 1955.<sup>5</sup>

In December 1956, both Ruth and her husband were arrested and charged with high treason along with 154 other leaders of the Congress Movement. All of accused were acquitted after a treason trial that lasted four years. From 1960, following the state of emergency declared after the Sharpeville shootings,<sup>6</sup> Ruth First was banned and later arrested several times. While detained in solitary confinement for 90 days, she contemplated suicide.

In March 1964, she left South Africa with her children on an exit permit to join her husband in London. Despite her exile, she remained intensely involved in the anti-apartheid politics. In the 1970s, she resumed writing and authored several books, pamphlets and articles on Africa and in particular on the destabilising role South Africa was playing in the region. She also taught developmental sociology at Durham University in England, a role which stood her in good stead during her later stay in Mozambique.

Ruth First had a towering intellect. She did not suffer fools gladly. She rejected racism outright and sneered at patriarchy. She envisaged a non-racial, non-sexist society – a polity to which our own Constitution aspires. Many of her writings were landmarks in Marxist academic debate. She was sharply critical when the occasion called for it. Some observe that she was impatient with bluster, something which earned her enemies in political debate, even amongst comrades in party circles. But she was not dogmatic. Independence was her watchword.

In 1977, she returned to Africa. She became a professor and research director of the Centre for African Studies at the Eduardo Mondlane University in Maputo, Mozambique. The apartheid regime considered her nearness to our borders sufficiently ominous to cut short her life by a deadly letter bomb.

As I depart from this brief description of the life of Ruth First, it is appropriate that I recall the tribute paid to her by *Umsebenzi*<sup>7</sup> and the South African Communist Party who properly hailed her as ‘another martyr in this long struggle for liberation.’ The tribute continued:

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<sup>5</sup> The Freedom Charter was the statement of core principles of the South African Congress Alliance, which consisted of the African National Congress and its allies, the South African Indian Congress, the South African Congress of Democrats and the Coloured People’s Congress. It is characterised by its opening demand. Available at <http://www.anc.org.za/show.php?id=72> (accessed on 4 March 2014).

<sup>6</sup> It was officially announced that 67 Africans were killed and 186 wounded, after the police had opened fire on the crowd. On the same day a riot took place at Langa location near Cape Town, where another crowd of Africans, estimated at 20 000 assembled at police stations to give themselves up for arrest. The police failed to disperse the crowd by baton charges, and the crowd began to throw stones. The police opened fire and 54 people were injured. Available at <http://www.baha.co.za/mmc/gallery/detail/events/sharpeville-massacre-1960---how-it-began> (accessed on 4 March 2014).

<sup>7</sup> *Umsebenzi* is the Voice of the South African Communist Party and has an electronic version *Umsebenzi Online* which is an exclusively electronic publication of the South African Communist Party. It is published on the first and third Wednesday of every month. Available at <http://www.sacp.org.za/list.php?type=Umsebenzi+Online&year=2014> (accessed on 4 March 2014).

Her death had been fashioned in the hearts of those who had long realised that she was a tireless and committed fighter and revolutionary; a writer of consummate skill gifted with a rare incisive vision which combined her craft and energy to actively combat the unspeakably evil South African system.

Comrade Harry Gwala<sup>8</sup> taught us about Ruth First's commitment to, and sacrifice for, the struggle on Robben Island. His audience included the current President of the Republic and myself. This self-proclaimed Stalinist and master of the revolution paid the following tribute, a revolutionary mantra, to this great woman:

A woman's greatest possession is life. Since it is given to her to live but once, she must so live it that in dying she must be able to say: all my life and all my strength have been dedicated to the finest cause in the world and that is the liberation of mankind.<sup>9</sup>

Enough about the revolution and its poetry. The agonising questions I have chosen to ask are as follows. In what way should the heroic life of Ruth First inspire my role as a judge in a post-conflict society? How should my actions, as judge and a citizen, navigate the tension between radically transforming society and acknowledging the constraints inherent in a society in transition? I propose to explore these question within the over-arching framework of what Ruth First might have called 'courage of principle'.

## II THE COLLECTIVE VISION

It seems to me that people who are bent on changing their world require courage of principle. Courage of principle implies three fundamental and inter-connected patterns of behaviour. The first is vision. The second requires concrete steps to pursue and realise the vision. The third is the preparedness to pay the price for a rigorous pursuit of the vision.

The starting point of individual or collective change must be a vision. A vision must be formulated and articulated. It is that internally coherent statement of principles that imagines idealised or desirable social, political or cultural outcomes. In the context of a political or revolutionary movement, a vision may consist of only minimum demands or rise to the level of ideology suitably supplemented by strategy and tactics. At different times in our long struggle, we have seen the movement of the people stake the claim for freedom, equality and democracy. One of the earliest articulations of these values occurred in 1912 with the formation of the African National Congress. Thereafter, they were consistently followed in a variety of charters such as the Atlantic Charter,<sup>10</sup> the Freedom Charter,<sup>11</sup> the Ten

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<sup>8</sup> Harry Themba Gwala joined the SACP in 1942 and two years later the ANC. Available at <http://www.sacp.org.za/main.php?ID=1567> (accessed on 4 March 2014).

<sup>9</sup> These powerful words have stayed with, and guided me. I have, however, substituted female pronouns for the original male pronouns.

<sup>10</sup> In December 1942, the ANC conference held in Bloemfontein approved the formation of a youth wing and adopted the 'Atlantic Charter from the Standpoint of Africans within the Union of South Africa' and Bill of Rights documents. Available at <http://www.sahistory.org.za/topic/african-national-congress-timeline-1940-1949> (accessed on 4 September 2014).

<sup>11</sup> See above note 5.

Point Programme of the Unity Movement,<sup>12</sup> the Africanist Manifesto<sup>13</sup> and the socialist humanism of the black consciousness movement.

Thus a vision is that lodestar that lights the way to a just society. We have seen how Ruth First was consumed by the high notions of a non-racial non-sexist equal society. Her entire activism sought to banish underdevelopment, the uneven spread of means of production and distribution, and the resultant human indignity imposed on working people and the poor both at home and in the rest of the world.

For me, as a judge, the most recent and coherent articulation of our collective convictions arising from our revolution must be the high principles of our Constitution. I am not interested in debates about whether the Constitution is perfect, whether it reflects a sufficiently progressive bargain; or whether it promises the best social order we deserve given our history. Such debates are helpful so long as we remind ourselves that our collective vision has been settled by democratic principle. The unanimous representatives of the people installed it as our first law and joint ideal of a just society. Through their representatives, the people may change it. They have done so 15 times thus far. Amending the Constitution is the prerogative of the people who created it, provided the requisite majority is present and the formalities of the Constitution are followed.

In the same vein, when parliament enacts a law that is consistent with the Constitution, as a judge, I am duty-bound to give effect to it. Thus, our vision of a just society is a dynamic one; open to constant but necessary revision. It is subservient to the democratic ethos provided it takes the form of valid laws and executive policy. Our Constitution never was, and is not, cast in stone. Yet it goes without saying that it should never be changed to pander to narrow sectarian interests.

It seems to me that as a judge, I must hold dear and cherish the collective vision of the people I am required to serve. I must know and understand the high principles that animate the Constitution. Reading these two commitments together, I must dedicate myself without reservation to the migration of our society from its dim past to a just social order. In so doing, fidelity to the Constitution as supreme law and to other laws of our country is indispensable. As a judge, I owe a duty to the rest of our people to police its compliance. So the two commitments reinforce one another: I recall the long and heroic struggles against past injustice; with the full recognition of the Constitution's mission to afford a better life to all. In other words, it behoves us to remember how we came to where we are and what animates the democratic project in the pursuit of a just society.

We cannot deepen democracy and realise social justice without certain bare minimums. Put bluntly, we cannot defeat the triple burden of unemployment,

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<sup>12</sup> This 10-point programme called for freedom of speech, press, meetings and association in the framework of one person, one vote, and the enforcement of socio-economic rights under the leadership of the working class. Available at <http://www.sahistory.org.za/archive/draft-declaration-unity-including-10-point-programme-state%C2%ADment-approved-continuation-commit> (accessed on 4 March 2014).

<sup>13</sup> It was accepted in 1959 by the Pan African Congress. Available at <http://www.pac.org.za/manifesto> (accessed on 4 March 2014).

poverty and disease without certain constitutional desiderata. We need the rule of law and not mob rule.<sup>14</sup> All public power must be sourced in law.<sup>15</sup> The exercise of public power, and indeed of private power where it serves the same purpose as public power, must be rational, it must pursue a public good or a legitimate government purpose.<sup>16</sup> In other words, public power, including fiscal and budgetary competences, may not be deployed to pursue ulterior or other expedient purposes. For instance, appointments in the public space must be done in accordance with the law, rationally, lawfully and not in pursuit of mere hegemony or patronage.<sup>17</sup> The people so appointed, objectively speaking, ought to be sufficiently competent to pursue to public task with which they are entrusted.<sup>18</sup> This is a commonsensical utilitarian requirement. If public officials are incompetent to give effect to their public duties or are incapable of effective and honest use of public resources, then our shared vision of a good society will come to nought. We cannot compromise on the competence and the integrity of those who are duty-bound to enable our society move to a better space.

The Constitution enjoins us to observe good governance within an effective state. It insists that the business of government and indeed of all organs of state must be transparent, accountable and responsive.<sup>19</sup> These values cannot now dissipate under the madness of incumbency.

These stringent requirements apply equally to judges. All law binds the governors and the governed. In my personal and judicial life, I may not act unlawfully or inimical to the vision of our people as concretised in law and valid policies. Besides being impartial, I must be efficient, diligent and effective as I perform my judicial function in an open court. The principle of open justice requires nothing less. It behoves me to be transparent, accountable and responsive.

<sup>14</sup> See *Garnis v S.ATAWU (Minister for Safety & Security, Third Party)* [2012] ZACC 13, 2013 (1) SA 83 (CC); *Garnis v S.ATAWU (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC). But see S Woolman 'My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in *Garnis v S.ATAWU (Minister for Safety & Security, Third Party)* 2010 (6) SA 280 (WCC)' (2011) 27 *South African Journal on Human Rights* 450.

<sup>15</sup> *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

<sup>16</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458. See, further, F Michelman 'The Rule of Law, Legality and Constitutional Supremacy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 11; D Dyzenhaus 'The Past and the Future of the Rule of Law in South Africa' (2007) 124 *South African Law Journal* 734.

<sup>17</sup> Public Protector *Against the Rules: Report of the Public Protector in terms of Section 182(1) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act, 1994 on an Investigation into Complaints and Allegations of Maladministration, Improper and Unlawful Conduct by the Department of Public Works and the South African Police Service relating to the Leasing of Office Accommodation in Pretoria* (2011) Report Number 33 of 2010/2011. Available at [www.info.gov.za/view/DownloadFileAction?id=142293](http://www.info.gov.za/view/DownloadFileAction?id=142293) (accessed on 6 May 2011). See, generally, S Woolman 'Security Services' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 3, May 2011) Chapter 23B.

<sup>18</sup> Auditor-General *Report on a Performance Audit of Service Delivery at Police Stations and 10111 Call Centres at the South African Police Service 2007–2008* (March 2009) 2. Available at <http://www.agsa.co.za/audit-reports/SAR.aspx> (accessed on 10 April 2011).

<sup>19</sup> *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC).

I must explain and lay bare my reasoning for all to assess, criticise and, one hopes, support.

I welcome the public debate that ensues on the merits of the reasoning and outcome of my judgments. I am a citizen no higher or lower than any other. And yet it is singularly unhelpful to suggest that because one differs with a judgment or outcome, the judge concerned is serving an ulterior goal or political party. Judges are accountable to all our people and to no political or ideological tendency. I am proud to say that virtually all my judicial sisters and brothers take seriously this obligation and live by it. In some instances, judges get the facts or the law wrong. That tells us nothing about their judicial probity. Our democratic system, like most in the world, readily acknowledges judicial fallibility and arrests that risk by creating a hierarchy of courts with appellate responsibility.

A few jurisdictions on our African continent have increasingly undermined this requirement of an open and accountable judicial function – much to their utter detriment. Judges have stopped explaining themselves publicly. Arbitrariness and judicial dishonesty invariably take root.

The commitment to an open and accountable judicial function is a powerful touchstone. The Constitutional Court recently received a judicial commission delegation from our sister country Kenya. The delegation related how their judiciary faltered so as to make it necessary to require all judges to resign in the interest of a fresh start. The delegation sought our counsel and judicial experience thus far.<sup>20</sup>

For us, the lesson to be drawn from the Kenyan experience must protect the integrity and the effectiveness of all of our democratic institutions. Narrow, sectarian gambits to make any public institution compliant, or even merely pliable, ultimately redounds to the disadvantage of our people. These institutions have to survive inter-generational and political party changes as we continue to pursue our collective good.

### III CONCRETE STEPS TO MAKE THE VISION REAL

I suggested earlier that a vision of the ideal must be married to concrete and credible steps designed to make the ideal real. That holds true for the judicial function. Courage of principle requires judges to do what is to be done within the remit of responsibilities. So: Just as social activists must take practical steps to realise our collective vision, judges must take practical steps at the same time as they show absolute fidelity to the law.

Judicial power flows from the Constitution. Our Constitution vests in judges wide and vast decision-making powers. It is no exaggeration to state that the people have installed the judiciary as the ultimate guardians of the Constitution. In this sense, the judiciary is an integral part of the transition and the achievement of the wide variety of social and economic goods and ends to which our Constitution aspires.

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<sup>20</sup> Our esteemed retired colleague, Justice Emeritus Albie Sachs serves on a panel assisting Kenya in the selection fresh judges in accordance with their new Constitution.

At its barest, the judicial function is not anything more than an instrument to prosecute and to advance these cherished values. Its primary duty is to ensure that laws, hopefully just laws that flow from a Constitution devised to uphold our common convictions, are honoured. In that sense, the rule of law is more than a fetish of lawyers, it is an integral part of the democratic process. Laws are made by the people through their democratically elected representatives. In their purest form, they are meant to represent the hopes, and diminish the anxieties, of the people. Fear is one of the greatest threats to our young republic. Judges must squarely address the deepest fears of our society, and simultaneously nurse the best out of all of us.

On this view, judges are vital agents. However, contrary to the vision of judicial maximalists, our role is modestly utilitarian. Modestly utilitarian. This turn of phrase captures the contextual method at the heart of modern jurisprudence and, properly understood, should debunk some of the mystery around the judicial function.

The judicial function necessarily mediates conflict. But the mediation does not occur through the application of arid principles. Judges enforce the standards that we have imposed upon ourselves in pursuit of a collective vision of the good made manifest in the Constitution. To do so, judges must be embedded in the crucial struggles of the society that they serve. They must be alive to the history, social context and contradictions of the society within which we live. When all public and private functionaries are performing their duties with integrity and sincerity within the boundaries of their competencies, judges must refuse to trespass into those terrains. They must stand back and cheer and applaud as society flourishes.

Judging must be performed with strict observance of the basic law's division of powers. Parliament must make the laws, and compose budgetary allocations, that provide for the appropriate redress of our divided and unequal past. The executive formulates policies that give true effect to the law, manages implementation of the budget and carries out the public services necessary for the development of all members of our society. It is, therefore, self-evident that courts are relevant only in the event of 'system failure'. Our role is not proactive, but reactive. It arises only when a breach of a vital right or interest is alleged and only when other forms of mediation have failed.<sup>21</sup> We don't choose cases; they choose us. We have neither the purse, nor the sword and yet, we are entrusted with vast policing duties. This scheme that apportions public power is foundational to democratic

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<sup>21</sup> Even then, courts should, where possible, endeavour to push parties to meaningfully engage one another in the pursuit of the best possible outcome. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC); *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* [2009] ZACC 31, 2010 (2) BCLR 99 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2011] ZACC 8. That said, as guardians of the Constitution, judges must never lose the courage of their principles, even in cases that through up polycentric problems. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC). See also D Bilchitz *Poverty and Fundamental Rights* (2006); S Liebenberg *Adjudicating Socio-Economic Rights under a Transformative Constitution* (2010).



projects. Courts must bolster rather than diminish democratic control. They must be wary not to intrude into the terrain of the legislature, the executive and other state institutions. They must do that only in the clearest of cases, and only when the Constitution permits the intrusion.

That however, does not reflect wholesale deference to other state actors. Our Constitution is pro-poor. It takes cognisance of the vulnerability of all too many denizens of our society. It engages directly a past that has entrenched vacuous but real divisions along race, gender, class, religion, conscience and belief, culture, language, origin and sexual orientation. Like Ruth First, our Constitution seeks to achieve a caring, sharing and empathetic society. It rejects the notion of mere political might being right and seeks to restrain and control all public and private powers within the constraints of an over-arching basic law.

In many senses, our courts have been remarkable. Shortly after our transition, equality and discrimination cases proliferated. In a series of notable cases, courts have refused to tolerate inequality and discrimination.<sup>22</sup> They have struck down scores of laws that undermined appropriate respect for diversity;<sup>23</sup> or that harbour antiquated prejudices. Amidst many rumblings, courts would not tolerate for example homophobia or gender inequality inspired by religious or cultural patriarchy.<sup>24</sup> They have fashioned a conception of substantive equality that travels well beyond liberal notions of formal equality.<sup>25</sup> We have insisted that laws and policy must provide for adequate protection of children,<sup>26</sup> root out systemic patterns of sexual violence,<sup>27</sup> enable people with disability, and offer appropriate succour for permanent residents, refugees and migrants.<sup>28</sup>

Courts have, time without count, required the executive to give effect to socio-economic claims of the poor, the vulnerable and those living on the margins of existence. We have required government to provide appropriate access to health

<sup>22</sup> *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4, 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* [2002] ZACC 20, 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC); *Daniels v Campbell and Others* [2004] ZACC 14, 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC); *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) (15 October 2004); *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC); *Langemaat v Minister of Safety & Security and others* 1998 (3) SA 312 (T), [1998] 2 All SA 259 (T).

<sup>23</sup> *MEC for Education, KwaZulu-Natal, & Others v Pillay* [2007] ZACC 21, 2008 (1) SA 474 (CC).

<sup>24</sup> *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice* [1998] ZACC 15, 1999 (1) SA 6 (CC), 1998 (2) SACR 556 (CC), 1998 (12) BCLR 1517 (CC); *National Coalition for Gay & Lesbian Equality & Another v Minister of Home Affairs* [1999] ZACC 17, 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC); *Shilubana & Others v Nwamitwa* [2008] ZACC 9, 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC).

<sup>25</sup> For more on the South African conception of substantive equality, see C Albertyn & B Goldblatt 'Equality' in S Woolman & M Bishop Constitutional Law of South Africa (2nd Edition, OS, 2007) Chapter 35.

<sup>26</sup> *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)

<sup>27</sup> *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC); *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC).

<sup>28</sup> *Khosa & Others v Minister of Social Development & Others; Mablaule & Others v Minister of Social Development & Others* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC); *Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 (C).

care.<sup>29</sup> As a result, our jurisdiction now possesses a robust public treatment regime for HIV/Aids patients. We have reminded the executive of its duty to provide access to housing.<sup>30</sup> Courts have been slow to evict homeless people and we have insisted that government must find alternative accommodation should eviction ensue.<sup>31</sup> Courts have insisted that drinkable water be made available to all members of society.<sup>32</sup> We have protected learners from being subjected to a medium of instruction they do not want.<sup>33</sup> We have required that learners be furnished with study material.<sup>34</sup> We have mediated differences around rampant eviction of homeless, urban and rural occupiers who are said to be unlawful. Courts have required the social grants to reach all including migrants; and that they are paid promptly, particularly in the rural neighbourhoods.<sup>35</sup>

Our courts have developed a proud jurisprudence on justice in the workplace.<sup>36</sup> That is a consequence of the vital choices our founding mothers and fathers have made on workers' rights, the recognition and formation of trade unions and employers organisations, the resultant collective bargaining and fair labour practices. Properly so, courts have refused to sacrifice workplace justice on the back of claims or promises of economic growth that a so called open labour market will ostensibly bring to us. That is decidedly not a matter upon which judges may free-wheel. Just labour laws are integral to an equal and just society where the dignity of all, and all working people, is well shielded.

We have been properly pre-occupied with the right to free expression, a right that embraces a free press, the ability to impart and to receive information, and the capacity to use satire as a robust form of political criticism.<sup>37</sup> Our judgments point to the intrinsic worth of free expression and the many public and private blessings of a free, open and agonistic society. And yet, our judgments have also warned that free expression has limits, particularly when it encroaches on dignity and privacy.<sup>38</sup> However, when public interest is in issue, other and perhaps more

<sup>29</sup> *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).

<sup>30</sup> *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).

<sup>31</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC).

<sup>32</sup> *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28, 2010 (4) SA 1 (CC), 2010 (3) BCLR 239 (CC).

<sup>33</sup> *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC).

<sup>34</sup> *Section 27 & Others v Minister of Education & Another* [2012] ZAGPPHC 114, 2013 (2) SA 40 (GNP), 2013 (2) BCLR 237 (GNP).

<sup>35</sup> *Khosa and Others v Minister of Social Development and Others, Mablale and Another v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

<sup>36</sup> *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* [2002] ZACC 27, 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC); *South African Police Services v Nkambule & Others* [2013] ZALCPE 11.

<sup>37</sup> *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* [2005] ZACC 7, 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC).

<sup>38</sup> *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

pressing considerations come to the fore. That balance is not generic. It can be properly struck only on a case by case basis.<sup>39</sup>

Unfortunately, very few cases on land restitution or expropriation or acquisition for public use have reached our Court. One would have expected that a matter so pressing as land use, occupation or ownership would pre-dominate the list of disputes. It may be that the property and restitutionary provisions in s 25 of the Constitution on land have been underworked.<sup>40</sup>

Courts have intervened where valid allegations have been made about wrongful procurement of goods and services by government.<sup>41</sup> When spheres of the state contract for goods and services, they must do so within a system that is fair, equitable, transparent, competitive and cost effective. To that end, Parliament is enjoined to legislate in order to delineate an appropriate procurement policy. Of course, the Constitution was alive to the fact that our government would serve as a vital cog in the achievement of a more equal society; and it is thus anxious to ensure that proper modes of public procurement reverse long-term patterns of underdevelopment and social inequality. In the same breath, our constitutional arrangements are properly inimical and intolerant of public or private corruption. Courts can only deal with prosecutions that come before them; and these matters may be fewer than what they should be. Where the prosecuting authorities have ventured into courts, the record shows that my judicial sisters and brothers have not wavered.

Competition law has found a discernable niche in our judicial system.<sup>42</sup> This is admirable. In the past, our economy has permitted very little or real competition in the market because of structural and behavioural anti-competitiveness. Some of our manufacturing and retail business have been found by our courts to have engaged in collusive practices including price fixing. The Competition Commission and its tribunals have done much enviable work to remedy or to reduce commercial injustices to consumers that flow from collusive pricing.<sup>43</sup>

Do I have regrets about the judicial function over the last score of years? The answer is yes. The judicial function can only be reactive and is often limited to a specific case and its peculiar set of facts. The decisions cited above have done their part to advance the achievement of a better life for all. And yet the impact of judicial precedent is often minute in comparison to the tools of social transformation placed in the hands of the legislature, the executive and civil society.

<sup>39</sup> On the virtues of deciding cases on a case by case basis, see C Sunstein *One Case at a Time* (1996); C Sunstein 'Leaving Things Undecided' (1996) 110 *Harvard Law Review* 4; C Sunstein *Why Nudging?* (2013).

<sup>40</sup> But see *Alexkor Ltd & Another v The Richtersveld Community & Others* [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC).

<sup>41</sup> *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21, 2011 (1) SA 327 (CC), 2011 (2) BCLR 207 (CC).

<sup>42</sup> *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9 (Commission imposed unprecedented R 1 000 000 000 penalty on Pioneer for collusive price fixing, with respect to bread and flour, that invariably harmed the most vulnerable consumers.)

<sup>43</sup> *Competition Commission v Engen Petroleum Ltd* [2012] ZACT 14.

Judges cannot be much more than referees.<sup>44</sup> They hope to keep the players on the straight and narrow so that all have genuine equality of opportunity. Even so, a rather large gap exists between formal opportunity and lived reality. Thus my regret stems from the continued chasm between our Constitution's collective promise to one another and the lived reality of the majority of our people. About that, judges cannot do much more. We must keep the faith and ensure that other state actors practise the faith. We must ensure compliance with the promise in the hope that it will accrue to the benefit of all our people.

Perhaps the second and greatest sadness I shoulder is that the vast majority of citizens enjoy rather limited levels of access to courts that might hear their grievances. The lack of access to courts, and therefore to justice, reinscribes obvious patterns of gender, class and racial discrimination. Who can afford to litigate matters up to apex courts like the Supreme Court of Appeal and the Constitutional Court? Meaningful and consistent access to justice has become unaffordable for the poor and the middle class.

In this context, much of our jurisprudence flows from the innovative and caring intervention of public interest lawyers and their organisations and various organs of civil society. We owe them an immense debt of gratitude. They have taken on many trend-setting cases that have brought respite to the poor and vulnerable. Otherwise, our jurisprudence would have been skewed in favour of powerful commercial interests in a society already deeply divided and unequal. Legal Aid South Africa does a splendid job of increasing access to courts. Much innovation and resources have to be devised urgently to make justice more accessible. On this score alone, Ruth First would have wondered what her and our struggle was about.

That then brings me to my third judicial sadness. One of my conventional obligations as a judge is to make prison visits. I would want to do that in any event as one who grew up in a prison. Ruth First would have wanted to do that having been arrested and detained so long and so often. Like me, she would not have been amused. Our prisons are full, very full of young men and young women well beyond their occupancy levels. In a recent tour of one of our largest prisons in Gauteng, I witnessed the frightening overcrowding of spaces dedicated to prisoners awaiting trial. Three to four people appeared to have little choice but to share a bed meant for one. The authorities told me that the average wait for a final trial is approximately two years. Yet the intake of additional people awaiting trial occurs daily. Whilst the Department responsible for correctional centres may be doing its best in the trying circumstances, courts must, in collaboration with other institutions, devise an effective case load management system that will honour and not diminish the constitutional guarantee to a fair and speedy trial. It seems particularly apposite at this juncture for judges (myself included) to remind themselves regularly that 'while the legislature is the will of the majority the Court must always remain the conscience of the society'.

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<sup>44</sup> See S Woolman 'Humility, Michelman's Method and the Constitutional Court: Rereading the *First Certification Judgment* and Reaffirming the Distinction between Law and Politics' (2013) 24 *Stellenbosch Law Review* 242.

IV THE WILLINGNESS TO BEAR THE CONSEQUENCES

I suggested at the beginning that the inevitable consequence of courage wedded to principle must be a willingness to bear the consequences. Ruth First paid that ultimate price. Sadly, she will not be the last. Rulers, even in well-intentioned and well-ordered societies, may forget their own history and resort to unlawful killings, sexual violence, torture, discrimination and cronyism to prop up their hegemony.

We have established a new, admirable and justifiably proud multi-party and multi-racial democracy: a nation that has, to a reasonable degree, broken with its brutal, repressive past and cottoned on to the virtues of recognising the intrinsic, equal worth of every member of this society. Some cynics might be inclined to say that this new South Africa has done no more than pick low hanging fruit and that our fairly progressive constitutional jurisprudence is an inevitable function of a progressive constitutional text. But such glib analysis denies the courage, the principled choices, the contributions and the extraordinary sacrifices of so many South Africans in bringing about our relatively peaceful revolution. In this relatively peaceful and ongoing revolution, our courts have played an exemplary role.

However, a kernel of truth lies with the cynics' canards. We, the people of South Africa, have only just begun the radical reformation required by our Constitution. Judges, cossetted as we can seem to be, cannot now back off from our duty to educate and to train the young, and to transmit to them the values that enabled our long and heroic struggle to succeed. Judges must keep our Constitution's 'collective vision' in sight: our eyes on a prize that lies on a distant horizon. Judges must gather up the courage to speak out against the ills that still beset this great land, and, more importantly, must create the space for others to speak out as well. We, all of us, must require our public functionaries to pursue, in truth, a better life for all. In this day and age, the price we pay for social activism is small indeed. It can hardly be said to compare with Ruth First's willingness to pay the supreme price. Indeed, Ruth First's exemplary and extraordinary commitment to the creation of a just, fair and equal social order should provide us with the necessary resolution to call it right in the most difficult of circumstances. If Ruth First is to be our guide, then our collective vision of the right and the good cannot really be open for debate. Its transparency, simplicity, clarity and lucidity is well settled by the long, virtuous struggle for emancipation, and by the text of a Constitution whose premises and promises have been universally accepted and democratically decreed. Ruth First would only ask that we continue the struggle, with the courage of principle.

# Causation in the Constitutional Court: *Lee v Minister of Correctional Services*

Anton Fagan\*

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## I INTRODUCTION

The central question in *Lee v Minister of Correctional Services* was framed as follows:

Assuming, first, that the defendant had negligently and wrongfully failed to maintain an adequate system for the management of tuberculosis in a prison in which the plaintiff had been incarcerated and, secondly, that the plaintiff had contracted tuberculosis whilst so incarcerated, had the defendant committed a delict against the plaintiff?<sup>1</sup>

The Supreme Court of Appeal concluded previously that the defendant had *not* committed a delict against the plaintiff.<sup>2</sup> Its grounds for so concluding were three-fold. First, the question as to whether the defendant had committed a delict against the plaintiff had to be determined by applying the South African common law. Secondly, the common law contained the following four rules:

- (1) A person who performed negligent conduct can be delictually liable for harm suffered by another person only if the negligent conduct was a factual cause of the harm;<sup>3</sup>
- (2) negligent conduct was a factual cause of harm if and only if, but for the negligent conduct, the harm would not have occurred;<sup>4</sup>
- (3) a court is justified in concluding that a defendant's negligent conduct was a factual cause of a plaintiff's harm if and only if the plaintiff has proved that the negligent conduct probably was a factual cause of that harm;<sup>5</sup> and
- (4) a plaintiff has proved that a defendant's negligent conduct probably was a factual cause of the plaintiff's harm if and only if the plaintiff has proved that, but for the negligent conduct, the harm probably would not have occurred.<sup>6</sup>

Thirdly, the condition stipulated by rule (4) above had not been satisfied. That is, the plaintiff had not proved that, but for the defendant's negligent failure to maintain an adequate system for the management of tuberculosis, the plaintiff probably would not have contracted the disease.<sup>7</sup>

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<sup>1</sup> *Lee v Minister of Correctional Services* [2012] ZACC 30, 2013 (2) SA 144 (CC) ('*Lee CC*').

<sup>2</sup> *Minister of Correctional Services v Lee* [2012] ZASCA 23, 2012 (3) SA 617 (SCA) ('*Lee SCA*').

<sup>3</sup> *Ibid* at 628I.

<sup>4</sup> *Ibid* at 626E, 628J–629C, 629F.

<sup>5</sup> *Ibid* at 626E.

<sup>6</sup> This result is entailed by (2). It is also assumed to be true by the *Lee SCA* Court. *Ibid* at 631F.

<sup>7</sup> *Ibid* at 631D–G.



The Supreme Court of Appeal's conclusion, namely that the defendant had not committed a delict against the plaintiff, was rejected by a majority of the Constitutional Court. According to the *Lee CC* Court, the Supreme Court of Appeal had erred in its conclusion because it had proceeded from a mistaken premise. That premise was that the South African common law contained the four rules set out above. The majority of the Constitutional Court accepted that the common law contained rules (1) and (3).<sup>8</sup> It denied that the common law contained rules (2) and (4).

Rule (2) makes it a necessary condition, for negligent conduct to be a factual cause of harm, that, *but for the negligent conduct*, the harm would not have occurred. That, said the *Lee CC* Court, was not the common law. Why not? Because the common law accepted that, in exceptional circumstances, it would be a sufficient condition for conduct to be a negligent factual cause of harm if, *but for the conduct*, the harm would not have occurred.<sup>9</sup> In other words, according to the *Lee CC* Court, the common law did not contain rule (2) above, but rather rule (2)\* below:

- (2)\* Negligent conduct was a factual cause of harm if and only if either:
- (a) but for the negligent conduct the harm would not have occurred; or
  - (b) the circumstances were exceptional and, *but for the conduct*, the harm would not have occurred.

Of course, if rule (2) is replaced by rule (2)\*, rule (4) necessarily has to change as well. Specifically, it has to be substituted by rule (4)\* below:

- (4)\* A plaintiff has proved that a defendant's negligent conduct probably was a factual cause of the plaintiff's harm if and only if:
- (a) the plaintiff has proved that, but for the negligent conduct, the harm probably would not have occurred; or
  - (b) the circumstances were exceptional and the plaintiff has proved that, *but for the conduct*, the harm probably would not have occurred.

However, according to the *Lee CC* Court, even rule (4)\* does not yet properly reflect the common law. For, insisted the majority, the common law recognised a third condition, in addition to conditions (a) and (b) above, sufficient for a plaintiff to have proved that a defendant's negligent conduct probably was a factual cause of the plaintiff's harm. It was this: the circumstances were exceptional and the plaintiff has proved that, but for the negligent conduct, *the risk of that harm would have been reduced*.<sup>10</sup> In other words, according to the majority of the Constitutional Court, the common law contained neither rule (4) nor rule (4)\* above, but rather rule (4)\*\* below:

- (4)\*\* A plaintiff has proved that a defendant's negligent conduct probably was a factual cause of the plaintiff's harm if and only if:
- (a) the plaintiff has proved that, but for the negligent conduct, the harm probably would not have occurred; or

<sup>8</sup> *Lee CC* (note 1 above) at 161A–D, 163D, 168C, 168E–F, 168H–I, 169C–D, 173B, 173F.

<sup>9</sup> *Ibid* at 162D–E, 163C, 163F–H, 164B–C, 166B–D, 168B, 173E–F.

<sup>10</sup> *Ibid* at 168G–H, 169C–D, 170B–C.

- (b) the circumstances were exceptional and the plaintiff has proved that, *but for the conduct*, the harm probably would not have occurred; or
- (c) the circumstances were exceptional and the plaintiff has proved that, but for the negligent conduct, *the risk of that harm would have been reduced*.

It was on the basis of conditions (b) and (c) above that the *Lee CC* Court set aside the Supreme Court of Appeal's finding that the defendant had *not* committed a delict against the plaintiff. According to the majority, both condition (b) and condition (c) were satisfied. The plaintiff had proved that, but for his incarceration, he probably would not have contracted tuberculosis.<sup>11</sup> He also had proved that, but for the defendant's negligent failure to maintain an adequate system for the management of tuberculosis, the risk of his contracting tuberculosis would have been reduced.<sup>12</sup> On both grounds, therefore, the plaintiff had shown that 'there is a probable chain of causation between the negligent omissions by the [defendant] and [the plaintiff's] infection with TB'.<sup>13</sup>

This article focuses on several questions raised by the way in which the majority of the *Lee CC* Court dealt with factual causation. The first question, which is the concern of section II below, is whether it is of any practical significance whether factual causation is determined by application of rules (2) and (4) or by application of rules (2)\* and (4)\*\*. It certainly mattered to the parties to the *Lee CC* case. But does it matter more generally? Are there other situations in which different outcomes will be yielded, depending upon whether factual causation is determined by applying rules (2) and (4) or by applying rules (2)\* and (4)\*\*? If so, how common are those situations?

The second question, which is discussed in section III below, is whether the majority of the *Lee CC* Court got the common law right. Did the South African common law, at the time *Lee* was decided, really contain rules (2)\* and (4)\*\*, as the majority believed? Or did it rather contain rules (2) and (4), as the Supreme Court of Appeal had assumed? Also discussed in section III is a third question, which is closely connected to the second. If, contrary to what the *Lee CC* Court asserted, rules (2)\* and (4)\*\* were not in fact part of the common law, should they nonetheless be? That is, are there any analytical or moral reasons to prefer a common law containing rules (2)\* and (4)\*\* over a common law containing rules (2) and (4)?

The conclusion to this article briefly deals with a fourth question raised by the *Lee* case. If the Constitutional Court majority in *Lee* in fact got the common law wrong, would the common law have been altered by its mistake? That is, would the effect of *Lee* be that, henceforward, factual causation in our law is to be determined by application of rules (2)\* and (4)\*\* rather than by application of rules (2) and (4)? This question is of particular interest if there are not in fact any analytical or moral reasons favouring rules (2)\* and (4)\*\* over rules (2) and (4).

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<sup>11</sup> Ibid at 168B.

<sup>12</sup> Ibid at 168G–H, 169C–170C.

<sup>13</sup> Ibid at 173B.

## II THE DIFFERENCE THE RULES MAKE

This section shows that it is of great practical significance whether factual causation is determined by application of rules (2) and (4) or by application of rules (2)\* and (4)\*\*. A great many situations exist in which different outcomes will be yielded, depending on whether the former two or latter two rules are applied. This palpable difference is most easily demonstrated by example. Consider then the following four hypothetical sets of facts:

*The driver and the pedestrian:* A drives down a city road at 90 km/h. Without warning, B runs into the road and is killed by the impact of A's car. It was negligent for A to have driven at a speed in excess of 80 km/h. But it would not have been negligent for A to have driven at 80 km/h or slower. Had A not driven down the road, B would still have been alive. However, even if A had driven at 70 km/h to 80 km/h, B probably would still have been killed by the impact of the car.

*The nurse and the patient:* Nurse A administers 100 ml of a certain drug to patient B. B has a reaction to the drug which kills B. It was negligent for A to have administered more than 50 ml of the drug to B. But it would not have been negligent for A to have administered 50 ml of the drug or less to B. Had A not administered the drug to B, B would still have been alive. However, even if A had administered 40 ml to 50 ml of the drug to B, B probably would still have had the reaction and died.

*The doctor and the patient:* Dr A administers 80 ml of a certain drug to patient B in order to combat a certain condition. B nonetheless dies of the condition. It was negligent for A to have administered less than 100 ml of the drug to B. But A would have acted without negligence, had A administered 100 to 150 ml of the drug to B. Had A administered 140 to 150 ml of the drug to B, B probably would still have been alive (as the condition probably would have been successfully managed). However, had A administered 100 ml to 110 ml of the drug to B, B probably would have died of the condition in any event.

*The engineer and the vintage-car owner:* Engineer A designs a retaining wall with a foundation of 1 metre for a property belonging to C who sells it on to B. As a result of a once-in-500-years earthquake, the wall collapses, destroying four vintage cars belonging to B. It was negligent for A to have designed a retaining wall with a foundation of less than 2 metres. But A would have acted without negligence, had A designed a retaining wall with a foundation of 2 metres or more. Had A designed a retaining wall with a foundation of 3 metres or more, B's cars probably would not have been damaged (as the retaining wall probably would not then have collapsed). However, had A designed a retaining wall with a foundation of 2 metres to 2.5 metres, B's cars probably would have been damaged in any event (as the retaining wall would then still have collapsed).

As I explain in subsection A below, if rules (2) and (4) are applied to these four examples, A could not be delictually liable for B's harm in any of them. As is explained in subsection B below, if rules (2)\* and (4)\*\* are applied, then more or less the opposite conclusion holds true: That is, A could be delictually liable for B's harm in all four.

To be strictly accurate, it should be noted that these divergent liability outcomes are not produced by the application of these rules alone – that is, by the application of only, on the one hand, rules (2) and (4) and, on the other, rules (2)\* and (4)\*\*. The divergent outcomes are produced, instead, by the application of these rules *in combination with* rules (1) and (3). However, it is a bit of a mouthful to speak every time of 'rules (1), (2), (3) and (4)' or of 'rules (1), (2)\*, (3) and (4)\*\*'. When

this article speaks of ‘rules (2) and (4)’, their combination with rules (1) and (3) will therefore often be assumed. Likewise when it speaks of ‘rules (2)\* and (4)\*\*’. Sometimes the combination is not assumed. In such instances, the text should make that clear.

## A Rules (2) and (4)

To understand how rules (2) and (4) are to be applied to the four hypothetical examples provided at the start of this section, one needs look no further than Corbett JA’s dissenting judgment in *Siman & Co v Barclays National Bank*.<sup>14</sup> In the judgment, Corbett JA provided a detailed explanation of the so-called ‘but-for’ or ‘*causa sine qua non*’ test. The explanation is worth quoting in full. It explains not only the application of rule (2), but also the application of rule (4). Corbett JA writes:

In order to apply this test one must make a hypothetical enquiry as to what *probably* would have happened but for the unlawful act or omission of the defendant. In some instances this enquiry may be satisfactorily conducted merely by mentally eliminating the unlawful conduct of the defendant and asking whether, the remaining circumstances being the same, the event causing harm to plaintiff would have occurred or not. If it would, then the unlawful conduct of the defendant was not a cause in fact of this event; but if it would not have so occurred, then it may be taken that the defendant’s unlawful act was such a cause. This process of mental elimination may be applied with complete logic to a straightforward *positive act* which is *wholly unlawful*. So, to take a very simple example, where A has unlawfully shot and killed B, the test may be applied by simply asking whether in the event of A not having fired the unlawful shot (ie by a process of elimination) B would have died. In many instances, however, the enquiry requires the substitution of a hypothetical course of lawful conduct for the unlawful conduct of the defendant and the posing of the question as to whether in such case the event causing harm to the plaintiff would have occurred or not; a positive answer to this question establishing that the defendant’s unlawful conduct was not a factual cause and a negative one that it was a factual cause. This is so in particular where the unlawful conduct of the defendant takes the form of a negligent *omission*. [It has been] suggested that the elimination process must be applied in the case of a positive act and the substitution process in the case of an omission. This should not be regarded as an inflexible rule. It is not always easy to draw the line between a positive act and an omission, but in any event there are cases involving a *positive act* where the application of the ‘but-for’ rule requires the hypothetical substitution of a lawful course of conduct. A straightforward example of this would be where the driver of a vehicle is alleged to have negligently driven at an excessive speed and thereby caused a collision. In order to determine whether there was factually a causal connection between the driving of the vehicle at an excessive speed and the collision it would be necessary to ask the question whether the collision would have been avoided if the driver had been driving at a speed which was reasonable in the circumstances. In other words, in order to apply the ‘but-for’ test one would have to substitute a hypothetical positive course of conduct for the actual positive course of conduct.<sup>15</sup>

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<sup>14</sup> *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A).

<sup>15</sup> *Ibid* at 951B–H (References have been omitted and emphasis has been added).

The majority judgment in *Lee* quoted almost all of the above passage.<sup>16</sup> But it failed to grasp its central point. It is that, in order to determine whether negligent (or wrongful) conduct was a factual cause of harm, one has to mentally eliminate or ‘think away’ *as much of the conduct as, but no more of the conduct than,* was negligent (or wrongful). Thereafter one must ask: if *this much, but no more,* of the conduct were eliminated, would the harm still have occurred? If the answer is: yes, the harm would still have occurred, the negligent (or wrongful) conduct was not a factual cause of the harm. But if the answer is: no, the harm would not then have occurred, the negligent (or wrongful) conduct was a factual cause of the harm.

It was precisely to illustrate this point that Corbett JA provided his two examples – both of which involve a positive act. In the first example, A’s shooting is, as Corbett JA put it, ‘wholly unlawful’. To eliminate as much of A’s conduct as, but no more than, is wrongful, one thus has to eliminate the shot in its entirety. In the second example, by contrast, it is not the driver’s driving *per se*, but only his driving at an excessive speed, which is wrongful. Hence, to eliminate as much of the driver’s conduct as, but no more than, is wrongful, one has to eliminate, not his driving, but only his speeding. And, of course, if one eliminates only the driver’s speeding, one is left with him driving at a proper or reasonable speed.

There is yet another way of putting the point that Corbett JA made in the quoted passage above. In order to determine whether negligent (or wrongful) conduct was a factual cause of harm, one always has to posit or imagine a course of conduct that deviates from the actual one. However, and this is critical, the course of conduct which one posits or imagines should deviate from the actual conduct *no more than is necessary* to deprive the conduct of its negligent (or wrongful) character. To put it another way, the imagined conduct should alter the actual conduct *only just enough* to render it non-negligent (or lawful). In Corbett JA’s first example, the alteration required one to imagine A not shooting at all. In Corbett JA’s second example, by contrast, the alteration required one to imagine the driver still driving, but now at a proper speed.

The foregoing represents Corbett JA’s explanation, in *Siman*, of rule (2). However, Corbett JA’s use of the word ‘probably’ in the first line of the quoted passage, as well as his subsequent application of ‘these principles’ to the facts of the case, make it clear that he meant this to constitute an explanation also of rule (4).<sup>17</sup> All that is required is the insertion of the word ‘probably’ in the appropriate places. In other words, whether negligent conduct *probably* was a factual cause of harm is to be determined as follows:

- (1) Mentally eliminate *as much of the conduct as, but no more of the conduct than,* was negligent.
- (2) Ask the question: if *this much, but no more,* of the conduct were eliminated, would the harm *probably* still have occurred?
- (3) If the answer is: yes, the harm *probably* would still have occurred, then the negligent conduct *probably* was not a factual cause of the harm.
- (4) But if the answer is: no, the harm *probably* would not have occurred, then the negligent conduct *probably* was a factual cause of the harm.

<sup>16</sup> *Lee CC* (note 1 above) at 165D–J.

<sup>17</sup> See, in particular, *Siman* (note 14 above) at 918A–C, 920C, 921H.

The implications of this explanation for the first two examples provided at the beginning of this section should be obvious. After all, the example of *the driver and the pedestrian* just adds detail to Corbett JA's own example of the driver and the collision, which has already been discussed. As for the example of *the nurse and the patient*, the cast and the conduct may have been changed, but the basic plot remains the same. However, since the point that Corbett JA made in the above passage may have been misunderstood not only by the majority in *Lee CC* but also by others, it nonetheless is worth setting out those implications in full.

Consider first the example of *the driver and the pedestrian*. Step one, as has just been explained, is to eliminate as much of the driver's conduct as, but no more of his conduct than, is negligent. That is, we are to imagine a course of conduct that deviates from the driver's actual course of conduct to the minimum degree necessary to remove its negligent character. Thus, since the driver's negligence consisted in his driving too fast, we are to imagine him driving at the very highest speed that would not have been negligent. That speed, we are told, is 80 km/h. Step two is to ask whether, if the driver had driven at that speed – that is, the very highest speed that would not have been negligent: thus 80 km/h – B's harm probably would still have occurred. We are also told what the answer to this question is: it probably would. It follows, according to rule (4), that A's negligent conduct probably was *not* a factual cause of B's harm. It follows, when rule (4) is combined with rules (1), (2) and (3), that A could *not* be liable in delict for that harm.

Consider now the example of *the nurse and the patient*. Again we begin by eliminating as much of the nurse's conduct as, but no more of her conduct than, is negligent. In other words, we are to start by positing a course of conduct that differs from the nurse's actual course of conduct to the smallest extent necessary to cancel out its negligent nature. The nurse's negligence, according to the stated facts, consisted in her administering too much of a certain drug to B. We are therefore to imagine the nurse's giving B the very largest amount of that drug that it would not have been negligent of her to give to him. That amount, the stated facts tell us, is 50 ml. Next we are to ask whether, if the nurse had given B that amount of the drug – that is, the very largest amount that it would not have been negligent for her to give him – B's harm probably would still have occurred. Once again, the facts stated in the example tell us what the answer to this question is: even if the nurse had administered 50 ml of the drug to B, B probably would still have had the reaction in question and died. It follows, according to rule (4), that A's negligent conduct probably was *not* a factual cause of B's harm. And it follows, when rules (1), (2) and (3) are added into the mix, that A could *not* be delictually liable for that harm.

The implications of Corbett JA's explanation in *Siman* for the third and fourth examples provided at the outset of this section may be less obvious than for the first and second. The reason is that, whereas the first and second examples involve negligent *positive acts*, the third and fourth examples involve negligent *omissions*. Corbett JA provided no example of a negligent omission in his explanation. However, he made it clear that his explanation covered negligent omissions no less than negligent positive acts. In other words, irrespective of



whether negligent conduct took the form of a positive act or an omission, one is to determine whether that negligent conduct was, or was probably, a factual cause of harm by mentally eliminating *as much of the conduct as, but no more of the conduct than*, is negligent. To put this in the way it also was put earlier: one has to imagine a course of conduct that deviates from the actual conduct *no more than is necessary* to deprive the conduct of its negligent character.

It is true that, in the passage quoted above, Corbett JA stated that, in the case of unlawful omissions, application of the ‘but-for’ test usually requires ‘the *substitution* of a hypothetical course of lawful conduct’ rather than ‘merely ... *eliminating* the unlawful conduct of the defendant’.<sup>18</sup> However, it would be a mistake to infer from this requirement that Corbett JA meant to suggest that the application of rules (2) and (4) to negligent omissions differs fundamentally from their application to negligent positive acts. For he went straight on to point out not only that the line between positive acts and omissions is vague at best, but also that ‘there are cases involving a positive act where the application of the but-for rule demands the hypothetical substitution of a lawful course of conduct’.<sup>19</sup> Moreover, he presented his second example – that is his example of the driver and the collision – as exactly such a case.<sup>20</sup> Corbett JA also discussed several earlier judgments in which, though the negligent conduct in question took the form of a positive act, the ‘but-for’ test was applied by substituting non-negligent for negligent conduct.<sup>21</sup> This alteration holds true of Corbett JA’s own judgment in *Siman*: that is, Corbett JA applied the ‘but-for’ test by substituting a negligent positive act (the giving of ‘incorrect advice’) with a non-negligent one (the giving of ‘correct advice’).<sup>22</sup>

That the distinction between positive acts and omissions is of no consequence to the application of rules (2) and (4) is borne out by consideration of the third example: *the doctor and the patient*. In respect of the third example, as with the first and second examples, one has to start by imagining a course of conduct that differs from the doctor’s actual course of conduct to a sufficient degree for it to lose its negligent aspect, yet to no greater degree than is necessary for the conduct to do so. The doctor’s negligence, we are informed, consisted in her giving too small an amount of a certain drug to B. The question we must therefore ask ourselves is this: what is the very smallest amount of that drug that the doctor could have given B without being negligent? The answer to this question, we are told, is: a 100 ml. In respect of the third example, as with the first and second examples, the question one has to ask next is whether, if the doctor had given B that amount of the drug – that is, the very smallest amount that the doctor could have given without being negligent: thus a 100 ml – B’s harm probably would still have occurred. We also find the answer to this question in the stated facts: it probably would. It therefore follows, because of rule (4), that the doctor’s negligent conduct probably was *not* a factual cause of B’s harm. And it follows,

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<sup>18</sup> *Siman* (note 14 above) at 915E, 915B–C (emphasis added).

<sup>19</sup> *Ibid* at 915F–G.

<sup>20</sup> *Ibid* at 915G–H.

<sup>21</sup> *Ibid* at 916A–917H.

<sup>22</sup> *Ibid* at 918D–922E.

because of rules (1), (2) and (3), that the doctor could *not* be liable in delict for that harm.

The same analysis applies to the final example: *the engineer and the vintage-car owner*. That should come as no surprise. Its basic structure, if not its superficial details, is identical to the example of *the doctor and the patient*. The engineer was negligent because he failed to design a sufficiently deep foundation. For the engineer not to have been negligent, all that was required of him was to have designed a foundation 2 metres deep. However, even if he had designed a foundation of 2 metres in depth, the wall probably would still have toppled over and damaged B's cars. Consequently, the engineer's negligent conduct probably was not a factual cause of B's harm, by virtue of rule (4). Nor, therefore, could the engineer be delictually liable in terms of rules (1), (2) and (3).

### **B Rules (2)\* and (4)\*\***

The previous subsection showed that the application of rules (2) and (4) to the four hypothetical examples provided at the beginning of this section yields the same result: A's conduct did not factually cause B's harm, and thus A could not in any of them be liable for B's harm. This subsection explains that it is by no means certain that the same results would be yielded by the application of rules (2)\* and (4)\*\*. It is possible that, for the purposes of rules (2)\* and (4)\*\*, the circumstances in all four examples are exceptional rather than ordinary. In that event, whether A's negligent conduct probably was a factual cause of B's harm could (and possibly would have to) be determined by application of condition (b) or (c), rather than condition (a), in rule (4)\*\*. Moreover, as is explained below, condition (c) in rule (4)\*\* is satisfied in all four examples, while condition (b) in rule (4)\*\* is satisfied in at least two of them.

Whether the circumstances in the four examples are exceptional rather than ordinary is a question that will be dealt with presently. For the moment, however, assume that they are. It follows that whether A's negligent conduct probably was a factual cause of B's harm could, in every example, be determined by application of what follows the conjunction in condition (c) in rule (4)\*\*. That is, it could be determined by asking this question: but for A's negligent conduct, would the risk of B's harm have been reduced? For the reasons given below, this is a question which *necessarily* receives a positive answer.

Negligent conduct by definition is conduct which poses a risk of harm. In respect of any negligent conduct, it therefore is an analytic truth that, but for the negligent conduct, there would have been a reduced risk of harm.<sup>23</sup> Admittedly, it is not an analytic truth in respect of any negligent conduct and *any* harm, that, but for the negligent conduct, there would have been a reduced risk of *that* harm. Thus, for example, where a person performs conduct which is negligent because it poses a risk of harm to another person's property, and the latter person suffers harm to his body, it is not necessarily true that, but for the former's negligent conduct, there would have been a reduced risk of the harm actually suffered by the latter.

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<sup>23</sup> This point was in fact clearly enunciated by the minority *Lee CC. Lee CC* (note 1 above) at 183C–D.

However, it is different where a person performs conduct which is negligent because it poses a risk of a particular harm to another person, and the latter person suffers that very harm. In that case, it *is* an analytic truth that, but for the negligent conduct, there would have been a reduced risk of the harm actually suffered. To put this more formally: if X's conduct was negligent because it exposed Y to a risk of harm Z, and Y suffered harm Z, then it necessarily is the case that, but for X's negligent conduct, there would have been a reduced risk of Y's suffering harm Z. Moreover, precisely that was the case in every one of the four hypothetical examples. In every one of them, A's conduct was negligent because it exposed B to a risk of the harm which B indeed suffered, namely physical injury or death. Hence, in respect of all four of the examples, it *is* an analytic truth that, but for A's negligent conduct, there would have been a reduced risk of B's harm.

What about condition (b) in rule (4)\*\*? On the assumption that the circumstances are exceptional in all four examples, A's negligent conduct in every one of them probably would be a factual cause of B's harm, if the following question has a positive answer: Is it true that, but for A's conduct, B's harm would probably not have occurred? This question yields a positive answer, at least in the examples of *the driver and the pedestrian* and of *the nurse and the patient*. To determine the answer to this question in respect of the first example, we have to (or at any rate may) eliminate, not A's driving too fast, but simply his driving down the road. To determine the answer to this question in respect of the second example, we have to (or may) eliminate, not A's administering too much of the drug, but simply her administering it at all. Then we must ask: what probably would have happened in that event? The answer, of course, is that in both cases B probably (in fact certainly) would not have suffered the harm he actually did suffer. In respect of both examples, therefore, it is the case that, but for A's conduct, B's harm probably would not have occurred.

Because the third and fourth examples – *the doctor and the patient* and *the engineer and the vintage-car owner* – involve negligent omissions rather than negligent positive acts, it is more difficult to answer the question posed by condition (b) in respect of them. However, one *could* describe the doctor's conduct in the third example as: the failure to administer 140–150 ml of the drug in question to B. And one *could* describe the engineer's conduct in the fourth example as: the failure to design a foundation of 3 metres or more. And one *could* then go on to ask: if we were to eliminate the doctor's conduct, so described, and the engineer's conduct, so described, what probably would have happened in each case? We know the answer: B probably would still have been alive in the first case and B's cars probably would not have been damaged in the second. It would therefore seem that with respect to the third and fourth examples, but for A's conduct, B's harm probably would not have occurred.

So, provided the four examples are exceptional in their circumstances, rule (4)\*\* yields the result that A's negligent conduct probably was a factual cause of B's harm in all of them. It does so, in respect of all four examples, because of condition (c). It does so, *certainly* in respect of the two examples involving negligent positive acts and *possibly* in respect of the two examples involving negligent omissions, because of condition (b). These results have two further

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consequences. First, in all four examples, the condition in rule (3) is satisfied. Secondly, it follows from the first consequence that the condition in rule (1) is satisfied too. It follows that A, in all four examples, could be held delictually liable for B's harm. At the very least, if A could not be held delictually liable to B in any of the four examples, then it would have to be because delictual liability requires the satisfaction of a desideratum other than factual causation.

However, this result does not yet mean that rules (2)\* and (4)\*\* yield contrary liability outcomes to rules (2) and (4) in respect of any of the four hypothetical examples. For this conclusion to follow, it would have to be the case, in addition, that the proviso stated at the beginning of the previous paragraph is met. That is, the circumstances in the four examples would have to be *exceptional*. This condition raises the following question: What, for the purposes of conditions (b) and (c) in rule (4)\*\*, makes circumstances exceptional rather than ordinary? Unfortunately, the attempt to answer this question receives next to no assistance from the *Lee CC* Court. The analysis that follows is thus speculative in nature, and based on a fragment here and a passing remark there.

One possibility is that the circumstances of a case are exceptional if the application of rules (2) and (4) to that case would produce an *injustice*. This possibility is suggested by the following remark in the majority judgment: 'There are cases in which the strict application of the [but-for] rule would result in an injustice, hence a requirement of flexibility.'<sup>24</sup> Elsewhere, the judgment speaks of 'the injustice of an inflexible approach to factual causation'.<sup>25</sup>

These remarks are hardly helpful. The *Lee CC* Court clearly believes that the application of rules (2) and (4) to the facts of the case before them *would* result in an injustice. However, in the absence of some explanation as to the nature of that injustice, no reason exists to think that a similar injustice might not also be occasioned by the application of rules (2) and (4) to the four hypothetical examples.

A second possibility is that the circumstances of a case are exceptional if the application of rules (2) and (4) to the case would have the result that the question of factual causation became 'a mixed question of fact and law', so that '[t]he distinction between factual and legal causation made in our law becomes unnecessarily less clear'.<sup>26</sup> However, this too is unhelpful. The majority judgment's reason for thinking that the application of rules (2) and (4) might have this result is that it necessarily 'involves an evaluation of normative considerations'.<sup>27</sup> Why? Because it requires one to eliminate as much of the conduct as, but no more of the conduct than, *was negligent* (or wrongful); and because the degree to which conduct *was negligent* (or wrongful) is an evaluative or normative question. As is explained in the next section, it is doubtful that this reasoning is valid. But assume for a moment that it is. Clearly, the application of rules (2) and (4) would have this result no matter what case those rules were applied to. Judged by this criterion, therefore, *all* cases are exceptional.

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<sup>24</sup> Ibid at 162D–E.

<sup>25</sup> Ibid at 173C–D.

<sup>26</sup> Ibid at 166F–G. See also at 167E–F.

<sup>27</sup> Ibid at 166E.

A third possibility, also suggested (but no more than that) by the *Lee CC* Court is that the factual predicates of a case are to be treated as exceptional if the harm suffered also impugned a constitutionally-protected interest and the conduct was negligent because it posed a risk of harm to that interest.<sup>28</sup> But this twist also does not work. The specified condition is satisfied by the facts of *Lee*. The harm suffered by the plaintiff was to his bodily integrity: a right protected by s 12 of the Constitution.<sup>29</sup> Moreover, the risk to this interest constitutes the defendant's negligence. The difficulty, however, is that the specified condition is also satisfied in every one of the four hypothetical examples. And it would make no difference if the condition were expanded so as to require also that 'the conduct was wrongful because it breached a constitutionally-grounded duty not to pose a risk of harm to that interest'. The right to bodily integrity in s 12 and the right to property in s 25 (as implicated in the example of *the engineer and the vintage-car owner*) undoubtedly justify the imposition of such duties, not only on the state, but also on private parties. In short, these rights may have direct horizontal application.<sup>30</sup>

A final possibility is suggested by the majority judgment's assertion that 'the wrong done to [the plaintiff] is not treated as a *mere* omission', as well as its assertion that '[t]he wrong [the plaintiff] complains of is, in our law, based on *being detained* in [certain] conditions'.<sup>31</sup> Perhaps the majority, in making these assertions, is drawing a line between two kinds of omissions: those constituted by the failure to protect another against a danger posed by a third party or an external force, on the one hand, and those constituted by the failure to protect another against a danger created by one's own prior (or concurrent) positive conduct, on the other. And perhaps it believes that cases involving omissions of the first kind (call them 'pure' omissions) are ordinary – and thus are to be dealt with by applying condition (a) in rule (4)\*\*, whereas cases involving omissions of the second kind (call them 'impure' omissions) are exceptional – and thus are to be handled by applying conditions (b) and (c).<sup>32</sup>

This possibility holds more promise. It is by no means unusual for negligent conduct to take the form of a pure omission. Indeed, the doctor's failure to administer enough of the drug in the example of *the doctor and the patient* and the engineer's failure to design a foundation of sufficient depth in the example of *the engineer and the vintage-car owner* are both 'pure' omissions. It follows that, if the distinction between ordinary and exceptional circumstances were to be drawn in this manner, a large number of cases would be treated as ordinary rather than exceptional. There also would be a large number of cases in which the question

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<sup>28</sup> Ibid at 167F–168A, 171A–B.

<sup>29</sup> Constitution of the Republic of South Africa, 1996.

<sup>30</sup> The specified condition could be further tightened up by requiring also that 'there was no other way of holding to account the person who negligently posed the risk to the constitutionally-protected interest'. Alternatively, it could be relaxed by requiring simply that 'the negligent conduct breached a constitutionally-grounded duty, owed to the person suffering the harm in question, either to perform or refrain from performing some act'. *Lee CC* provides some support for both propositions. *Lee CC* (note 1 above) at 167F–G, 170E–F, 171A–B. However, neither alternative would serve to distinguish the facts of *Lee* from the four hypothetical examples.

<sup>31</sup> *Lee CC* (note 1 above) at 163G, 167F–G (emphasis added in both quotes).

<sup>32</sup> This possibility was suggested to me by my colleague Helen Scott.



as to whether the negligent conduct in question was a factual cause of the harm would have to be answered by application of condition (a), rather than conditions (b) and (c), in rule (4)\*\*.

However, further consideration of the distinction between pure and impure omissions shows it to be less useful than it may initially seem. In the first place, it is rarely the case that a person is under a legal duty to not negligently harm another by a pure (as opposed to an impure) omission. Most pure omissions, even if negligent, are therefore not wrongful. It follows that, in respect of most pure omissions, the question as to whether the omission was a factual cause of another's harm is of no practical significance: no prospect of delictual liability obtains. In the second place, impure (as opposed to pure) omissions are by no means uncommon. Indeed, the law reports are full of them. One only has to think of the long line of so-called 'municipality cases' to realise that this is so.<sup>33</sup> But it is not only public bodies which commit impure omissions. Private persons do so too. An obvious example would be my failure to keep a proper look-out when driving my car down the high street. In the third place, the basis for the distinction between pure and impure omissions is the connection that the former have, but the latter lack, with positive conduct. There can be no reason, therefore, to treat impure omissions as exceptional but positive conduct as ordinary. To put this another way, there may be a rational basis for dividing the set consisting of positive acts, impure omissions and pure omissions into positive acts, on the one hand, and impure and pure omissions, on the other, or into positive acts and impure omissions, on the one hand, and pure omissions, on the other. But there can be no rational basis for a division between positive acts and pure omissions, on the one hand, and impure omissions, on the other.

The foregoing has the following two implications. First, even if the line between exceptional and ordinary circumstances were to be drawn using the distinction between impure and pure omissions, there would be no reason not to treat as exceptional the two examples involving positive conduct, that is, the example of *the driver and the pedestrian* and the example of *the nurse and the patient*. Secondly, while there might then be reason to treat as ordinary the third and fourth examples, that is, the examples of *the doctor and the patient* and of *the engineer and the vintage-car owner*, there would be no reason to treat as ordinary the omission in the example below:

*The municipality and the driver:* Municipality A digs a large hole at the side of a road under its control. A negligently omits either to put up any sign warning drivers about the hole or to fence it off. B is driving down the road on the opposite side to the hole. In order to avoid a collision with a drunk driver, B swerves to his right, and plunges into the hole. The force of the impact kills B. Had A not dug the hole at all, or had A put up a barrier solid enough to deflect a car going at the speed B was going at, B would still have been alive. However, even if A had put up a warning sign of sufficient size, and had erected a barrier sufficiently

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<sup>33</sup> See, for example, *Halliwel v Johannesburg Municipal Council* 1912 AD 659; *Cape Town Municipality v Clobesity* 1922 AD 4; *De Villiers v Johannesburg Municipality* 1926 AD 401; *Moulang v Port Elizabeth Municipality* 1958 (2) SA 518 (A); *Pretoria City Council v De Jager* 1997 (2) SA 46 (A); *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA). See also *SARE&H v Estate Saunders* 1931 AD 276; *Administrator, Cape v Preston* 1961 (3) SA 562 (A); *Silva's Fishing Corporation v Mawezqa* 1957 (2) SA 256 (A).



substantial, for it to have acted without negligence, B probably would still have swerved as he had, plunged into the hole, and died of the impact.

It follows that, in respect of this example, as in respect of the examples of *the driver and the pedestrian* and *the nurse and the patient*, rule (4)\*\* would permit, or even require, the question whether the negligent conduct was a factual cause of the harm to be answered by applying conditions (b) or (c) rather than condition (a). For reasons that need not be repeated, application of conditions (b) and (c) would yield the result that A's negligent conduct probably was a factual cause of B's harm, and therefore also the further result that A could be delictually liable to B. Those, of course, are exactly the opposite results to the ones that would be yielded by the application of rules (2) and (4) to this example.

### C From the Particular to the General

Of course, not all readers of the cases – and of my analysis – will feel compelled to reach the same conclusions. At least one thoughtful respondent presented the following (possible) objection:

The stated aim of this section is to show that it is of great practical significance whether factual causation is determined by applying rules (2) and (4) or rather by applying rules (2)\* and (4)\*\*. The section was supposed to show this by demonstrating that there are many situations in which different outcomes will be yielded, depending on whether the former or latter pair of rules is applied. So far, the section has proved that the two pairs of rules produce divergent results in respect of the examples of *the driver and the pedestrian*, *the nurse and the patient*, and *the municipality and the driver*, and possibly also in respect of the examples of *the doctor and the patient* and *the engineer and the vintage-car owner*. But it has not yet proved that the two rule-pairs produce divergent results in a large number of cases. For the examples are unusual ones, specially-tailored to make the point.

This objection is, as I have been at pains to show, *not* valid. The five examples have the following three features in common:

- (1) It is true – under some description of A's conduct – that A's conduct was negligent.
- (2) It is true – under some description of A's conduct – that, but for A's conduct, B's harm would not have occurred.
- (3) It is *not* true – under any single description of A's conduct – both that A's conduct was negligent and that, but for A's conduct, B's harm would not have occurred.

In respect of *any* situation possessing these three features, the application of what follows the conjunctions in conditions (b) and (c) in rule (4)\*\* will produce the opposite results to the application of rule (4). So, therefore, may opposite results be produced by the application of rule (4)\*\* and rule (4). That depends only on whether the situation is an exceptional one – which it seems many, even most, situations are. Moreover, the number of situations possessing these three features is not a small one. On the contrary, it is very large indeed.

### III THE RULES THE COMMON LAW DID AND SHOULD CONTAIN

This section has two main aims. The one, which is pursued in subsection A, is to show that, at the time of the *Lee*, the South African common law *did* in fact

contain rules (2) and (4), as the Supreme Court of Appeal had assumed, and *not* rules (2)\* and (4)\*\*, as the majority of the Constitutional Court maintained. The other, which is pursued in subsections B and C, is to show that there is no reason, of either an analytical or moral nature, to think that the South African common law would be improved if it were to replace rules (2) and (4) with (2)\* and (4)\*\*. Indeed, as subsection C shows, the opposite may well be the case. An ancillary concern, which forms the subject matter of subsection D, is to quell possible doubts about the interpretation which this article has placed on the *Lee CC* Court judgment. In particular, the concern is to justify the claim that the majority attributed rules (2)\* and (4)\*\* to the common law.

### A Evidence that the Common Law Contained Rules (2) and (4)

On the face of it, the South African cases provide overwhelming support for the conclusion that, at the time of *Lee*, the common law contained rules (2) and (4) rather than rules (2)\* and (4)\*\*. Rules (2) and (4), to recall are as follows:

- (2) Negligent conduct was a factual cause of harm if and only if, but for the negligent conduct, the harm would not have occurred.
- (4) A plaintiff has proved that a defendant's negligent conduct probably was a factual cause of the plaintiff's harm if and only if the plaintiff has proved that, but for the negligent conduct, the harm probably would not have occurred.

During the four decades leading up to *Lee*, these two rules had been expressly or impliedly endorsed by a number of Appellate Division and Supreme Court of Appeal judgments – often as a part of a judgment's *ratio*. Here are some of those judgments:

*Minister of Police v Skosana*;<sup>34</sup> *Siman & Co (Pty) Ltd v Barclays National Bank*;<sup>35</sup> *International Shipping Co v Bentley*;<sup>36</sup> *Groenewald v Groenewald*;<sup>37</sup> *Mukheiber v Raath*;<sup>38</sup> *Minister of Safety and Security v Van Duivenboden*;<sup>39</sup> *Minister van Veiligheid en Sekuriteit v Geldenbuys*;<sup>40</sup> *Minister of Safety and Security v Hamilton*;<sup>41</sup> *Minister of Safety and Security v Carmichele*;<sup>42</sup> *Minister of Finance v Gore*;<sup>43</sup> *mCubed International (Pty) Ltd v Singer*;<sup>44</sup> *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar*.<sup>45</sup>

On the basis, presumably, of this long list of cases, the *Lee CC* Court acknowledged that ‘the [theory on causation] frequently employed by courts in determining

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<sup>34</sup> *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 35A–37B, 44C–45F.

<sup>35</sup> *Siman* (note 14 above).

<sup>36</sup> *International Shipping Co v Bentley* 1990 (1) SA 680 (A).

<sup>37</sup> *Groenewald v Groenewald* [1998] ZASCA 17, 1998 (2) SA 1106 (SCA).

<sup>38</sup> *Mukheiber v Raath* 1999 (3) SA 1065 (SCA).

<sup>39</sup> *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79, 2002 (6) SA 431 (SCA).

<sup>40</sup> *Minister van Veiligheid en Sekuriteit v Geldenbuys* [2003] ZASCA 90, 2004 (1) SA 515 (SCA).

<sup>41</sup> *Minister of Safety and Security v Hamilton* [2003] ZASCA 98, 2004 (2) SA 216 (SCA).

<sup>42</sup> *Minister of Safety and Security v Carmichele* [2003] ZASCA 117, 2004 (3) SA 305 (SCA).

<sup>43</sup> *Minister of Finance v Gore* [2006] ZASCA 98, 2007 (1) SA 111 (SCA).

<sup>44</sup> *mCubed International (Pty) Ltd v Singer* [2009] ZASCA 6, 2009 (4) SA 471 (SCA).

<sup>45</sup> *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* [2010] ZASCA 85, 2010 (5) SA 499 (SCA).

factual causation is the *conditio sine qua non* theory or but-for test.<sup>46</sup> In other words, the majority conceded that the South African courts had on many occasions applied rules (2) and (4) in determining factual causation. Nevertheless, said the majority, ‘the rule regarding the application of the [but-for] test in positive acts and omission cases is not inflexible’.<sup>47</sup> That is, according to the majority, the South African common law accepted that, at least in some cases, factual causation was *not* to be determined by application of rules (2) and (4).<sup>48</sup> Moreover, the *Lee CC* Court seemed to believe that this more ‘flexible’ stance had been the common-law position for some time. It went on to assert that ‘[t]his flexibility has a long history’.<sup>49</sup>

The majority in *Lee* did not think it necessary to present the long line of cases which, in its view, had adopted a ‘flexible’ approach to rules (2) and (4).<sup>50</sup> That is not altogether surprising: *for these cases do not exist*.

How, then, did the majority seek to justify its contention that the South African common law takes a ‘flexible approach’ to the application of rules (2) and (4)? It did so, in the first place, by citing four *dicta* to the effect that, when applying the ‘but-for’ test to determine whether negligent conduct was a factual cause of harm, a court is to apply ‘common sense’ and cannot always adhere strictly to ‘logic’.<sup>51</sup> However, both the wording of these *dicta* and the context in which they appear make it plain that they were never meant to suggest that common sense may justify the *non*-application of rules (2) and (4), but only that common sense is to be exercised *in* the application of rules (2) and (4). The majority tried to support its claim that the common law takes a ‘flexible approach’ to the application of rules (2) and (4), in the second place, by claiming that the application of these rules was regarded as ‘wrong or inappropriate’ by the majority in *Siman*.<sup>52</sup> But this claim is false, and patently so. Far from regarding the application of rules (2) and (4) as mistaken, the majority judgment in *Siman* applied those rules in textbook fashion.

One of the questions in the *Siman* case was whether the allegedly negligent and wrongful conduct of a manager in the employ of the defendant had factually caused certain loss suffered by the plaintiff. The majority found that it had not. It reached that conclusion by reasoning as follows:

- (1) The manager’s conduct had two aspects to it: (a) a refusal (or decision not) to carry out a certain request by the plaintiff; (b) a statement of his reason for refusing – which statement contained a falsehood.<sup>53</sup>
- (2) The plaintiff alleged that (b) was negligent and wrongful. But it never alleged that (a) was.<sup>54</sup>

<sup>46</sup> *Lee CC* (note 1 above) at 161F–G.

<sup>47</sup> *Ibid* at 162D.

<sup>48</sup> *Ibid* at 162E, 163B–D, 163F–H, 164B–C, 166A–D, 173E–G.

<sup>49</sup> *Ibid* at 163H.

<sup>50</sup> *Ibid* at 163G–H.

<sup>51</sup> *Lee CC* (supra note 1) at 163H–166B. The *dicta* are from *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) at 220B–D; *Siman* (supra note 14) at 917H–918A; *Van Duivenboden* (supra note 39) at 449E–F; *Gore* (supra note 43) at 125E–G.

<sup>52</sup> *Lee CC* (note 1 above) at 166B–C.

<sup>53</sup> *Siman* (note 14 above) at 904H.

<sup>54</sup> *Ibid* at 905B, 907D–E, 908A–B.

- (3) It follows that, to determine whether the manager's allegedly negligent and wrongful conduct factually caused the plaintiff's loss, one has to 'eliminate' only (b), and not also (a), and ask whether the loss probably would still have occurred in that event. To put this in another way: one has to ask whether, but for (b), and not but for (a) or but for (a) and (b), the loss probably would still have occurred.<sup>55</sup>
- (4) The answer to that question is that it probably would have: for (a) probably was a sufficient condition for the plaintiff to have suffered its loss.<sup>56</sup>
- (5) Hence, the manager's allegedly negligent and wrongful conduct was not a factual cause of the plaintiff's loss.<sup>57</sup>

This reasoning perfectly applies rules (2) and (4). It is therefore puzzling that the majority judgment in *Lee CC* could have understood the majority in *Siman* to be rejecting them. The explanation for this confusion on the part of the majority in *Lee CC* seems to be that it misinterpreted the following passage in *Siman*:

[I]t is wrong or inappropriate, in applying the "but for" test to [the manager's] misstatement, to eliminate it and substitute another, different statement to the effect that the Bank was willing to procure the forward cover that afternoon ...<sup>58</sup>

The majority judgment in the *Lee CC* interpreted this passage to mean that 'the majority in *Siman* considered it wrong or inappropriate to apply the substitution exercise of a hypothetical course of lawful conduct for unlawful conduct'.<sup>59</sup> But that is not at all what it means. The majority judgment in *Siman* had no objections to 'apply[ing] the substitution exercise of a hypothetical course of lawful conduct for unlawful conduct'. In fact, the substitution exercise of a hypothetical course of lawful conduct is precisely what it did. What the judgment insisted upon, however, was that the unlawful conduct in question had to be restricted to the misstatement, and could not include the refusal (as the plaintiff had alleged only that the former, and not that the latter, was unlawful). Hence, when substituting lawful conduct for the manager's (allegedly) unlawful conduct, one could not do so in a way which effectively removed the refusal too. But that precisely would have been the effect of substituting, for the manager's (allegedly) unlawful conduct, 'a statement to the effect that the Bank was *willing* to procure the forward cover that afternoon'.<sup>60</sup> As was pointed out by the majority in *Siman*, 'that hypothetical statement would be entirely contrary to or inconsistent with [the manager's] refusal'.<sup>61</sup>

So, neither the four *dicta* emphasising the use of common sense in the application of the 'but-for' test, nor the majority judgment in *Siman*, vindicate the *Lee CC* Court's claim that the South African common law takes a 'flexible approach' to the application of rules (2) and (4). It is possible, however, that the *Lee CC* Court believed its claim to be justified on a third ground: namely the fact that several judgments of the Appellate Division and Supreme Court of Appeal

<sup>55</sup> *Ibid* at 907D–G.

<sup>56</sup> *Ibid* at 905C–908A.

<sup>57</sup> *Ibid* at 907A.

<sup>58</sup> *Ibid* at 907E.

<sup>59</sup> *Lee CC* (note 1 above) at 166B–C.

<sup>60</sup> *Siman* (note 14 above) at 907E.

<sup>61</sup> *Ibid* at 907F.

claimed no more than that rules (2) and (4) are *generally* to be applied in order to determine factual causation. That there are such judgments is shown by the following extracts from *Skosana Siman*, and *International Shipping Co v Bentley*:<sup>62</sup>

[G]enerally speaking (there may be exceptions ...) no act, condition or omission can be regarded as a cause in fact unless it passes [the but-for] test ... .<sup>63</sup>

The enquiry as to factual causation *generally* results in the application of the so-called “but-for” test ... .<sup>64</sup>

The enquiry as to factual causation is *generally* conducted by applying the so-called “but-for” test ... .<sup>65</sup>

However, for several reasons, the fact that these judgments make this claim does not justify the inference, drawn by the majority in *Lee*, that the common law viewed the application of rules (2) and (4) as ‘flexible’. In the first place, the claim that the ‘but-for’ test is *generally* to be applied was, in every judgment in which it appears, *obiter* – for every one of those judgments did in fact go on to apply it. In the second place, there are a couple of judgments which expressly state the opposite. That is, they expressly say that the ‘but-for’ test is *always* to be applied. So, for example, in *Mukeheber*, it was stated that ‘[a]s far as *factual causation* is concerned, this Court follows the *conditio sine qua non* – or “but for” – test’.<sup>66</sup> So, too, in *Carmichele*, the Court wrote that, to the question whether harm was factually caused by negligent conduct, ‘the answer has to be sought by using the “but-for” test’.<sup>67</sup> And, in *Gore*, it was said that ‘[i]n our law the time-honoured way of formulating the question [of factual causation] is in the form of the “but for” test’.<sup>68</sup>

There is yet another reason why the claim that the ‘but-for’ test is *generally* to be applied, as it appears in some Appellate Division and Supreme Court of Appeal judgments, does not justify the inference that the common law viewed the application of rules (2) and (4) as ‘flexible’. The origins of this claim can be traced back to two judgments by Corbett JA (as he then was), namely his majority judgment in *Skosana* and his dissenting judgment in *Siman*.<sup>69</sup> In these two judgments, Corbett JA contemplated only two possible exceptions to the ‘but-for’ test. The one is in cases of so-called ‘concurrent’ or ‘duplicative’ causation. The other is in cases of so-called ‘supervening’ or ‘pre-emptive’ causation. This is clearly shown by the following passage in the second judgment: ‘In a case such as the present one, which is uncomplicated by concurrent or supervening causes emanating from the wrongful conduct of other parties ... the but-for or, *causa*

<sup>62</sup> In addition to these three cases, see also *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at 163G–H; *mCubed International* (note 44 above) at 479F.

<sup>63</sup> *Skosana* (note 34 above) at 35C–D.

<sup>64</sup> *Siman* (note 14 above) at 914H.

<sup>65</sup> *International Shipping Co* (note 36 above) at 700F. This sentence has been quoted, with approval, in subsequent judgments. See *Groenewald* (note 37 above) at 1113D–E; *Van Duivenboden* (note 39 above) at 449A–B; *Hamilton* (note 41 above) at 239I–240A.

<sup>66</sup> *Mukeheber* (note 38 above) at 1077I–1077J.

<sup>67</sup> *Carmichele* (note 42 above) at 327I–328A.

<sup>68</sup> *Gore* (note 43 above).

<sup>69</sup> *Skosana* (note 34 above) and *Simon* (note 14 above).

*sine qua non*, test is, in my opinion, an appropriate one for determining factual causation.<sup>70</sup>

This has the following implication. Even if the claim that rules (2) and (4) are *generally* to be applied could have been attributed to the South African common law, because it had appeared in the *rationes* of certain judgments and had not been directly contradicted by *dicta* in certain others, that would mean no more than that the South African common law had adopted the following qualified versions of those rules:

*Except in cases of concurrent or supervening causation*, negligent conduct was a factual cause of harm if and only if, but for the negligent conduct, the harm would not have occurred.

*Except in cases of concurrent or supervening causation*, a plaintiff has proved that a defendant's negligent conduct probably was a factual cause of the plaintiff's harm if and only if the plaintiff has proved that, but for the negligent conduct, the harm probably would not have occurred.

However, for the common law to have adopted these qualified versions of rules (2) and (4) would still fall way short of its having adopted the 'flexible approach' which is envisaged by the majority judgment in *Lee*. Why? Because the 'flexible approach' envisaged by the majority judgment is meant to allow for the non-application of rules (2) and (4) also in cases not involving either concurrent or supervening causes. If that were not so, the 'flexible approach' would have been of no relevance or use to the majority judgment – for the simple reason that the judgment concerned a case involving neither concurrent causes nor supervening ones.

### **B The Lee CC Court's Reasons for Preferring Rules (2)\* and (4)\*\* to Rules (2) and (4)**

Presumably because of its conviction that rules (2) and (4) had already been rejected by the common law and that rules (2)\* and (4)\*\*, if they had not already been adopted by the common law, were at least consistent with it, the *Lee CC* Court did little to explain why it preferred the latter to the former. However, a few passages in the judgment suggest that the majority believed that analytical and doctrinal reasons justified its preference.

One analytical reason provided by the *Lee CC* Court is that rules (2) and (4) have 'the potential to cause confusion between factual causation and negligence'.<sup>71</sup> But this reason does not survive scrutiny. Consider the following questions: 'Did I buy this because it is beautiful?'; 'Did I marry her because I love her?' Could it really be said that if, in order to answer the first question, I were to ask myself: 'But for its beauty, would I have bought it?', I would be confusing a causal question with an aesthetic one? Or that if, in order to answer the second question, I were to ask myself: 'But for my love for her, would I have married her?', I would be running together an enquiry into a causal relationship with an enquiry into an emotional state? Obviously not. That being so, it is puzzling why the majority in

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<sup>70</sup> *Simon* (note 14 above) at 915A–B.

<sup>71</sup> *Lee CC* (note 1 above) at 162I.



*Lee* should have thought that if, in order to answer the question whether harm was factually caused by negligent conduct, one were to ask oneself the questions: ‘But for the negligent conduct, would the harm have occurred?’ or ‘But for the negligent conduct, would the harm probably have occurred?’, one would be at risk of muddling an enquiry into factual causation with an enquiry into negligence.

Another analytical reason provided by the *Lee CC* Court has already been highlighted in the previous section. Ostensibly, rules (2) and (4) inevitably result in the question of factual causation becoming ‘a mixed question of fact and law’, and therefore also in ‘[t]he distinction between factual and legal causation ... becom[ing] unnecessarily less clear’.<sup>72</sup>

But this line of reasoning is nonsense.

It is true that, in order to determine whether negligent conduct was a factual cause of harm, rules (2) and (4) require one to eliminate as much of the conduct as, but no more of the conduct than, *was negligent*. It also is true that the degree to which conduct *was negligent* is an evaluative question. And it is true that, as it is understood by the South African common law, the enquiry into legal causation is in part evaluative.<sup>73</sup> But the evaluative question raised by the enquiry into negligence is *entirely different* from that raised by the enquiry into legal causation. The former evaluates conduct, to see whether the conduct was unreasonable from an *ex ante* perspective. The latter evaluates a causal connection between conduct (which is, or is assumed to be, unreasonable from an *ex ante* perspective) and harm or loss, to see whether – given the nature of that connection – it is reasonable to impose liability on the person who performed the conduct for that harm or loss. So even if it were the case (which, as explained the previous paragraph, it is not) that rules (2) and (4) confused factual causation and negligence, it would not, as a result, make the distinction between factual causation and legal causation any less clear.

Not only is the second of these analytical reasons invalid, but it may also have been self-contradictory for the majority in *Lee* to invoke it. As was explained in the previous section, in order to apply rule (4)\*\* to a set of facts, one has to decide whether those facts are exceptional or ordinary: otherwise one would not know whether to apply condition (a) or rather conditions (b) and (c). As was also explained in the previous section, the majority in *Lee* seems to have supposed that, in order to make this decision, one may or even should consider what liability outcome would be the most *just*. This truly *would* make the question of factual causation a mixed question of fact and value. It really *would* do what the majority purports to be anxious to avoid, namely to ‘contaminate the factual part of the causation enquiry with ... normative considerations based on social and policy considerations’.<sup>74</sup>

So: the *Lee CC* Court’s analytical reasons for preferring rules (2)\* and (4)\*\* over rules (2) and (4) are invalid, and possibly self-contradictory. It seems, however, that the majority also had a moral reason to prefer rules (2)\* and (4)\*\* over rules

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<sup>72</sup> Ibid at 166F–G.

<sup>73</sup> See, for example, *International Shipping Co* (note 36 above) at 700H–I; *Smit v Abrahams* 1994 (4) SA 1 (A) at 15E–F; *Standard Chartered Bank of Canada v Nedperm Bank* 1994 (4) SA 747 (A) at 764I.

<sup>74</sup> *Lee CC* (note 1 above) at 167E–F.

(2) and (4). To understand that reason one has to go back to the judgment of the Supreme Court of Appeal. In particular, one has to take a closer look at how the Supreme Court of Appeal reached its conclusion that, on the evidence before it, the condition stipulated by rule (4) had not been satisfied. The two critical passages from *Lee SCA* follow:

It is just as likely as not that [the plaintiff] was infected by a prisoner whom the prison authorities could not reasonably have known was contagious.<sup>75</sup>

The difficulty that is faced by [the plaintiff] is that he does not know the source of his infection. Had he known its source, it is possible that he might have established a causal link between his infection and specific negligent conduct on the part of the prison authorities. Instead he has found himself cast back upon systemic omission. But, in the absence of proof that reasonable systemic adequacy would have altogether eliminated the risk of contagion, which would be a hard row to hoe, it cannot be found that but for the systemic omission he probably would not have contracted the disease.<sup>76</sup>

Because it is important that this line of reasoning be properly grasped, it is best to set it out again, but this time in point form:

- (1) The plaintiff would have satisfied the condition stipulated by rule (4) had he been able to prove that, but for a *specific* negligent omission on the part of the defendant, he probably would not have contracted tuberculosis.
- (2) But he had not been able to prove this, as he had not been able to identify the *source* of his infection – that is, he had not been able to identify the fellow prisoner from whom he had contracted the disease.
- (3) Consequently, the plaintiff could only satisfy the condition stipulated by rule (4) by proving that, but for a *systemic* negligent omission, he probably would not have contracted tuberculosis.
- (4) However, to prove this the plaintiff would have had to prove that reasonable systemic adequacy would have *altogether eliminated* the risk of contagion – that is, the plaintiff would have had to prove that, but for the systemic omission on the part of the defendant to provide an adequate system for the management of tuberculosis in the prison in which the plaintiff had been incarcerated, the chances of the plaintiff's contracting tuberculosis would have been nil.
- (5) This the plaintiff could not do.

The majority in *Lee CC* accepted this line of reasoning as valid.<sup>77</sup> So did the *Lee CC* minority.<sup>78</sup> But neither the majority nor the minority liked the further consequence that followed if – as had been done by the Supreme Court of Appeal – rule (4) was combined with rules (1), (2) and (3). This consequence was that not only the plaintiff in *Lee*, but also others similarly situated, would be without a delictual remedy.<sup>79</sup> The minority expressly described this outcome as contrary to ‘con-

<sup>75</sup> *Lee SCA* (note 2 above) at 631D.

<sup>76</sup> *Ibid* at 631E–F.

<sup>77</sup> *Lee CC* (note 1 above) at 163E–F, 170C–D, 171B.

<sup>78</sup> *Ibid* at 177E–179B, 181D–E, 182F–G.

<sup>79</sup> Strictly speaking, the plaintiff and others similarly situated would only be without an Aquilian remedy. As to the question of whether they would have a remedy under an *actio iniuriarum*, neither rules (1), (2), (3) and (4), nor the line of reasoning set out above, is of any relevance.

stitutionally tailored justice'.<sup>80</sup> The majority clearly thought the same.<sup>81</sup> Where the majority and minority judgments differed from one another, however, was in their responses to this conclusion. According to the majority, this conclusion could be avoided merely by recognising that the Supreme Court of Appeal had misconstrued the common law. Contrary to what had been assumed by the *Lee SCA* Court, the common law did not accept rule (4), nor rule (2), but rather rules (2)\* and (4)\*\*. According to the minority, by contrast, the Supreme Court of Appeal had made no mistake about what the common law was.<sup>82</sup> It had erred in assuming that the common law was as it ought to be. It concluded that *Lee* presented the Court with a matter in which the common law required development.<sup>83</sup> In other words, because the outcome produced by rules (1), (2), (3) and (4) was unjust and constitutionally unacceptable in circumstances similar to those presented in *Lee*, one or more of those rules had to be, and indeed should have been, changed.

However, contrary to what was believed not only by the Supreme Court of Appeal, but also by the majority and minority in the Constitutional Court, the line of reasoning set out above is *not* valid. It is *not* valid, because its fourth premise is false. To see why it is false, consider the following two *new* hypotheticals:

*Hospital A and patient B*: In a case between hospital A and patient B, the court finds the following: 100 patients in hospital A, including patient B, contracted disease *a*; the hospital had taken no steps to protect its patients from the disease, and that failure was negligent; had the hospital acted reasonably (ie, without negligence), it would have adopted disease-prevention scheme *aa*; had the hospital adopted disease-prevention scheme *aa*, it would not have prevented every one of the 100 patients who contracted disease *a* from contracting it, but it would have prevented 80 of them from doing so; however, it is impossible to know which of the 100 patients who contracted disease *a* would have been in that 80 and which not.

*Hospital C and patient D*: In a case between hospital C and patient D, the court finds the following: 100 patients in hospital C, including patient D, contracted disease *c*; the hospital had taken no steps to protect its patients from the disease, and that failure was negligent; had the hospital acted reasonably (ie, without negligence), it would have adopted disease-prevention scheme *cc*; had the hospital adopted disease-prevention scheme *cc*, it would not have prevented every one of the 100 patients who contracted disease *c* from contracting it, but it would have prevented 51 of them from doing so; however, it is impossible to know which of the 100 patients who contracted disease *c* would have been in that 51 and which not.

Imagine that, in these two cases, the court were to apply rules (1), (2), (3) and (4). Would it be compelled to conclude that, because it was impossible for factual causation to be established, there was no possibility of delictual liability? No, it would not. In the first case, an 80 per cent probability exists that, had hospital A adopted disease-prevention scheme *aa*, patient B would not have contracted disease *a*. In second case there is a 51 per cent probability that, had hospital C adopted disease-prevention scheme *cc*, patient D would not have contracted dis-

<sup>80</sup> *Lee CC* (note 1 above) at 181D, 180D, 181B, 182A, 182G–H.

<sup>81</sup> *Ibid* at 170D–171B.

<sup>82</sup> *Ibid* at 178C.

<sup>83</sup> *Ibid* at 180D–E, 182A–B, 184D–E.

ease *c*. In both cases, therefore, the condition stipulated by rule (4) is satisfied: but for the negligent conduct of hospital A, the harm to B probably would not have occurred; but for the negligent conduct of hospital C, the harm to D probably would not have occurred. Since the condition stipulated by rule (4) is satisfied, so are the conditions stipulated by rules (3), (2) and (1).

The hypotheticals have in common two features which, for present purposes, deserve emphasis. The first is that there is no suggestion, in either, that the patient – B in the first case, D in the second – knows, or even could know, the *source* of his infection. The second is that, *ex hypothesi*, even if the hospitals had adopted reasonable disease-prevention schemes, they would still not thereby have *altogether eliminated* the risk that the patients would contract the diseases in question. Even if hospital A had adopted scheme *aa*, there would still have been a 20 per cent probability that B would contract disease *a*. Even if hospital C had adopted scheme *cc*, there would have remained a 49 per cent probability that D would contract disease *c*. However, and this is the critical point, neither of these features has any bearing on the question as to whether the condition stipulated by rule (4) is satisfied. Neither feature therefore precludes the conclusion that the negligent failure to provide a reasonable disease-prevention scheme by the hospital in question *was* a factual cause of the patient in question's harm. Nor therefore, does either feature preclude the possibility that the hospitals *could* be delictually liable to the patients.

The implication of this analysis for the outcome in *Lee* should be clear. The fact that the plaintiff in the case was unable to identify the *source* of his infection did *not* entail that, to prove that the defendant's negligent omission probably was a factual cause of his having contracted tuberculosis, the plaintiff had to prove that, but for that omission, the risk of his contracting the disease would have been *altogether eliminated*. As the discussion of the two hypotheticals makes plain, it would have been sufficient for the plaintiff to have provided evidence that, if the defendant had put in place a reasonable tuberculosis-management system, the general incidence of the disease in the prison during the period of his incarceration would have dropped by 51 per cent. That is, it would have been enough for him to have shown that, out of every 100 prisoners who contracted the disease in that time, 51 would not have contracted it. For, in that case, the plaintiff *would* have proved that the defendant's negligent omission probably was a factual cause of his having contracted tuberculosis. He would, therefore, have satisfied the condition in rule (4). He also, as a consequence, would have satisfied the conditions in rules (3), (2) and (1).<sup>84</sup>

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<sup>84</sup> It would appear that, in *Lee*, the plaintiff did not in fact meet this burden. That is, he did not manage to show that, if the defendant had put in place a reasonable tuberculosis-management system, the general incidence of the disease in the prison would have dropped by 51 per cent. As the Supreme Court of Appeal put it: the evidence regarding the defendant's systemic failure was 'scant' (*Lee SCA* (note 2 above) at 630E–F). That finding of scantiness suggests that the Supreme Court of Appeal's conclusion, that the plaintiff had not proved that the defendant's negligence probably caused his harm, was correct, even if not for the reasons expressly stated.

The foregoing analysis eviscerates the *Lee CC* Court's moral objection to rules (2) and (4).<sup>85</sup> As has been explained, the objection rests on two premises. The first is that, as a matter of constitutional justice, the plaintiff in *Lee* and others similarly situated should not be denied a delictual remedy just because: (a) they cannot identify the source of their infection and (b) they cannot prove that, but for the systemic negligent omission on the part of the prison authorities, their risk of infection would have been zero.<sup>86</sup> The second premise is that, as a matter of logic, rule (4) – when combined with rules (1), (2) and (3) – has precisely this effect.<sup>87</sup> It now turns out that the second of these premises is false. Rule (4) does not have this effect because, even where (a) and (b) are the case, the condition in rule (4) can still be satisfied by proving: (c) that, but for the systemic negligent omission on the part of the prison authorities, the general risk of infection would have been reduced by 51 per cent.

### C Other Reasons, For and Against

Application of rules (2) and (4) to the two hypotheticals introduced in the previous subsection has another implication, which also deserves mention, as some may find it worrisome. Consider again the first case, that is, the one involving hospital A and patient B. It is not only patient B who would succeed in establishing factual causation, but every one of the 100 patients who contracted disease *a*. For, in respect of every one of those 100 patients, there is an 80 per cent probability that, had hospital A adopted disease-prevention scheme *aa*, he or she would not have contracted disease *a*. Every one of the 100 patients would thus be able to establish that, on a balance of probabilities, the hospital's negligent failure to adopt disease-prevention scheme *aa* was a factual cause of his harm. Hence, also, every one of the 100 patients would be able to hold the hospital liable.

However, the finding upon which the probability of 80 per cent is based is that, if hospital A had adopted disease-prevention scheme *aa*, it would have prevented 80 of the 100 patients from contracting disease *a*, but would not have prevented 20 of them from contracting it in any event. It is therefore implicit in the finding upon which the 80 per cent probability is based that hospital A's negligent conduct was *not* a factual cause of the harm suffered by 20 out of the 100 patients. It follows that the application of rules (1), (2), (3) and (4) to the first hospital case yields a result that is *over-inclusive*: the hospital's failure to act as it should have factually caused harm to only 80 patients, but the application of the four rules results in the hospital's being held liable to all 100 of them. To put it another way, the result is that 20 of the 100 patients get to recover from the hospital even though they were not in fact harmed by its wrongdoing.

Consider now the second case, the one involving hospital C and patient D. Once again, every one of the 100 patients who contracted the disease will succeed

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<sup>85</sup> The analysis is equally destructive of the minority's moral objection to the *combination* of rules (1), (2), (3) and (4). It also suggests that the minority's invocation of *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32 in support of its conclusions may have been spurious.

<sup>86</sup> *Lee CC* (note 1 above) at 170C–171B.

<sup>87</sup> *Ibid* at 170C–D, 171B.

in holding the hospital liable. In the case of every one of the 100 patients, there is a 51 per cent probability that, but for the hospital's failure to adopt the relevant disease-prevention scheme, he or she would not have contracted the disease in question. However, the basis for this probability is a finding according to which 49 of the 100 patients would have contracted the disease even if the hospital had put the disease-prevention scheme in place. The over-inclusivity in the second case is therefore even greater than that in the first. In the first case, 20 patients got lucky. In the second case, 49 do.

More or less the same outcomes would be true in *Lee*. Imagine that the plaintiff had managed to show that, had the defendant introduced a reasonable tuberculosis-management system, the general incidence of the disease in the prison during the period of his incarceration would have dropped by 51 per cent – but also that he had managed to show no more than that. Assume further that the number of prisoners infected by the disease during the relevant period was 1 000. It would follow, if rules (1), (2), (3) and (4) were applied, that every one of the 1 000 prisoners would have a delictual claim against the defendant. In respect of every one of the 1000, there would be a 51 per cent probability that, but for the defendant's negligence, he would not have contracted the disease. It would also follow, however, that the result yielded by the application of those rules would be *significantly over-inclusive*: 490 prisoners would get damages from the defendant, even though its wrongdoing had in fact made no difference to their contraction of the disease.

Whether the potential over-inclusivity of rules (2) and (4), when combined with rules (1) and (3), should count against them is doubtful. But that is not of present concern. For present purposes, it is enough to point out that the described over-inclusivity could not possibly have served as a reason for the *Lee* majority to object to those rules. For the rules preferred by the *Lee* majority, namely rules (2)\* and (4)\*\*, are clearly far *more over-inclusive* in their potential effect. This is shown by the following variation on the hospital-and-patient hypotheticals. Imagine that, if one of the hospitals had adopted the disease-prevention scheme that reasonableness required, 10 (but no more than that) of the 100 patients who contracted the disease in question would not have done so. And, again, suppose that it is not possible to tell who the 10 would have been. In this scenario, rules (2) and (4), when combined with rules (1) and (3), would yield the result that no one recovers. Rules (2)\* and (4)\*\*\*, by contrast, would yield the result that all do. In other words, the effect of rules (2)\* and (4)\*\* would be that 90 patients out of the 100 get to recover from the hospital, even though the hospital's wrongdoing had no impact on them.

The discussion so far in this and the previous subsection has aimed only to refute certain reasons *for* preferring rules (2)\* and (4)\*\* over rules (2) and (4). But I have yet to offer any argument *against* that preference. Here is one. The argument thus far presented relates solely to rule (2)\*. However, with minor modification, it can be made to apply with equal force to rule (4)\*\*\*. Consider the following three questions, all asked about an atheistic gay man who was recently refused appointment as a Constitutional Court judge:



- (1) 'Was his being *a man* a cause of his being refused appointment as a Constitutional Court judge?'
- (2) 'Was his being *a gay man* a cause of his being refused appointment as a Constitutional Court judge?'
- (3) 'Was his being *an atheistic gay man* a cause of his being refused appointment as a Constitutional Court judge?'

As the word 'cause' is used in ordinary speech and, more importantly perhaps, as the concept of causation is employed in ordinary thought, there is an obvious distinction between these three questions. Moreover, because the three questions are distinct, it is possible that they do not all have the same answer. That is, it is possible for the answers to the three questions to be: 'yes', 'no' and 'no'. And it is possible for the answers to the three questions to be: 'yes', 'yes' and 'no'. Furthermore, these distinctions are not in any way value-dependent. Thus, if a person were to argue that, because that would serve some moral or political goal, a yes-answer to question (1) should be taken to entail yes-answers also to questions (2) and (3), he would be assumed – and rightly so – to have misunderstood the very concept of causation.

The same is true of the following two sets of questions, the first asked about a man who conducted himself violently and the woman who divorced him, the second asked about a man who performed unreasonable-risk-posing conduct and a woman who suffered harm:

- (1) 'Was his *conduct* a cause of her divorcing him?'
  - (2) 'Was his *violent conduct* a cause of her divorcing him?'
- 
- (1) 'Was his *conduct* a cause of her harm?'
  - (2) 'Was his *unreasonable-risk-posing conduct* a cause of her harm?'

As the word 'cause' is used in ordinary speech and as the concept of causation is employed in ordinary thought, the two questions in each set – just like the three questions about the atheistic gay man who was recently refused appointment as a Constitutional Court judge – are distinct questions to which different answers are possible. That is, it is possible that the answers to the questions in the first set are: yes, his conduct was a cause of her divorcing him; but, no, his violent conduct was not a cause of her divorcing him. And it is possible that the answers to the questions in the second set are: yes, his conduct was a cause of her harm; but, no, his unreasonable-risk-posing conduct was not a cause of her harm. Moreover, once again, these distinctions are value-independent.

Now consider again rule (2)\*. According to this rule, there are circumstances in which *negligent conduct* will be a factual cause of harm if, but for *the conduct*, the harm would not have occurred. This result is a function of condition (b) in the rule. Moreover, what those circumstances are depends, it seems, at least in part on *justice*. Negligent conduct is, of course, unreasonable-risk-posing conduct. This proposition can be put another way. As rule (2)\* defines the concept of causation, there are circumstances in which questions (1) and (2) in the second set above are not in fact distinct, and in which a yes-answer to the former does entail a yes-answer to the latter. More than that, what those circumstances are, and thus also whether these two questions are distinct or not, seem to be partly value-

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dependent. Clearly, therefore, the concept of causation in rule (2)\* is at odds with the concept of causation in ordinary thought and speech.

It may be said: ‘All true, but so what? Why should the fact that the concept of causation in rule (2)\* diverges from that used in ordinary language and thought count against the common law’s adoption of rule (2)\*? After all, the common law is free to define its concepts in ways that do not accord with common usage.’ Well, yes, the common law no doubt is free to do so. But it always does so at a cost. And the cost is a moral one. To the extent that the common law defines its concepts in ways that deviate from ordinary usage, it compromises an important moral, political and constitutional value. That value, one held by the Constitutional Court to be at the very heart of our constitutional project on numerous occasions, is mentioned more than once by the *Lee CC* Court: the rule of law.<sup>88</sup> Whatever else the rule of law demands, it demands that the law be clear to those who are subjected to it.<sup>89</sup> And, of course, the more the law defines its concepts in ways deviating from the ordinary understanding of those concepts, the less clear the law will become.

Rules (2)\* and (4)\*\* compromise the rule of law, not only because their concept of causation is eccentric, but also for a second reason, namely that the rules are excessively indeterminate. As was explained in the previous section, in respect of a large number of situations, contrary liability outcomes will be yielded by application of, on the one hand, condition (a) in rule (4)\*\* and, on the other, what follows after the conjunctions in conditions (b) and (c) in that rule. As was also explained, whether (a) is to be applied, or rather (b) or (c), depends on whether the situation is ordinary or exceptional. Although this was not previously discussed, the same holds for conditions (a) and (b) in rule (2)\*. The line between the ordinary and the exceptional is by its nature a vague one. Moreover, as was shown in the previous section, the majority judgment in *Lee* did almost nothing to draw it more sharply.

There may even be a third respect in which rules (2)\* and (4)\*\* compromise the rule of law. As was explained in the previous section, it is possible that the majority in *Lee* meant the line between the exceptional and the ordinary to be drawn by reference to *justice*. In other words, one is to apply condition (a) in rules (2)\* and (4)\*\* unless a more just liability outcome would be achieved by applying condition (b) in rule (2)\*, or conditions (b) or (c) in rule (4)\*\*, in which case one is to apply them. But this trades in rule-based decision making for palm-tree justice. Rather than liability being determined by application of a set of rules designed to serve justice, it is in fact being determined by applying justice (or at any rate, the decision-maker’s understanding thereof) directly. To be clear, it should be noted that the difficulty here is not that rules (2)\* and (4)\*\* require causation to be determined by evaluative reasoning – the same, after all, is true of the determination of negligence, wrongfulness, and legal causation. The difficulty is the nature of the evaluative reasoning which their application requires.

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<sup>88</sup> *Ibid* at 172A–B, 172H–I, 173A–B.

<sup>89</sup> See L. Fuller *The Morality of Law* 1969, (revised ed) 63–65.

Finally, no student of South African constitutional law needs reminding that the rule of law has been recognised as a foundational value both in the text of the South African Constitution and immense body of jurisprudence built up by the Court itself over its first 20 years of existence.<sup>90</sup> More than that, it is in fact inextricably linked with some of the most important values protected by the South African Bill of Rights.<sup>91</sup> The connection is fully explained by the following three quotations from Joseph Raz's article 'The Rule of Law and Its Virtue':

But there are more reasons for valuing the rule of law. We value the ability to choose styles and forms of life, to fix long-term goals and effectively direct one's life towards them. One's ability to do so depends on the existence of stable, secure frameworks for one's life and actions. The law can help to secure such fixed points of reference ... by a policy of self-restraint designed to make the law itself a stable and safe basis for individual planning. This last aspect is the concern of the rule of law.<sup>92</sup>

[O]bservance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future.<sup>93</sup>

The violation of the rule of law can take two forms. It may lead to uncertainty or it may lead to frustrated and disappointed expectations ... The evils of uncertainty are in ... restricting people's ability to plan for their future. The evils of frustrated expectations are greater. Quite apart from the concrete harm they cause they also offend dignity in expressing disrespect for people's autonomy.<sup>94</sup>

#### **D Evidence that the majority in *Lee* really did endorse rules (2)\* and (4)\*\***

The claim that the majority in *Lee* took the South African common law to contain what this article has called 'rule (1)' and 'rule (3)' is unlikely to prove controversial. The same holds for the claim that the majority took the common

<sup>90</sup> See s 1(c) of the Constitution of the Republic of South Africa, 1996. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC); *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 33; *Affordable Medicines Trust & Others v Minister of Health & Another* [2005] ZACC 3, 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC). See, on the meaning of the rule of law in s 1(c), J Fowlkes 'Founding Provisions' in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* (2nd Ed, RS 5, 2014) Chapter 13; F Michelman 'The Rule of Law, Legality and Constitutional Supremacy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Ed, OS, 2006) Chapter 11.

<sup>91</sup> For detailed commentary on the rule of law jurisprudence built up by the Court and its relationship to various substantive provisions in the Bill of Rights, see C Hoexter *Administrative Law in South Africa* (2nd edition, 2012) 121; Michael Bishop and Alistair Price have recently developed legality or rule of law jurisprudence in sophisticated ways that take their cue from Professor Michelman's work. See M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy on the South African Constitution* (2012) 1; Alistair Price 'The Content and Justification of Rationality Review' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy on the South African Constitution* (2012) 37. See, in addition, H Botha 'The Legitimacy of Legal Orders (3): Rethinking the Rule of Law' (2001) 64 *THRHR* 523.

<sup>92</sup> J Raz *The Authority of Law* (1979) 220.

<sup>93</sup> *Ibid* at 221.

<sup>94</sup> *Ibid* at 222.

law *not* to contain what this article has labelled ‘rule (2)’ and ‘rule (4)’. It is possible, however, that someone may object to this article’s assertion that the majority in *Lee* accepted that the South African common law contained, or at any rate was not inconsistent with, ‘rule 2\*’ and ‘rule 4\*\*’, which are set out once more below:

- (2)\* Negligent conduct was a factual cause of harm if and only if:
  - (a) *but for the negligent conduct*, the harm would not have occurred; or
  - (b) the circumstances were exceptional and, *but for the conduct*, the harm would not have occurred.
- (4)\*\* A plaintiff has proved that a defendant’s negligent conduct probably was a factual cause of the plaintiff’s harm if and only if:
  - (a) the plaintiff has proved that, *but for the negligent conduct, the harm probably would not have occurred*; or
  - (b) the circumstances were exceptional and the plaintiff has proved that, *but for the conduct, the harm probably would not have occurred*; or
  - (c) the circumstances were exceptional and the plaintiff has proved that, *but for the negligent conduct, the risk of that harm would have been reduced*.

In response to this possible objection, it should be conceded right away that working out exactly what rules the majority in *Lee* took the common law to accept, if not rules (2) and (4), is no easy task. The judgment nowhere provides a clear formulation of those rules. And its reasoning concerning the content and application of the rules is at times opaque. That said, the evidence for the majority’s endorsement of condition (c) in rule (4)\*\* is strong, as the following passages from the judgment show:<sup>95</sup>

What was required, if the substitution exercise was indeed appropriate to determine factual causation, was to determine hypothetically what the responsible authorities ought to have done to prevent potential TB infection, and to ask whether that conduct had a better chance of preventing infection than the conditions which actually existed during [the defendant’s] incarceration.<sup>96</sup>

It would be enough ... to satisfy probable factual causation where the evidence establishes that the plaintiff found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures.<sup>97</sup>

As I understand the logic of the Supreme Court of Appeal’s approach, it is not possible to make this kind of inference of likely individual infection from the fact that a non-negligent system of general systemic control would generally reduce the risk of contagion. I do not agree.<sup>98</sup>

Admittedly, there is no equally strong evidence for the majority’s endorsement of condition (b), not only in rule (4)\*\*\*, but also in rule (2)\*. However, the judgment clearly does endorse and apply a *second* condition for determining whether negligent conduct was a factual cause of harm, apart from the one featured in

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<sup>95</sup> Indirect evidence for this view can be found in the minority judgment in *Lee*. The dissenting justices understood the majority judgment in the very same way. *Lee CC* (note 1 above) at 182I–183A.

<sup>96</sup> *Ibid* at 168G–H.

<sup>97</sup> *Ibid* at 169C–D.

<sup>98</sup> *Ibid* at 170B–C.

the extracts above.<sup>99</sup> The judgment also makes it clear that this other condition, unlike the one featured in the extracts above, does not require one to pose the counterfactual: ‘but for the negligent conduct of the defendant’. Indeed, the judgment says this repeatedly:<sup>100</sup>

‘[I]t was not necessary for the substitution of reasonable alternative measures to determine factual causation’<sup>101</sup>

‘[O]ur law requires neither the inflexible application of a substitution exercise in the application of the but-for test’.<sup>102</sup>

‘Our existing law does not require ... the use of the substitution of notional, hypothetical lawful conduct for unlawful conduct in the application of the but-for test for factual causation.’<sup>103</sup>

At the same time, the judgment did not suggest that the second condition could be applied without posing any counterfactual at all. But what was that counterfactual, if it was not: ‘but for the negligent conduct of the defendant’? A simple process of subtraction yields, as an alternative: ‘but for *the conduct* of the defendant’. That the majority had this particular counterfactual in mind is borne out by a passage in the judgment in which it is stated that, to determine whether the defendant probably had factually caused the plaintiff to contract tuberculosis by its negligent failure to put in place certain precautions against the disease, it was acceptable simply to ask ‘whether the factual conditions of [the defendant’s] incarceration were a more probable cause of his tuberculosis, than that which would have been the case had he not been incarcerated in those conditions’.<sup>104</sup>

#### IV CONCLUSION

For the reasons discussed in sections II and III of this article, it matters whether the South African common law contains rules (2) and (4), or rather rules (2)\* and (4)\*\*. Consequently, it also matters whether the majority judgment in *Lee* actually changed the common law. It may seem that it must have done so. After all, the judgment’s rejection of rules (2) and (4) and acceptance of rules (2)\* and (4)\*\* were part of its *ratio*. However, as this conclusion briefly explains, there is room for doubt.

As was shown earlier in this article, the majority judgment supposed – erroneously – that the South African common law had already rejected rules (2) and (4). And it supposed – erroneously again – that there was no inconsistency between the South African common law and rules (2)\* and (4)\*\*. Moreover, on the basis of these two erroneous suppositions, the majority judgment concluded

<sup>99</sup> The fact that it is here called the ‘second’ condition must not be taken to mean that it was introduced second. It was not. The majority judgment completed its discussion of the second condition, and commenced its discussion of the first condition with the words ‘Even if one accepts that the substitution approach is better suited to factual causation ...’. *Ibid* at 168C.

<sup>100</sup> In addition to the extracts below, further evidence of the *Lee* CC Court’s view can be found elsewhere. *Ibid* at 162C–E, 166A–C, 166E.

<sup>101</sup> *Ibid* at 163B–C.

<sup>102</sup> *Ibid* at 163F–G.

<sup>103</sup> *Ibid* at 166B–C.

<sup>104</sup> *Ibid* at 168B.

that, in so far as it was rejecting rules (2) and (4) and accepting rules (2)\* and (4)\*\*,<sup>105</sup> it was not developing the South African common law. This raises interesting questions, the answers to which are by no means self-evident:

1. Can the common law be developed by a Constitutional Court judgment which expressly disavows any intention of – and therefore also provides no constitutional reasons for – doing so?
2. Can the common law be changed by a mistaken statement in a Constitutional Court judgment as to what the common law is, as opposed to a statement (true or false) as to what – for constitutional reasons – the common law ought to be?

One might be inclined to answer to each of these questions in the negative. Some support for this conclusion can be found in FC ss 167(3) and 168(3).<sup>106</sup> It is possible, therefore, that rules (2)\* and (4)\*\* will be still-born. The Supreme Court of Appeal and the High Courts may push back (for the very reasons suggested in this article). Were such resistance to occur, the *Lee CC* Court's holding's risk of harm to the common law of causation, may not, in the end, cause that harm.

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<sup>105</sup> Ibid at 173C–174A.

<sup>106</sup> Not all mistakes have law-changing effect. Thus, if the Constitutional Court were to hold that the Constitution requires a particular development of the common law, either to give effect to a right in terms of s 8 or to promote the spirit, purport and objects of the Bill of Rights in terms of s 39(2), as part of the *ratio* of a judgment, that holding would be binding, even if it were mistaken. However, imagine that the Constitutional Court were to reach a decision on the basis that a particular statutory provision required it, but that it had gotten the *wording* (and not merely the interpretation) of the provision wrong. Would we regard this mistake as law-changing? More specifically, would we conclude that the Constitutional Court had in fact struck down the original provision and replaced it with its mistaken version? Would lower courts thereafter be obliged to apply the provision as worded (mistakenly) by the Constitutional Court, or rather the provision as worded in the original statute? The answers, surely, are no, no, and no again – at any rate if the Constitutional Court provided no constitutional reasons for the wording it applied. Of course, what is true in respect of legislation is not necessarily true in respect of the common law. So, for example, a mistaken statement by the Supreme Court of Appeal as to what the common law is, if part of a *ratio*, *would* have precedential force (even though its effect would not necessarily be to overrule the existing common law, but perhaps only to create a conflict within the common law). In the case of mistaken statements by the Constitutional Court, at least at the time *Lee* was decided, as to what the common law is, a further complication was added by FC ss 167(3) and 168(3). These provisions seem to have presupposed a division of expertise, and thus also of authority and labour, between the Constitutional Court and the Supreme Court of Appeal. It is in large part that division which raises the two questions posed above.



# The Problem of the ‘Other’ Language

Stu Woolman\* & Brahm Fleisch\*\*

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There is increasing ignorance of the second language; ignorance brings a feeling of inferiority, and that in turn brings aggressive assertion that it is a good thing to be unilingual and that strength lies in isolationism. Let us save our children from isolationism. The adult, with all the worries of a busy life and the handicap of an unfavourable environment, finds it difficult to acquire a new language and to break down group barriers; to a child it is ‘child’s play’. The world is moving away from the isolationist principle... Fullness of life, educationally or spiritually, is not comparable with the barbed-wire fences of racial politics. With the sun of a new world rising over the grandeur of our limitless veld, the darkness of estranging barriers will yield; it will yield before the creative inspiration of giving ourselves to South Africa – ourselves undivided to her undivided.

TJ Haarhoff<sup>1</sup>

## I INTRODUCTION: INSIDE AND OUT

The above words, written at a very different time, in a vastly different context, contain a contemporary resonance. Haarhoff and Malherbe can be read as maintaining that genuine reconciliation, dignity and equal citizenship can only be achieved in multilingual, radically heterogeneous societies when members of any given group learn the language(s) of the other groups with whom they share political sovereignty. That Haarhoff and Malherbe understood reconciliation, race and the ‘other’ solely in terms of English and Afrikaans give their words a bitterly ironic bite.

That bitter ironic bite has not been lost on present day commentators and members of our highest courts. In *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another*,<sup>2</sup> Deputy Chief Justice Moseneke offers a set of reflections substantially more germane for our time:

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<sup>1</sup> ‘Foreword’ in EG Malherbe *The Bilingual School* (1941).

<sup>2</sup> *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC) (‘Ermelo’). The High Court had heard the matter twice. *Hoërskool Ermelo & Others v Departementshoof van die Mpumalanga Departement van Onderwys en Ander* [2007] ZAGPHC 4 (2 February 2007) (‘Hoërskool Ermelo I’); *Hoërskool Ermelo & Others v Departementshoof van die Mpumalanga Departement van Onderwys en Ander* [2007] ZAGPHC 232 (12 October 2007) (‘Hoërskool Ermelo II’). In *Hoërskool Ermelo I*, Judge Prinsloo, of the Pretoria High Court, suspended a decision of the Mpumalanga Education Department to dissolve the school’s governing body and to replace it with a departmentally appointed committee. The dissolution would have enabled the Mpumalanga Education Department to alter the school’s language policy

The case arises in the context of continuing deep inequality in our educational system, a painful legacy of our apartheid history. The school system in Ermelo illustrates the disparities sharply. The learners-per-class ratios in Ermelo reveal startling disparities which point to a vast difference in resources and of the quality of education... . And therefore, an unequal access to education entrenches historical inequity since it perpetuates socio-economic disadvantage... . [W]hite public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government... . On the other hand, formerly black public schools have been, and by and largely remain, scantily resourced... . That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education... . Of course, vital parts of the ‘patrimony of the whole’ are indigenous languages which, but for the provisions of s 6 of the Constitution, languished in obscurity and underdevelopment with the result that, at high-school level, none of these languages have acquired their legitimate roles as effective media of instruction and vehicles for expressing cultural identity... . And that perhaps is the collateral irony of this case. Learners whose mother tongue is not English, but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now well settled that, especially in the early years of formal teaching, mother-tongue instruction is the foremost and the most effective medium of imparting education... . *However, I need say no more about this irony because the matter does not arise for adjudication.*<sup>3</sup>

and allowed English-speaking pupils to receive instruction in English. On appeal, Transvaal Judge President Ngoepe, along with Judges Seriti and Ranchod, set aside the High Court ruling in *Hoërskool Ermelo I*. The *Hoërskool Ermelo II* Court found that the Afrikaans-medium public school must admit English-speaking pupils. Of particular moment for the *Hoërskool Ermelo II* Court was the undersubscription of Hoërskool Ermelo. Given that Hoërskool Ermelo was operating at only half-capacity, the Full Bench found that it was ‘reasonably practicable’ – as contemplated by Final Constitution (‘FC’) s 29(2) – for the high school to accommodate the 113 Grade 8 learners. The mere fact that all the classrooms were being employed and that the existing curriculum turned on the current availability of classrooms did not constitute sufficient grounds for excluding English learners and maintaining Hoërskool Ermelo as a single-medium Afrikaans-speaking public school. Equity, practicability and historical redress – the three express grounds for assessment of existing language policy in terms of FC s 29(2) – justified the transformation of Hoërskool Ermelo from a single-medium public school into a parallel-medium public school. The Supreme Court of Appeal reversed the judgment of the High Court in *Hoërskool Ermelo III*. *Hoërskool Ermelo & Another v Head, Department of Education, Mpumalanga, & Others* [2009] ZASCA 22, 2009 (3) SA 422 (SCA) (*Hoërskool Ermelo III*). The Supreme Court of Appeal found that the provincial Head of Department (‘HoD’) lacked the requisite statutory authority to alter the SGB’s language policy. It did not contemplate the constitutional implications of the matter. The Constitutional Court upheld some aspects of the SCA’s judgment – namely the rebuke of the HoD with regard to a brace of procedural irregularities that undermined the Department’s attempt to alter Hoërskool Ermelo’s language policies. At the same time, the Constitutional Court indicated that it wanted to hear – after appropriate consideration – how the HoD planned to engage the issue of a parallel instruction school or an English only instruction school in the Ermelo circuit. It also made clear that Hoërskool Ermelo must revisit its language policies in light of the Constitutional Court’s finding that the SGB did not possess the unmitigated authority to determine the school’s language policy and that it was obliged, in terms of FC s 29(2), to take the needs of *all* learners and the broader society into account when it determined the language of instruction.

<sup>3</sup> *Ermelo* (note 2 above) at paras 46–49. Deputy Chief Justice Moseneke’s use of the term ‘indigenous languages’ places in him in hotly contested waters. That would still be true if he had chosen the term ‘African languages’. The Afrikaans language lobbies have convincingly pressed the claim that

Seventy years later, race, language and understanding the 'other' retain their force with respect to the promise of genuinely equal citizenship. Only the players and the petitioners have changed. Most black South Africans have done their share of heavy lifting when it comes to overcoming problems associated with race, language and understanding the 'other'. The same cannot be said for most white South Africans.

This article takes the *Ermelo* Court's concerns seriously. It refracts the issues the judgment raises from the issue they raise through recent policy initiatives designed to influence how we, as School Governing Bodies (SGBs), provincial Heads of Department (HoDs), the Department of Basic Education (DBE), interested academics, lawyers, teachers, parents and learners should decide which official languages should be taught at any given public school.

The new Curriculum and Assessment Policy Statement [CAPS] (First Additional Language Policy) and the draft Incremental Implementation of African Language (IIAL Policy or Second Additional Language Policy (SAP)) have led to a number of disputes over the languages taught in our public schools.<sup>4</sup> The new policies broach at least two new education law questions. First, do parents *alone* have a right to choose the First Additional Language their children will learn?<sup>5</sup> Or does the state, with its responsibilities to the commonweal as a whole, and not just the interests of insular minorities, have an obligation to turn inward-looking communities outward and prepare all learners for engagement with other members of our radically heterogeneous society. Second, assuming that provincial education departments have some say over language policy, what does the Constitution, the South African Schools Act (SASA) and extant case

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Afrikaans is both an African language *and* an indigenous language. If one wished to avoid an outcome in which Afrikaans is understood to be both an African language *and* an indigenous language – for the purposes of an argument that distinguishes between Afrikaans and other African languages *and/or* indigenous languages – one could adopt the locution found in s 6 of the Constitution, 'historically diminished indigenous language', or the equally inelegant 'African languages other than Afrikaans'. For the sake of form, and *not* substance, this article often deploys the term 'African languages' in a manner that assumes the same denotation of the phrase 'African languages other than Afrikaans'.

<sup>4</sup> Department of Basic Education (2012) *National Curriculum Statement: Curriculum and Assessment Policy Statement Foundation Phase R-3, English Home Language*, available at [www.education.gov.za/LinkClick.aspx?fileticket=qARJRpYgmRI%3d&tabid=671&mid=1213](http://www.education.gov.za/LinkClick.aspx?fileticket=qARJRpYgmRI%3d&tabid=671&mid=1213).

<sup>5</sup> South African language law and policy contain quite a number of technical terms that may not be familiar to scholars from other disciplines. For example, the term Language of Learning and Teaching (LOLT) refers to the language medium in which learning and teaching, including assessment, takes place. Home Language (HL) denotes the language that is spoken most frequently in the home by a learner and her or his family. First Additional Language (FAL) indicates a (second) compulsory language subject which learners must study. Dual medium of instruction signifies the use of two mediums (languages) of instruction by a learner in a lesson and the ability of both the teacher and the learner to switch from one medium to the other medium during the same lesson. Parallel-medium instruction, on the other hand, means that tuition takes place in two or more languages of instruction in separate classes at the same grade level within the same school. See Department of Basic Education (2011) *The Status of Language of Learning and Teaching (LOLT) in South African Public Schools: A Quantitative Overview* 3.

law tell us about the strictures placed upon SGB decisions with regard to First Additional Language policies and Incremental Implementation of Additional Language policies in our schools?

These questions are not merely of consequence for those elite public schools which have generally chosen English and Afrikaans as primary mediums of instruction (Home Language and First Additional Language), and a third African language as something akin to an extra-curricular activity. Prior to the introduction of CAPS, most South African schools tended to teach in their learners' home language: that is, in one or two of the nine African languages.<sup>6</sup> A small percentage of disadvantaged schools shifted to English as the 'default' home language and medium of instruction. In the past, most quintile 1–3 schools introduced English towards the end of the Foundation Phase.<sup>7</sup> However, many learners in these schools did not acquire sufficient vocabulary and reading and writing proficiency to cope with the language demands of English-medium teaching in Grade 4.

Aware of this deficit, the Department of Basic Education has shifted the introduction of the first additional language to the first year of schooling. The department reasoned as follows:

Children come to school knowing their home language. They can speak it fluently, and already know several thousand words. Learning to read and write in Grade 1 builds on this foundation of oral language. Therefore, it is easier to learn to read and write in your home language. When children start to learn an additional language in Grade 1, they need to build a strong oral foundation. They need to hear lots of simple, spoken English which they can understand from the context. Listening to the teacher read stories from large illustrated books (Big Books) is a good way of doing this as it also supports children's emergent literacy development. As children's understanding grows, they need plenty of opportunities to speak the language in simple ways. This provides the foundation for learning to read and write in Grades 2 and 3. In South Africa, many children start using their additional language, English, as the Language of Learning and Teaching (LoLT) in Grade 4. This means that they must reach a high level of competence in English by the end

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<sup>6</sup> A growing body of evidence supports the proposition that a significant percentage of learners who begin their school careers learning in one of the nine non-Afrikaans African languages, are in fact not learning in their 'mother tongue'. Extant research reveals two permutations of this phenomenon. First, a significant portion of African language learners are taught an African language that is not spoken at home. Second, even where learners are, broadly speaking, taught in their home language, the African language of instruction often takes the form of a dialect with which they are not entirely familiar. For example, many learners speak isiMpondo rather than isiXhosa, or Sesotho-se-Pretoria rather than Sesotho-se-Lebowa. See National Education Evaluation and Development Unit (2013) *National Report 2012*.

<sup>7</sup> In terms of the s 35 of the South African Schools Act, the Minister must develop a national quintile system, based on objective financial criteria, in which all public schools are assigned to one of five quintiles. Funding for non-personnel expenditure is then allocated to schools in terms of a formula that allows for historical redress. In terms of the quintile system, the poorest schools are in quintile 1, the richest in quintile 5. The current quintile school profile maps closely onto the 'racially' distinct departments of the apartheid era. Not surprisingly, most former white schools – while now racially and ethnically mixed – remain quintile 5 schools. In these schools, the home language of the learners is primarily, though not exclusively, English or Afrikaans.

of Grade 3, and they need to be able to read and write well in English. For these reasons, their progress in literacy must be accelerated in Grades 2 and 3.<sup>8</sup>

So far so good. It would appear an eminently reasonable manner in which to retool the early school environment of most South African learners. To address the specific challenge of ensuring that African language speakers become sufficiently proficient in English, CAPS made a First Additional Language (FAL) mandatory at *all* public schools. In most instances schools would choose English. They would expressly require instruction in English reading, writing and oral skills from Grade 1.

While CAPS may have been an appropriate curriculum policy decision for most quintile 1–3 schools, it has had unanticipated consequences for a growing number of quintile 5 English home language schools. Over the past 15 years, privileged public schools such as Parkview Junior Primary in Johannesburg and Grove Primary School in Cape Town began teaching two additional languages in the Foundation Phase. In Johannesburg, the two additional languages tended to be Afrikaans and isiZulu. Western Cape schools have been inclined to teach Afrikaans and isiXhosa. Tutelage in these additional languages was initially limited to oral instruction. By Grade 3, schools introduced a limited degree of reading and writing tuition.

A new irony arose. As a result of the new FAL requirement, a sizeable number of English home language schools (a) correctly assumed that they were obliged to make a choice as to which two languages required the 'Full Monty' in the Foundation Phase and (b) opted to drop non-Afrikaans African languages and select Afrikaans as the First Additional Language. The choice of Afrikaans as the FAL was, generally, based on a range of practical considerations. First, these schools had Foundation Phase teachers that have been trained to teach Afrikaans as a second language. The African language was often taught by a specialist SGB paid teacher. Second, the adoption of an African language as an FAL – with its additional two to three hours of weekly instruction – would have staffing consequences and increase overall school expenditures. As matters stood, these quintile 5 schools already possessed the existing resources – books and teachers – to provide instruction in Afrikaans as a second language. Few schools enjoyed comparable resources for African language instruction. Most publishers had never produced systematic materials in African languages for the youngest cohort of second language speakers.<sup>9</sup> Third, many parents expressed anxiety regarding the extremely high demands, and disadvantage, which isiZulu and other African language matriculation examinations would place upon their children. Even exceptional African language students often performed poorly. Afrikaans, by contrast, was widely viewed as an 'easy' language that offered the opportunity for excellent matric results. For learners in elite public schools competing for a limited number of places in first rate university programmes, a mediocre FAL mark could

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<sup>8</sup> Ibid.

<sup>9</sup> See H Koornhof *From Conception to Consumption: An Examination of the Intellectual Process of Producing Textbooks for Foundation Phase Education in South Africa*. (Dissertation, University of the Witwatersrand, 2012).



well prejudice their chances. Given the ‘locked-in’ systemic advantages of tuition in English and Afrikaans, the SGBs of many top quintile schools have chosen Afrikaans as the FAL and dropped African language instruction. The irony of which Deputy Chief Justice spoke is no longer collateral.<sup>10</sup> Diminished African language instruction, in a growing cohort of schools, is a direct function of the absence of adequate teaching materials, qualified teachers, additional expenses, ostensibly difficult matric exams and the lock-in of English and Afrikaans.<sup>11</sup>

These disheartening consequences raise a number of thorny legal questions. We know that s 6(1) of SASA grants an SGB the power to determine the language policy of the school subject ‘to the Constitution, this Act [SASA] and any applicable provincial law.’ For some SGBs, this grant of power answers any questions that one might have about an FAL. The learning of *Ermelo* suggests that the answer is not so straightforward. Although the most immediate answers to the statutory and constitutional questions raised in *Ermelo* engaged SGB admissions policies (and their exclusionary consequences), the broader concerns in the matter turned on who (which entity) possessed the ultimate authority to assess the ‘reasonableness’ of these policies. *Ermelo* found that the final say vested with the provincial HoD once it had undertaken appropriate review of (a) the SGB’s decision-making process and (b) the Final Constitution (‘FC’) s 29(2) rights of the learners in question.<sup>12</sup> At the same time, the *Ermelo* Court held that

<sup>10</sup> See MH Smit ‘Collateral Irony’ and ‘Insular Construction’: Justifying Single-Medium Schools, Equal Access and Quality Education’ (2011) 27 *South African Journal on Human Rights* 398. While Professor Smit is correct in noting that single-medium Afrikaans-speaking schools are entitled to contest the ‘reasonableness’ of state action which might require a single-medium school to become a parallel-medium school, his rather blinkered reading of *Ermelo* causes him to miss Deputy Chief Justice Moseneke’s two primary points: (1) that such single-medium schools have benefitted from and continue to benefit from radical differences in political and economic power exercised by teachers, parents, learners and the communities in which those schools are situated; and (2) that *all* state institutions have an obligation to *all* learners to ensure that their basic education enables them to engage on a relatively equal and respectful footing with other learners – who eventually become adult citizens – in other communities in South Africa. Neither we, nor DJC Moseneke, are alone in believing such ends to be within the accepted ambit of public school education. See J Jansen *Knowledge in the Blood: Confronting Race and the Apartheid Past* (2009). As we have argued elsewhere, following Justice Kriegler, individuals and groups who wish to opt out can do so on their own dime and their own time. See S Woolman & B Fleisch (2009) *The Constitution in the Classroom: Law and Education in South Africa, 1994 – 2008*; S Woolman ‘Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, If Not Comprehensive, Vision of the Good’ (2007) 18 *Stellenbosch Law Review* 31; *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [1996] ZACC 4, 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) (Kriegler J) at paras 39–42.

<sup>11</sup> Indeed, it is accurate to say that (a) almost all former Model C schools in Gauteng (including schools with a majority of black learners), and (b) virtually all schools in Gauteng with English, Afrikaner, Indian and Coloured learner majorities have opted for English and Afrikaans language instruction. The LOLT survey is but one public source of this data.

<sup>12</sup> As this article went to press, the Constitutional Court held that the same set of propositions hold true for ‘right to a basic education’ analysis in terms of FC s 29(1). See *Member of the Executive Council for Education in Gauteng Province & Others v Governing Body of the Rivonia Primary School & Others (Equal Education, Centre For Child Law, Suid-Afrikaanse Onderwysersunie, Amici)* [2013] ZACC 34, 2013 (6) SA 582 (CC) at paras 36, 39, 44, 48, 49 (*‘Rivonia’*) (“The Schools Act envisages that public schools are run by a three-tier partnership consisting of: (i) national government; (ii) provincial government; and (iii) the parents of the learners and the members of the community in which the school is located.... At a provincial level, section 3(3) of the Schools Act places an obligation on the relevant provincial MEC



good reasons *had to exist* in order for the provincial HoD to disturb the SGBs' original decisions. We will suggest that a similar, but by no means identical, set of issues are raised by FAL decisions taken by SGBs.

Unfortunately, the thorny legal and empirical questions thrown up by FAL do not end there. In the face of the need to develop non-Afrikaans African languages and to promote the tuition of these languages by English and Afrikaans first language speakers, the Department of Basic Education has recently initiated a new language pilot programme: the Incremental Implementation of African Languages (IIAL) Policy. Having reached the conclusion that many, if not *all*, quintile 5 schools will use the CAPS (FAL) policy to justify opting out of the teaching of African languages, the DBE had planned to remedy the neglect of indigenous languages but requiring *all* schools to add a third language to primary school curricula in 2014. (In the IIAL policy document, this third language is referred to as the Second Additional Language (SAL).) Given the tight time

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to ensure that "there are enough school places so that every child who lives in his or her province can attend school". If the MEC cannot comply with this obligation because of a lack of capacity existing at the commencement of the Schools Act, then, in terms of section 3(4), "he or she must take steps to remedy such lack of capacity as soon as possible and must make an annual report to the Minister on the progress achieved in doing so." Further, section 58C of the Schools Act contemplates that the MEC and the head of department will play a role in ensuring that the admission policy determined by the school governing body complies with the national norms and standards, where prescribed ... while the school governing body determines admission policy, individual decisions on admission are taken only provisionally at school level, by the principal acting under the authority of the head of department. Where the need arises, section 5(9) provides a safety valve, which allows the MEC to consider admission refusals and overturn an admission decision taken at school level... This matter is the latest instalment in a trilogy of school-related cases in this Court which, at their heart, concern the powers of a provincial department in relation to policies adopted by school governing bodies. The question that keeps coming back to this Court is whether a head of department is entitled to override or depart from a policy adopted by a school governing body. Distilling the core of these judgments, the principles that have emerged from the case law can be set out as follows: (a) Where the Schools Act empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other government functionary cannot simply override the policy adopted or act contrary to it. This is so even where the functionary is of the view that the policies offend the Schools Act or the Constitution. But this does not mean that the school governing body's powers are unfettered, that the relevant policy is immune to intervention, or that the policy inflexibly binds other decision-makers in all circumstances. (b) Rather, a functionary may intervene in a school governing body's policy-making role or depart from a school governing body's policy, but only where that functionary is entitled to do so in terms of powers afforded to it by the Schools Act or other relevant legislation. This is an essential element of the rule of law. (c) Where it is necessary for a properly empowered functionary to intervene in a policy-making function of the governing body (or to depart from a school governing body's policy), then the functionary must act reasonably and procedurally fairly. (d) Further, given the partnership model envisaged by the Schools Act, as well as the co-operative governance scheme set out in the Constitution, the relevant functionary and the school governing body are under a duty to engage with each other in good faith on any disputes, including disputes over policies adopted by the governing body. The engagement must be directed towards furthering the interests of learners."(Footnotes omitted.) See also *Head of Department, Department of Education, Free State Province v Welkom High School and Another*; *Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25, 2014 (2) SA 228 (CC); *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC). This line of cases, along with *Juma Masjid*, is consistent with a commitment to shared constitutional interpretation and episodic political participation by citizens articulated in S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013).

constraints, and the possible blowback from teachers, principals, schools, SGBs, learners, parents and provincial DoEs (faced with yet another unfunded mandate), the DBE wisely decided to roll out the IIAL in a select number of schools.

Both the *Ermelo* Court and the national government have made it clear that the nine official non-Afrikaans African languages ought to be treated with same degree of respect accorded English and Afrikaans in our public schools. Fair enough. It's taken long enough. For sound pedagogical reasons, they want to ensure that home language instruction and second language tuition is offered from initial entrance into our primary schools. Moreover, both the *Ermelo* Court and the national government have recognised that schools have more than just an obligation to provide what learners believe to be appropriate and desired instruction in the languages of their choice. Schools also have an obligation to enable learners, through language instruction, to engage members of the South African polity *who do not share their home language* in a respectful and dignified fashion. However, as the state and everyone else is well aware, the national purse, the resources of individual schools, the availability of appropriately trained teachers and the adequacy of existing textbooks across all 11 official languages place cognisable, constitutionally-recognised limits on our capacity to deliver immediately upon this laudable goal.

Thorny questions of capacity do not preclude 'ball-park' responses to some of the more obvious legal questions. When asked where SASA places ultimate authority for FAL and IIAL decisions, *Ermelo* and *Juma Masjid*<sup>13</sup> strongly support the dual proposition that while initial responsibility to determine the appropriate languages of instruction falls within the remit of SGBs and various private parties, that responsibility is shared with the provincial HoD (and even the national DBE.) That shared competence has its limits. Should the provincial HOD believe that a school has not applied its mind to both the internal and external demands for appropriate language instruction, it may, after appropriate consultation and adequate review of a school's language policy, reverse the FAL and IIAL (SAL) decisions of an SGB and intimately related private parties. Some might question this extension of the line of reasoning in *Ermelo* and *Juma Masjid*.<sup>14</sup> However, a clear *prima facie* case can be made that the FAL and IIAL (SAL) policies serve the rights to education, equality, dignity, equal citizenship and the commitment to the development of all 11 official languages. The aim of both policies is to create conditions in which we are truly capable of speaking to one another, as Malcolm X said, 'right down to earth in a language all of us can easily understand'.

But the purpose of such tuition is not the mere creation of a new nation. (Nation-building, and the 'we' so often invoked in its service, is a fraught endeavour in as fragmented, highly stratified and radically heterogeneous, a society as South Africa. Frankly, nation-building exercises in an age of disintegration and disorder ought to be viewed with some suspicion.) The *true aim* of these rather modest policies is the creation of greater trust through enhanced understanding of 'the

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<sup>13</sup> *Governing Body of the Juma Masjid Primary School & Others v Ahmed Asruff Essay N.O. & Others* [2011] ZACC 13, 2011 (8) BCLR 761 (CC).

<sup>14</sup> The recent decision in *Rivonia* would appear to bear out our understanding. See *Rivonia* (note 12 above) at paras 48–49.

other'. Apartheid was – and remains – enormously successful on its own terms. It drove racial, ethnic, cultural and linguistic communities apart. To overcome the depredations of apartheid, and rampant mistrust it sewed between communities, we need to identify means of according one another the dignity and the equal citizenship to which the Constitution tells us we are all entitled.

Underwritten by the language of FC s 7(1) and FC s 7(2),<sup>15</sup> and the gloss placed on these provisions by the Court in *Glenister*, the bottom line is that if all citizens are to enjoy the full benefits afforded us by our Constitution, then we need to secure an education for all learners that provides for a form of multilingualism that extends significantly beyond that to which we are already committed. By limiting instruction to English and Afrikaans, many learners are denied these basic entitlements. Second class linguistic skills invariably re-entrench second class status. The new policies allow us to look *inward* and protect our particular community's linguistic heritage. At the same time it demands that we also look *outward* toward the broader South African landscape so as to appreciate that learning another language, however difficult and uncomfortable, is essential if we are ever to truly understand and respect one another. While such understanding may appear thin to some, it must be, much like our rule of law doctrine, one of our first staging posts in a post-apartheid dispensation<sup>16</sup> possessed of the vibrant civil society to which we collectively aspire. Giant rainbows cannot just be willed into existence.<sup>17</sup>

In Part 2 of this article, we adumbrate the background for the implementation of the First Additional Language [FAL] policy and the Second Additional Language [IIAL] policy and assess the problems that the two policies have thrown up. In Part 3, we assess the two policies in terms of the existing case law – and, in particular, the jurisprudence of FC s 29(1) and FC s 29(2) recently developed in *Ermelo* and *Juma Masjid*. In Part 4, we look at *prima facie* justifications for FAL and IIAL. Both policies enjoy clear support in our basic law: from rights to equality (s 9), dignity (s 10), and linguistic community life (ss 30 and 31) to express principles or commitments to 11 official languages and equal citizenship. In Part 5, we press the claim that South Africa's democratic project is less likely to flourish until we all make some de minimus effort to understand one another as best as we possibly can, in languages we all ought to

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<sup>15</sup> FC s 7(1): 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

<sup>16</sup> See S Woolman 'Humility, Michelman's Method and the Constitutional Court: Rereading *the First Certification Judgment* and Reaffirming a Distinction between Law and Politics' (2013) 25 *Stellenbosch Law Review* 281.

<sup>17</sup> See M Ignatieff 'The New World Disorder' *The New York Review of Books* (September 2014); H Kissinger *World Order* (2014); F Fukuyama *Political Order and Political Decay* (2014).

make some effort to master.<sup>18</sup> We also believe that the Constitution *qua* social

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<sup>18</sup> However, we do not follow Martin Chanock's implicit claim that constitutionalism in South Africa will fail to take root until the Constitution itself and the language of all laws are expressly embedded in all 11 official languages – and the language of everyday life for the majority of South Africans. We do agree with him in so far as he contends that 'only a ... small proportion of the people speak or are literate in the language of constitutions, bill of rights and constitutional discourse.' M Chanock 'Constitutionalism, Democracy and Africa: Constitutionalism Upside Down' 28 *Law in Context* 126, 137 (see also P Andrews, S Ellmann & H Klug (eds) *For Martin Chanock: Essays on Law and Society*). Chanock is correct to assert, in echoing Locke and Huntington, that we would do well to remember that the first step in any constitutional order is to create effective authority: 'The primary problem is not liberty, but the creation of a legitimate public order.' Ibid citing SP Huntington 'Will More Countries Become Democratic?' (1984) 99 *Political Science Quarterly* 193 – 218. Tony Judt, the late social democratic historian makes this point even more powerfully in a recent survey of our global political landscape. See T Judt 'On Intellectuals and Democracy' (March 22, 2012) 59 *The New York Review of Books* 7 ('If you look at the history of nations that maximized the virtues that we associate with democracy, you notice that what came first was constitutionality, rule of law, and the separation of powers. Democracy almost always came last. If by democracy we mean the right of all adults to take part in the choice of government that's going to rule over them, that came very late – in my lifetime – in some countries that we now think of as great democracies. ... Democracy bears the same relationship to a well-ordered liberal society as an excessively free market does to a successful, well regulated capitalism. Mass democracy in an age of mass media means that on the one hand, you can reveal very quickly that Bush stole the 2000 election, but on the other hand, much of the population doesn't care. ... So we pay a price for the massification of our liberalism, and we should understand that. That's not an argument for going back to restricted suffrage. ... But it is an argument for understanding that democracy is not the *only* solution to the problem of unfree societies. ... Democracy has been the best short-term defense against undemocratic alternatives, but it is not a defense against its own genetic shortcomings. The Greeks knew that democracy is *not* likely to fall to the charms of totalitarianism, authoritarianism, or oligarchy; it's much more likely to fall to a corrupted version of itself. Democracies corrode quite fast; they corrode linguistically, or rhetorically, if you like – that's the Orwellian point about language. They corrode because most people don't care very much about them. ... The difficulty of sustaining voluntary interest in the business of choosing the people who will rule over you is well attested. And the reason why we need intellectuals ... is to fill the space that grows between the two parts of democracy: the governed and the governors.') Locke succinctly summarised the need for a social contract between relative equals if a legal order is to have any legitimacy at all: 'So that, however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, where there is no law, there is no freedom: for liberty is, to be free from restraint and violence from others; which cannot be, where there is no law: but freedom is not, as we are told, a liberty for every man to do what he lists: (for who could be free, when every other man's humour might domineer over him?) but a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.' J Locke *Second Treatise on Government: An Essay Concerning the True Original Extent and End of Civil Government* (1690) Chapter 6, Section 57. However, Chanock overeggs the pudding when, retracing Englund's analysis of the history of Malawi's Bill of Rights, he claims that because '[I]n new democracies translation of the foreign language concepts of human rights (and of statutory law generally) is often highly problematic ... [because] democratic and human rights discourses, have "arrived through official languages inherited from colonial rulers ... [and] control of, and choices made in, translation, flow downward from the powerful, not upward through soundings of popular meanings and is informed by the translator's interests.' M Chanock 'Constitutionalism and "the Customary"' (Conference Paper, Early Draft Version at <http://web.up.ac.za/sitefiles/file/47/15338/Constitutionalism%20and%20the%20%E2%80%98Customary%E2%80%99%20Chanock.pdf>). Chanock, following and quoting Mazrui, concludes that 'the continued reliance on imperial languages may itself have become the primary cause of in the failure of democracy and human rights culture to take root in the continent.' M Chanock 'Constitutionalism, Democracy and Africa: Constitutionalism Upside Down' (above) at 137 quoting A Mazrui 'Globalization and Some Linguistic Dimensions in Africa' in P Zeleza and P McConaughay (eds) *Human Rights, the Rule of Law and Development in Africa* (2004) 61. We would be inclined to dismiss

contract requires relationships between relative equals for our new legal order to possess legitimacy, and that some degree of aptitude by all South Africans in languages other than English and Afrikaans is a necessary condition for the equal citizenship that forms the basis for such legitimacy. To that end, we contend that a panoply of rights and other constitutional provisions provide more than *prima facie* support for FAL and IAL. Whilst others might argue that, as currently conceived, the combination of FAL and IAL will fail to meet the requirements of reasonableness and practicability found within the right to education itself, FC s 29(2), and the limitations clause, FC s 36, we show that the vast majority of South African public schools have the capacity to meet the challenges of the new policy regime and in many instances are already doing so.

## II THE POLICY BACKGROUND OF FAL AND IAL AND THEIR PROBLEMS

In order to understand the current 'languages of instruction' policy challenges, one must first appreciate the initial formulations of language policy in the post-apartheid era.<sup>19</sup> The Language in Education Policy (LiEP) – issued in terms of

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Chanock's analysis entirely if he did not offer the following clawback near the end of his analysis: 'This [problem of authority and legitimacy] is not a deficit in African understandings of the public realm that somehow needs to be closed, but it is a deficit in the modes of legal governance.' Chanock 'Constitutionalism and "the Customary"' (above). Even so, Chanock's views – in so far as they purport to describe those views held by the majority of South Africans – possess a patronising cast (even if unintended). Sociologists of law who likewise traffic in such views, ought to take cognisance of Steven Robbins' account of how 'rights discourse' – the ostensible playthings of the elite – have been used in post-apartheid South Africa: by NGOs in land struggles in Namaqualand, by the Khoi-San in creating a new social movement, by AIDs activists (of all colours) in pressing the government to respond to our AIDs pandemic, and by post-AIDS activists in using what they have learned (a) to press for recognition of non-traditional (but ever present) understandings of sexual identity, and (b) more recently, to demand, in concert with various local communities, that all children in this country receive the basic education to which FC s 29(1) entitles them. S Robbins *From Revolution to Rights in South Africa: Social Movements, NGOs and Popular Politics after Apartheid* (2009). Rights discourse and constitutional challenges, as tools employed by various social movements, can have significant disentranching effects with respect to the current holders of both public power and private power. For a similar, but no less radical, point of view that allows law its proper place without diminishing the capacity of the colonised and the historically disadvantaged to use the law to press for more egalitarian political and economic structures, see, eg, RM Unger *Politics: A Work in Constructive Social Theory* (1987); *Social Theory: Its Situation and Its Task (Volume I)*(1987); *False Necessity: Anti-Necessitarian Social Theory in the Service of Social Democracy (Volume II)*(1987); and *Plasticity into Power: Comparative Historical Studies on the Institutional Conditions of Economic and Military Societies (Volume III)*(1987). Language, as Robbins makes clear, is not the primary barrier to the success of historically disadvantaged groups and communities. They understand the Final Constitution well enough. The primary problem with rights challenges is their inherent limitations: the remedies offered by courts only take us so far. See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 215–221.

<sup>19</sup> FC s 29(2) frames all debates about language in the classroom and vouchsafes a right to tuition in the language of a learner's choice (subject to such modifiers as practicability, equity and historical redress.) SASA s 6 grants school governing bodies real but limited scope to develop language policy. The Language in Education Policy (LiEP) – promulgated in terms of the National Education Policy Act (1996) – provides guidelines regarding (a) the relationship between language policies and grade levels and (b) the determination as to whether extant circumstances make the provision of a new language practicable. For the purposes of this article, it is important to note that LiEP expressly recognises that the use of a home language in the classroom enables learners to grasp basic concepts more quickly and to adapt more readily to changes in a school's overall environment.



the National Education Policy Act (NEPA) and the South African Schools Act (SASA) – contain a number of critical provisions.<sup>20</sup> First, section 6 required all learners to learn one of the official languages in Grade 1 and 2, and only requires them to learn a second language from Grade 3 onwards. In terms of section 5 of the Norms and Standards Regarding Language Policy – published in terms of s 6(1) of SASA – school governing bodies (SGBs) must promote multilingualism through the use of one or more languages of instruction, and, where possible, by offering additional languages as fully fledged subjects. Section 6(2) signals that these language norms were subject to the 40/35 rule. The 40/35 rule holds that where fewer than 40 requests for instruction in a language in Grades 1 to 6 exist, and fewer than 35 requests occur in Grades 7 to 12 for such instruction, the onus to provide instruction shifts to the provincial department of education to address these language choice entreaties.<sup>21</sup>

A significant indicator of a shift in the language policy debate occurred in 2011. The Department of Basic Education published a report on the status of language of learning and teaching in South African public schools.<sup>22</sup> Based on annual school survey data from 1998 to 2007, the study tracks changes in learners' home language, their language of learning and teaching, their study of additional languages and the number of single medium and parallel medium schools. The survey revealed significant statistical patterns of disjunction between languages spoken most frequently at home and languages most often used in the classroom. At the same time, it reflected significant shifts toward the use of non-Afrikaans African languages in the classroom. At home, the majority of learners used isiZulu (25%), followed by isiXhosa (20%), Afrikaans (10%) and English (9%). Of greater interest, however, is that during the period covered by the study, the percentage of learners receiving primary Foundation Phase instruction in English declined from 31.7% in 1998 to 21.8% in 2007. At the same time, the percentage of learners receiving primary Foundation Phase instruction in isiZulu increased from 17% to 23.4%. The shift away from English as the initial LOLT to African languages other than Afrikaans has been attributed to the success of the LiEP and the National Curriculum Statement policies of the past decade.

That shift has had *extremely* limited long-term effects.

While a growing percentage of home language African language speakers shifted towards learning in their home language or another African language in the Foundation Phase, almost all of these learners shifted to English as the LOLT in Grade 4. In hard numbers, whereas 80% of learners were receiving instruction in their home language during the Foundation Phase in 2007, only 27% of learners were receiving instruction in their home language by Grade 4. More significantly, the report found that almost *no* learners who had received Foundation Phase instruction in an African language had received instruction

<sup>20</sup> Department of Education (1997) *Language in Education Policy*, at [www.education.gov.za/LinkClick.aspx?fileticket=XpJ7gz4rPT0%3d&tabid=390&mid=1125](http://www.education.gov.za/LinkClick.aspx?fileticket=XpJ7gz4rPT0%3d&tabid=390&mid=1125).

<sup>21</sup> Department of Education (1997) *Norms and Standards Regarding Language Policy* at <http://www.education.gov.za/LinkClick.aspx?fileticket=XpJ7gz4rPT0%3d&tabid=390&mid=1125>.

<sup>22</sup> Department of Basic Education (2011) *The Status of the Language of Learning and Teaching (LOLT) in South African Public Schools*.



in English or Afrikaans as First Additional Languages during their Foundation Phase (less than 5%). In other words, over 75% of learners had received no instruction in the two languages that would become the LOLTs in Grade 4.<sup>23</sup>

In 2012, the Curriculum and Assessment Policy Statement (CAPS) formalised the DBE's novel First Additional Language requirements for tuition in our public schools' Foundation Phase. As we noted above, prior to the introduction of CAPS, schools tended to teach Foundation Phase learners in their home languages. Although most quintile 1–3 schools introduced some English tutelage towards the end of the Foundation Phase, most children in South African schools did not receive sufficient training to meet the reading and writing demands of English-medium teaching initiated in Grade 4.<sup>24</sup> This problem, not surprisingly, has a long legacy. Researchers, such as Carol McDonald, have identified this on-going hindrance to reading and writing proficiency for more than a score years.<sup>25</sup>

Rather than introducing the First Additional Language at the end of the Foundation Phase, the Department of Basic Education decided to shift FAL to the first year of schooling. To ensure that all non-Afrikaans African language speakers become sufficiently proficient in English, CAPS has required that all schools identify a First Additional Language. In most instances, our public schools will choose English. They now teach English in oral and written form from Grade 1. The new curriculum policy explicitly demands that every school offers

<sup>23</sup> The LOLT report also contains a detailed analysis of languages of instruction across all South African public schools from the period 1998 to 2007. It showed substantial growth in English single-medium institutions and parallel-medium English and Afrikaans schools, and small, but significant, decrease in Afrikaans single-medium public schools. *More disturbingly for our purposes*, the data in the LOLTs report reflected no schools operating as parallel-medium institutions with both (1) LOLT in English or Afrikaans and (2) LOLT in an African language.

<sup>24</sup> See S Howie & T Plomp 'System-level Evaluation: Language and Other Background Factors Affecting Mathematics Achievement' (2005) XXXV *Prospects* 179. See also S Howie 'Contextual Factors in the School and Classroom Level Related to Pupils' Performance in Mathematics in South Africa' (2005) 11 *Educational Research and Development* 123; Y Broom 'Reading English in Multilingual South African Primary Schools' (2005) 7 *Bilingual Education and Bilingualism* 506; Z Desai 'Multilingualism in South Africa with Particular Reference to the Role of African Languages in Education' 47 (2001) *International Review of Education* 332; N Taylor & P Vinjevold *Getting Learning Right: Report of the President's Education Initiative Research Project* (1999); F Banda 'The Dilemma of the Mother Tongue: Prospects for Bilingual Education in South Africa' (2000) 13 *Language, Culture and Curriculum* 51; B Brock-Unte & H Holmarscott 'Language Policies and Practices in Tanzania and South Africa: Problems and Challenges' (2004) 24 *International Journal of Educational Development* 67; K Setati & J Adler 'Between Language and Discourses: Language Practices in Primary Multilingual Mathematics Classrooms in South Africa' (2000) 43 *Education Studies in Mathematics* 243; M Setati, J Adler, Y Reed & S Bapoo 'Incomplete Journeys: Codeswitching and Other Language Practice in Mathematics, Science and English Language Classrooms in South Africa' (2002) 16 *Language and Education* 128; N Alexander & M Cherry 'The Centrality of the Language Question in Post-Apartheid South Africa: Revisiting a Perennial Issue' (2012) 9/10 *South African Journal of Science* 108; N Alexander 'The Impact of the Hegemony of English on Access to and Quality of Education with Special Reference to South Africa' (2009) 141 *Language and Poverty* 53; R Sookrajh & J Joshua 'Language Matters in Rural Schools in South Africa: Are Educators Making the Implementation of the Language in Education Policy Work?' (2009) 37 *Language Learning Journal* 323; JW Tollefson and ABM Tsui (eds) *Medium of Instruction Policies: Which Agenda? Whose Agenda?* (2004); R Wildsmith 'The African Languages in South African Education, 2009–2011' (2013) 46 *Language Teaching* 120.

<sup>25</sup> CA Macdonald 'Crossing the Threshold into Standard Three in Black Education: The Consolidated Main Report of the Threshold Project' (1990).

between two and three hours per week of instruction for the First Additional Language in Grades 1 and 2, and between three and four hours per week for the First Additional Language in Grade 3. The primary purpose of this additional FAL instruction is to develop ‘listening and speaking, thinking and reasoning and language structure and use, which are integrated into all 4 languages skills (listening, speaking, reading and writing), reading and phonics, writing and handwriting.’ The CAPS Foundation Phase policy specifies that Grade 1 teachers should impart listening and speaking skills for one and a half hours a week, and spend an additional half an hour on reading and phonics for the First Additional Language. By Grade 3, the policy requires that teachers spend one hour on listening and speaking ability, one hour on reading and phonics proficiency, and half an hour respectively on writing and language use.

However, as several recent court cases and a significant number of unreported SGB disputes have demonstrated, the implementation of FAL has not been as straightforward as expected. The linguistic, racial and class heterogeneity and overall stratification of our society has led to a number of unanticipated conflicts between SGBs, parents, learners and provincial HoDs over early stage multilingual tuition.

In October 2012, a conflict erupted over the language policy at the Hillary Primary School outside Durban. English remains the first language of choice. The demographics of the school speak volumes as to the source of recent clashes over the FAL. Of the school’s 800 learners, 65 per cent are of Indian decent and 25 per cent are isiZulu first language speakers.

Somewhat surprisingly, most parents favoured Afrikaans as the FAL. What irked a sizeable percentage of parents has been the School Governing Body’s decision to discontinue the teaching of isiZulu in Grades 4 to 7.

The SGB chairperson, Mr Alex Ndlovu, acknowledged that the school had failed to invite its learners’ parents to a meeting to discuss and to resolve the matter. Instead, the SGB employed a ‘survey’ to guide the SGB’s decision. The survey might have sufficed had it not included the following sentence: ‘In the event of your child leaving KwaZulu-Natal, Zulu may not be offered in other provinces’. The survey thus contained a heuristic that invariably nudged parents toward Afrikaans and away from isiZulu. Here, for the first time, we begin to see why, despite the FAL’s goals to promote reading and writing in all 11 official languages, the default position remains LOLT instruction in English and Afrikaans.

The debate over FAL at Hillary Primary led to a somewhat unusual polarisation of powerful interest groups. The South African Democratic Teacher Union (SADTU) currently supports those parents who favour instruction in Afrikaans. The Pan South African Language Board, on the other hand, has weighed in on the side of those parents who support instruction in isiZulu. The conflict and the interim results are hardly surprising. Afrikaans remains – for historical and pecuniary reasons – an easier language to offer. The required materials and teachers for Afrikaans instruction already exist. The provision of materials and qualified teachers for adequate instruction in isiZulu remains a more complicated affair. On the other side of the ledger are those learners, parents, government

institutions and experts (such as Jonathan Jansen) who compellingly contend that we, as a nation, will not come to understand 'the other' and genuinely afford 'the other' mutual respect until we, collectively and individually, undertake the undeniably laborious task of learning to speak the language of 'the other'.<sup>26</sup> And let there be no doubt as to the meaning of 'the other'. No fancy continental footwork is necessary to work out that 'the other' means black folk.

Other parties have also waded into these choppy waters. The national deputy chief executive of the Federation of Governing Bodies of SA Schools suggested that the FAL choice has had less to do with the hegemony of English and Afrikaans and more to do with the limited number of teachers available to teach isiZulu as an additional language.<sup>27</sup> Of course, the adoption of such a position, and the re-inscription of English and Afrikaans as the two dominant means of discourse, creates an invidious cycle in which African languages fail to get a foot in the door. The only potentially meaningful response left is for the state to train a sufficiently large number of teachers to provide adequate instruction in African languages and spend the resources necessary to create comparable teaching materials.

A less compelling argument for the ascension of Afrikaans over isiZulu is on offer from Tim Gordon, the national chief executive of the Governing Body Foundation:

Afrikaans is a much easier language to master. There are no clicks, the vocabulary and the structures are part of the same family of languages as English and therefore easier to pick up... [It] has none of the archaic, historical structures of older languages like English, German, Latin [and] Zulu.<sup>28</sup>

This justification doesn't pass the laugh test.

For decades, Latin was taught in former model C schools and private institutions – just as Roman Law lasted in South African law school curricula well into the mid-1990s – simply because it was deemed to be 'necessary' for a classical education. It offered neither intrinsic nor extrinsic benefits. Nor was it used as a means of regular communication amongst any South African linguistic group.

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<sup>26</sup> See, eg, J Jansen *Knowledge in the Blood: Confronting Race and the Apartheid Past* (2009).

<sup>27</sup> N Mtshali 'Language and the Two Schools of Thought' *Independent on Line* (21 May 2013) <http://www.iol.co.za/news/south-africa/gauteng/language-and-the-two-schools-of-thought-1.1519470#.U11-iaEajEY> ('Federation of Governing Bodies of South African Schools chief executive Paul Colditz said that in principle, the federation supported the idea of multilingualism as it improved pupils' abilities to communicate effectively. Implementing the policy, though, does not seem feasible, he said. Colditz said the Curriculum and Assessment Policy Statement ... spells out how the curriculum should be delivered [and] does not make provision for an additional language. "If you introduce a third language, there won't be space for it in the curriculum. There won't be enough teaching time – you'd have to expand the school day or drop one of the existing languages," he said. "The second issue is the availability of teachers. We have almost 25 000 schools in the country with an average of 500 pupils each. For a new subject to be introduced, each school would need at least two new teachers to teach it. That's plus/minus 50 000 new teachers. Where are we going to get them?" Colditz said that in addition to hiring more teachers, the proposed policy has huge cost implications in terms of teacher training, additional school facilities, and teaching and learning materials.')

<sup>28</sup> W Jasson da Costa & L Jansen 'Afrikaans vs Zulu Row Brewing at Schools' *Independent on Line* (12 October 2013) available at <http://www.iol.co.za/news/south-africa/kwazulu-natal/afrikaans-vs-zulu-row-brewing-at-schools-1.1407943#.U12BbaEajEY>.

What language does the Governing Body Foundation believe will address issues of historical redress, equity, mutual respect, self-actualisation and equal citizenship? It's certainly not some new form of Esperanto. Perhaps the Governing Body Foundation would like to 'borrow us' an explanation?<sup>29</sup>

It may well be that Afrikaans is easier to pick up than isiZulu. But that alone hardly qualifies as a justification for teaching Afrikaans over any indigenous, officially recognized African language. The entire point of the FAL policy is to place African languages on a more equal footing with their European counterparts and to enable mother-tongue African language speakers to make the transition into English tuition far more comfortable.

Another set of justifications lurk in the background. Afrikaans is a preferred medium of instruction if the learner's goals turn on the number of distinctions secured during matric exams. As we noted above, a far higher percentage of exam takers secure distinctions in Afrikaans than in any of the other African languages. Afrikaans also remains the second most dominant language in which commerce is conducted. Again, neither of these justifications engages the primary driver of the FAL policy: Equal citizenship and equal respect require equal abilities to communicate effectively across a range of South Africa's official languages.

Another fascinating FAL dispute has recently taken place at the Gonubie Primary School in East London.<sup>30</sup> Parents of this middle class former Model C school were informed of the FAL policy in a meeting on the new curriculum that took place on the 30 January 2012. The School Governing Body decided that Afrikaans would be the school's First Additional Language for the Foundation Phase in 2012 and for the Intermediate Phase in 2013. Upon discovering that there had been no consultation process with the parents or the learners regarding the FAL, a cohort of concerned parents raised the matter (in writing and by telephone) with the school. The SGB undertook to vet the matter at its next meeting (6 February 2012). At the SGB meeting, the principal indicated that the parent's written FAL concern would be reviewed and that the parents would receive a justification for the decision from the SGB's Chairperson. When the SGB failed to respond with alacrity, the parents attempted to persuade the Parent Teachers Association to intervene on their behalf. That effort also proved unsuccessful. On the 27 February 2012, the concerned parents submitted a further letter to the SGB. The SGB refused to meet the concerned parents, but undertook to look into the matter and consider the curriculum implications for 2013. Dissatisfied with these apparently deliberate delays, the concerned parents turned to the Eastern Cape Department of Education. The intervention by the Department failed to

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<sup>29</sup> Actually, one of the best arguments for learning English, prior to the pressure that electronic communication has placed on verbal reading and written skills, was the complexity and richness of the language. The last printed Oxford English Dictionary (OED, 1989) contained well over three million words, and a dizzying array of denotations and connotations for many of its entries. Recent studies, however, have found that average daily word usage by English speakers has shrunk from 2800 words to roughly 800 words. Even the OED has acknowledged 'Thx' – sms shorthand – as a legitimate manner of saying 'thank you'. C'est dommage. Where is the French Academy when you need it?

<sup>30</sup> 'Parents in Race Row over isiXhosa' *City Press* (28 April 2012) at <http://www.citypress.co.za/news/parents-in-race-row-over-isixhosa-20120428>. We are grateful to the Legal Resources Centre for sharing with us documents related to the subsequent litigation.

advance matters. The relationships between parents, learners, the school and the SGB became increasingly polarised around language and race. In August 2012, the concerned parents lodged a complaint with the Equality Court.<sup>31</sup>

Comparable cases have been heard and adjudicated by Equality Courts. Take *Nkosi v Vermark & Durban High School Governing Body*.<sup>32</sup> The matter in *Nkosi* arose when the CEO of PANSALB sought admission for her son to one of Durban's finer public schools and insisted that her high school age son be given high level instruction in isiZulu as well as English. At the time, English was the primary language of instruction. Afrikaans maintained its status as a secondary language of tuition. IsiZulu pulled up the rear. In a fairly nuanced finding of fact and law – consistent with what we know today – Magistrate JV Sanders held that a single student was not entitled to mother-tongue instruction as matter of right, especially where numerous schools teaching primarily in isiZulu existed in the immediate environs. He concluded, however, that the question truly germane to the dispute revolved around the 'additional language'. So while Magistrate Sanders found that primary instruction in English constituted *fair* discrimination, the distinction made between, and the attention paid, respectively, to Afrikaans and to isiZulu constituted *unfair* discrimination on the basis of language. As first additional languages, they both had to be accorded equal respect and resources – rough parity of treatment would meet the learners' constitutional and statutory entitlements.

In response to the dual challenge of inadequate teaching of non-Afrikaans African languages and the well-nigh total neglect of indigenous languages in quintile 5 schools, the Department of Basic Education (DBE) initiated a process designed to rectify these gaps. Only weeks after the University of KwaZulu-Natal announcement that they intended to make isiZulu compulsory for all first-year students,<sup>33</sup> the Department presented its new draft policy to the National Assembly's Education Portfolio Committee.<sup>34</sup> The DBE argues that the new Incremental Implementation of African Languages (IIAL) policy addresses

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<sup>31</sup> Equality Court *Inequality at Gonubie Primary School* (Eastern Cape, 8 August 2012)(Record on file with authors and the Legal Resources Centre.) The LRC's record reveals apparent racist behaviour on the part of the extant SGB and mobilisation by white parents to exclude black parents from becoming members of the SGB in forthcoming elections.) The Equality Court determined that the school would offer tuition in both Afrikaans and isiXhosa and would operate as a parallel-medium school. What's more intriguing than the outcome is that the parties to the litigation appear satisfied that, having been heard, the language issue has been settled and the school can carry on with its normal business. This outcome – greater normative legitimacy and the overcoming of informational deficits – lends credence to the view that meaningful engagement and experimental constitutional structures such as participatory bubbles can overcome zero-sum outcomes associated with binary litigation. See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (note 18 above) at 208–222. The outcome also seems consistent with the Constitutional Court's instructions in *Ermelo*, *Juma Masjid* and *Rivonia* that all parties to litigation over FC s 29 issues must attempt to work out a solution that serves every learner's right to a basic education.

<sup>32</sup> *Nkosi v Vermaak NO & Another* (77/2007) [2008] ZAKZHC 83 (Equality Court, Durban, 30 September 2008).

<sup>33</sup> *Daily News* (17 May 2013).

<sup>34</sup> See Portfolio Committee Presentation and Debate Summary (June 2013) available at <http://www.pmg.org.za/report/20130610-teacher-development-introduction-african-languages-in-schools-departmental-briefings>.



manifold language problems in our public schools – but none more profound than the absence of tuition in home languages and the inability to become proficient readers, writers or interlocutors in either English or their home language. The DBE further contends that should African languages continue to go untaught, a real danger exists that these languages could be further marginalised, and that the culture and heritage associated with these languages would be lost. The IIAL imagines the incremental increase of African languages from the reception year (Grade R) all the way up to Grade 12. The IIAL would, if adopted as national policy, strengthen African language instruction through the provision of workbooks and an advocacy campaign. The more controversial aspect of the proposed policy turns on the requirement that all schools would be compelled to offer a second First Additional Language (SFAL) or more simply, a Second Additional Language. That language would, in all likelihood, have to be one of the nine quintessentially African languages or Afrikaans.

Initially, the inauguration of the IIAL policy was to occur at the onset of the 2014 school year. While the Basic Education Portfolio Committee was generally supportive of the policy, it articulated strongly worded concerns about the very tight time frames required by the DBE for implementation, the inevitable budgetary constraints and the adequacy of current resources in South Africa's teaching and learning environment.<sup>35</sup> In response to the Committee's concerns, and to make this new initiative more palatable to various constituencies, the DBE proposed that the IIAL begin as a pilot programme in 2014. Its efficacy in a representative cohort of schools would help the DBE and Parliament determine whether a full roll-out should occur at a later date.

### III EXISTING STATUTORY AND CONSTITUTIONAL FRAMEWORK FOR FIRST ADDITIONAL LANGUAGES

What, if any, statutory and constitutional issues arise from these disputes over FAL policies? In terms of s 6(1) of SASA, the governing body of a public school may determine the language policy of the school 'subject to the Constitution, this Act and any applicable provincial law'. The ostensible starting point of our analysis – confirmed by the Constitutional Court in *Ermelo* – is that the determination of school language policy first falls to the SGB.

But as a long, and now fairly settled, line of cases makes clear, the starting point is not our terminal point. The body of case law built up over the past 17 years evinces the present government's desire to advance transformation efforts more quickly and to control the exercise of private power in public spaces. At the same time, the decisions acknowledge that certain kinds of associational interests merit continued solicitude even in the face of the state's pursuit of more egalitarian educational arrangements. The cases discussed below engage the state's and

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<sup>35</sup> See Portfolio Committee Discussion of IIAL (June 2013) available at <http://www.pmg.org.za/print/report/20130610-teacher-development-introduction-african-languages-in-schools-departmental-briefings> and <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=37285&tid=110067>.



parent and learner groups' attempts to experiment with public school admissions requirements facially designed to protect linguistic rights.

Stated at a relatively high level of generality, the government has stepped into the breach created by those who assert a constitutional entitlement to single-medium public schools and those who assert the constitutional right to be educated in the official language of one's choice. Not surprisingly, the state has weighed in on the side of black students who wish to receive instruction in English, but who have found themselves excluded from predominantly Afrikaans-speaking public schools. (That English has not suffered the same setbacks (as yet) can be attributed to such contingent facts as: (a) the acknowledged hegemony of English as the language of business (and thus success) and (b) the identification of Afrikaans with the imposition of that language as a medium of instruction in the 1970s, the Soweto school uprisings of 1976, and the consequent use of schools as sites of struggle against the apartheid state.)

*Matukane & Others v Laerskool Potgietersrus* addressed the attempt by the parent of three learners, Mr Matukane, to enroll his three children (13, 13 and 8) at the Laerskool Potgietersrus.<sup>36</sup> Laerskool Potgietersrus was then, and remains still, a state-aided dual-medium primary school. In the High Court, Laerskool Potgietersrus argued that it was unable to accommodate more children and that it had not rejected the children on racial grounds. At the time of the hearing, Laerskool Potgietersrus had 580 Afrikaans students and 89 English students. (The applicants were black.) The Laerskool Potgietersrus expressed concern that if it admitted these children, it would be swamped by English-speaking children who would destroy the Afrikaans ethos of the school.

Our law uniformly prohibits discrimination on grounds of race. Despite the school's assertion that the refusals were based on overcrowding, not race, the facts clearly painted a different picture. No black children had been admitted to the school. There were no black children on the waiting list. Room existed to accommodate more English-speaking children. Little danger existed of the school's Afrikaans culture and ethos being destroyed even if every black applicant were to be accepted. The ratio of Afrikaans-speaking students to English-speaking students would remain 5:1. The *Matukane* court held that it could draw no other inference as to the actual intent of the school's admissions policy other than that it discriminated directly on the basis of race, ethnicity, social origin, culture and language. The *Matukane* court was driven by the facts to conclude that the ostensible promotion of language and culture were operating as surrogates for racial discrimination and that the respondent had failed to discharge its burden of proving the fairness of its admissions policies.

*Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys, en andere* extended the holding in *Matukane* from parallel-medium schools to single-medium schools.<sup>37</sup> However, in *Laerskool Middelburg*, the High Court was clearly more troubled by the conflict between the ostensible right to

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<sup>36</sup> *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T).

<sup>37</sup> 2003 (4) SA 160 (T).

a single-medium school and the right to be educated in the official language of one's choice.

After chiding the state for failing to take cognisance of FC s 29's commitment to linguistic and cultural diversity, the *Laerskool Middelburg* court conceded that the ostensible right to a single-medium public educational institution was subordinate to the indisputable right of every South African to a basic education and the need for linguistic and cultural communities to share education facilities with one another. The *Laerskool Middelburg* court was unwilling to allow the needs of 40 English-speaking – and largely black – learners to be prejudiced by the state's failure to play by the rules and the school's intransigence on the issue of dual-medium education. So while the state's actions had, in fact, been *mala fide*, it was still able to secure a victory for educational equity by getting the proper parties – namely the children – before the court.<sup>38</sup>

At issue in *The Western Cape Minister of Education & Others v The Governing Body of Mikero Primary School* was the refusal of an Afrikaans-medium public school to accede to a request by the Western Cape Education Department ('WCED') to change the language policy of the school so as to convert it into a parallel-medium school.<sup>39</sup> Acting on behalf of 21 learners, the WCED had directed the primary school to offer instruction in their preferred medium: English. The WCED had interpreted the Norms and Standards issued by the National Department of Education under SASA as requiring all primary schools with 40 learners who preferred a particular language of learning to offer instruction in that language. The Supreme Court of Appeal summarily rejected both the WCED's reading of

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<sup>38</sup> FC s 28(2)'s guarantee that the best interests of the child are always of paramount importance was held by the *Laerskool Middelburg* Court to trump the linguistic and cultural rights of the school's Afrikaans-speaking learners. In deciding that the 'minority' students must be accommodated, the *Laerskool Middelburg* court correctly concludes that the right to a single-medium public educational institution is clearly subordinate to the right to a basic education in a similar institution as well as a demonstrable need to share education facilities with other linguistic cultural communities. The *Laerskool Middelburg* court seems to be on far shakier grounds when it suggests that a claim to a single-medium institution is probably best defined as a claim to emotional and social-psychological security. This proposition trivialises the desire to maintain basic, constitutive attachments. The desire to sustain a given culture as it stands – read contemporary Afrikaner culture – is best served by single-medium institutions that reinforce implicitly and expressly the importance of sustaining the integrity of that community. As a result, the *Laerskool Middelburg* Court must be wrong when it claims that the conversion of a single-medium public institution to a parallel-medium school cannot *per se* diminish the force of each ethnic, cultural and linguistic community's claim to a school organised around its language and culture. *Ibid* at 173. That is exactly what the conversion does. Whether such insularity is good for learners in a multicultural society is another matter. We, like Professor Jansen and others, tend to think that it leaves such learners ill prepared to engage the radically heterogeneous world that they will enter upon graduation. See J Jansen *Knowledge in the Blood: Confronting Race and the Apartheid Past* (2009).

<sup>39</sup> *Minister of Education Western Cape & Others v Governing Body, of Mikero Primary School & Another* [2005] ZASCA 66, 2006 (1) SA 1 (SCA) ('Mikero'). See also *Governing Body, Mikero Primary School, & Another v Minister of Education, Western Cape & Others* 2005 (3) SA 504 (C), [2005] 2 All SA 37 (C), 2005 (10) BCLR 973 (C).

the Norms and Standards and the WCED's gloss on FC s 29(2).<sup>40</sup> The decision is notable in two important respects. First, it diminished the ability of the state to determine admissions policy with regard to language. Such power continued to vest in the SGB. Second, while affirming the rights of learners to instruction in a preferred language, it simultaneously confirmed that individual schools retain the privilege of offering instruction in a single medium.

*Mikro* brought temporary relief to SGBs of single-medium Afrikaans-speaking schools.

In *Seodin Primary School v MEC Education, Northern Cape*, the High Court held that the three SGBs of three primarily Afrikaans-speaking public schools could not use language preference to exclude black, primarily English-speaking learners from admittance.<sup>41</sup> Moreover, public pronouncements by the MEC for Education on the need for greater integration in the public schools system could not be interpreted as an *ultra vires* act aimed at the elimination of single-medium (ie, Afrikaans) public schools. *Seodin's* reading of the Final Constitution makes it clear that considerations of equality and transformation would, more often than not, trump considerations of associational freedom within public institutions. Put slightly differently, while the language of the Final Constitution appears to reflect a compromise between the two parties, FC s 29(2) clearly: (1) eliminates any 'right' to single-medium public schools, (2) grants the state ultimate authority over language policy and (3) makes any demand for single-medium schools subject to threshold tests for equity, practicability and historical redress.

The Constitutional Court's decision in *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* puts that last set of propositions beyond dispute. Although *Ermelo* addresses a mixed bag of legal irregularities, opaque statutory provisions and complex constitutional issues, Deputy Chief Justice Moseneke's opinion makes transparent the basis for the Court's lack of patience with Hoërskool Ermelo's intransigence with respect to language policy and to the admission of black students who wish to be taught in English:

[F]ormerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education ... [FC s 29(2)] is made up of

<sup>40</sup> The SCA did so on three primary grounds. First, the Supreme Court of Appeal overturned Bertelsmann J's finding in *Laerskool Middelburg* that the Norms and Standards provided a mechanism for the alteration of the language policy of a public school. At best, the Supreme Court of Appeal said, the Norms and Standards constituted a guideline for members of the department and those parties responsible for the governance of public schools. Second, the Supreme Court of Appeal held that SASA s 6(1) granted neither the national Minister of Education nor the provincial MEC or HoD the authority to determine the 'language policy of a particular school, nor does it authorize him or her to authorize any other person or body to do so'. The power to determine language policy vests solely with the SGB of a given public school and is subject only to the Final Constitution, SASA and any applicable provincial law. Third, the Supreme Court of Appeal rejected the applicant's contention that FC s 29(2) could be 'interpreted to mean that everyone had the right to receive education in the official language of his or her choice at each and every public educational institution where this was reasonably practicable'. *Mikro* (note 39 above) at para 30.

<sup>41</sup> *Seodin Primary School v MEC Education, Northern Cape* 2006 (1) All SA 154 (NC).

two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a language of choice [but] ... is available only when it is 'reasonably practicable' ... . The second part of s 29(2) of the Constitution protects the right to be taught in the language of one's choice. It is an injunction on the State to consider all reasonable educational alternatives which are not limited to, but include, single-medium institutions. In resorting to an option, such as a single or parallel or dual medium of instruction, the State must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices.<sup>42</sup>

Thus does the Deputy Chief Justice shut the window of *unencumbered* autonomy granted SGBs with respect to the determination of language policy (and the discharge of any other function). While the Head of Department of the Mpumalanga Department of Education may not have followed the correct statutory procedures, and had his decision reversed accordingly, a provincial HoD clearly possesses the power to withdraw, for good reason, a function currently discharged by an SGB. In this matter, the Constitutional Court found that the necessary grounds existed for the withdrawal of the SGB's restrictive language policies. It required that the HoD and the SGB revisit the existing language policy of Hoërskool Ermelo in light of the needs of learners in the Ermelo circuit and then report back to the Constitutional Court with regard to their findings.<sup>43</sup>

But what does this new legal regime mean for First Additional Language policies? The Deputy Chief sends an additional message when he writes:

[A]n unequal access to education entrenches historical inequity since it perpetuates socio-economic disadvantage... . [W]hite public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government... . On the other hand, formerly black public schools have been, and by and largely remain, scantily resourced... . That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education... . Learners whose mother tongue is not English, but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now well settled that, especially in the early years of formal teaching, mother-tongue instruction is the foremost and the most effective medium of imparting education.<sup>44</sup>

The Deputy Chief Justice does not pin the possibility of learners flourishing solely upon their ability to secure instruction in English. In this remarkable

<sup>42</sup> *Ermelo* (note 2 above) at paras 46, 49–53.

<sup>43</sup> It did not follow, however, that the withdrawal of an SGB function for good reason permitted the HoD to take over, effectively, the *Hoërskool Ermelo* SGB through the appointment of new personnel in terms of s 25(1) of SASA. As a consequence, the HoD's power to alter the language policy of *Hoërskool Ermelo* – while substantively sound as a matter of law (as interpreted by the Constitutional Court) – was reversed because of procedural irregularities. The *Hoërskool Ermelo* Court did, however, invite the HoD to report back to the Court on the language needs of learners in the Ermelo school district before the 2010 school year. The invitation – found in the Court's remedy – indicated the Court's interest in ensuring that all learners received instruction in their language of choice where it was both reasonably practical to do so and met other critical desiderata of fairness and historical redress. The *Hoërskool Ermelo* SGB was likewise invited to offer a new IAL-like gloss on its language policy in light of the Court's factual finding that the current language policy of the undersubscribed single-medium Afrikaans school was manifestly unconstitutional.

<sup>44</sup> *Ibid* at paras 46–48.

aside, the Deputy Chief Justice questions whether the majority of South African learners are well-served by choosing English as their sole or primary language of instruction. He contends, instead, that they would be better served by pursuing dual-medium instruction that embraces their home language.<sup>45</sup>

In *Ermelo*, the Deputy Chief Justice raises the real possibility that South Africa will experience a second lost generation of learners. This second generation would be lost *not* through the imposition of a language of instruction, but through an understandable misapprehension amongst parents about the language instruction that will serve their children best. In reading 'the market', parents of learners have concluded that the flourishing of their child hinges on a mastery of English. The Deputy Chief Justice calls that reading into question. As we previously noted, in policy circles a consensus is building around the conclusion that the *de facto* default position of English as the primary language of instruction from primary school onwards has not served South African learners well. Educationalists, as well as the Deputy Chief Justice, are rightly alarmed by illiteracy and innumeracy rates for primary school learners that place South Africa 45th out of 46 developing countries.<sup>46</sup>

A third, largely unstated, ground for Moseneke DCJ's remarks exists. He takes subtle aim at first language English speakers. Just as Jonathan Jansen has rightly rounded on first language Afrikaans-speaking communities for leaving their children ill-equipped to live in a multilingual society, so too might the Deputy Chief Justice remarks be read as a critique of white English-speakers' lassitude. Both Jansen and Moseneke call the cossetted privilege of each group into question.

So again: What does all this learning and pointed asides mean for FAL and IIAL policies?

FC s 29(1) (the right to an 'adequate' basic education) and FC s 29(2) (the right to instruction in the languages (plural) of one's choice) – when *read with* rights to dignity (FC s 10 and its commitment to equal worth, equal respect and self-actualisation), to equality (FC s 9 and its express presumption that no person will be unfairly discriminated on the grounds of language or race), to sustain existing linguistic and cultural practices (FC ss 30 and 31), and to recognise, concretely, all 11 official languages (FC s 6) – evince a Constitution that contemplates a nation in which a learner's choice of preferred language or *languages* of teaching and instruction ought not to be too strictly circumscribed by any given SGB's views regarding LOLTs. The right to learn in a First Additional Language is a qualified right in terms of FC s 29(2). FC s 29(2) contains the internal limitation of 'reasonably practicable' and the internal modifiers of 'historical redress' and 'equity'. In other words, as long as one can demonstrate that the provision of an FAL is reasonably practicable and meets the further threshold criteria of historical redress and equity, then a sufficiently large cohort of learners (35/40) ought to be guaranteed an FAL that suits them best.

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<sup>45</sup> Although the Deputy Chief Justice uses the term 'mother tongue', the preferred new nomenclature is 'home language'.

<sup>46</sup> B Fleisch *Primary Education in Crisis* (2010).



We can secure somewhat greater traction as to what would constitute a constitutionally-compliant FAL, if we return to the Language in Education Policy of 1997. This document reflects a first stab at a First Additional Language policy. Despite the provision of only gradual introduction of an FAL in the Foundation Phase, Section 6(2) of the Language in Education Policy reads as follows:

Where there are less than 40 requests [for tuition in a specific language] for Grade 1 to 6, or less than 35 requests in Grade 7 to 12 for instruction in a language in a given grade not already offered by a school in a particular school district, the head of the provincial department will determine how the needs of those learners will be met taking into account: the duty of the state and the right of the learners in terms of the Constitution, including: (a) the need to achieve equity; (b) the need to redress the results of past racially discriminatory laws and practices and (c) practicability and the advice of the governing bodies and principals of the public school concerned.<sup>47</sup>

One may be forgiven for hearing the *Ermelo* Court's reading of FC s 29(2) in this very early iteration of a multilingual national education policy. But does it really have anything particular to say about the rights of parents and learners with regard to FALs or IIALs of choice, in particular, and the limits that might be imposed upon SGBs to determine a school's FAL and IIAL policies?

By inference we can assume that where a primary school has more than 40 requests by learners for instruction in a given language, the school would be obliged to make the necessary arrangements to offer that language. When the number of requests from learners falls below 40, the responsibility shifts to the head of the provincial education department to make provision for instruction in the preferred language of choice for these learners. When the administrative head of the provincial education department must address such a request, he or she would need to consider the need to achieve equity, secure historical redress, and take into account the practicability of offering the desired tuition. While we presume that this rule was designed for the Language of Learning and Teaching (LOLT) policy, it's fair to assume that it would equally apply to FAL and IIAL policy. Thus, when a school receives 40 or more requests to tuition in a given language, its SGB would have to take these requests into consideration – within the well-articulated policy, statutory and constitutional law standards – in determining the school's language policy. If fewer than 40 students request FAL and IIAL instruction, then the Language in Education Policy of 1997 – read in light of *Ermelo* circa 2010 – implies that the responsibility falls upon the provincial department.

But let's tease out the consequences of *Ermelo* (as well as the more recent decisions of *Juma Musjid*, *Welkom* and *Rivonia*) for the FAL and IIAL policies a bit further.

First, the *Ermelo* Court interpreted s 22(1) of the South African Schools Act in a manner that permits an HoD to withdraw any function of an SGB, if s/he has good reason to believe that such powers were not reasonably exercised by the

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<sup>47</sup> Department of Education (1997) *Language in Education Policy*, available at [www.education.gov.za/LinkClick.aspx?fileticket=Xpj7gz4rPT0%3d&tabid=390&mid=1125](http://www.education.gov.za/LinkClick.aspx?fileticket=Xpj7gz4rPT0%3d&tabid=390&mid=1125); Department of Education (1997) *Norms and Standards Regarding Language Policy*, available at <http://www.education.gov.za/LinkClick.aspx?fileticket=Xpj7gz4rPT0%3d&tabid=390&mid=1125>.



SGB. So while an SGB may have the initial obligation and authority to determine a school's language policy, including the FAL (and the IIAL) policy, it must do so in a reasonable manner. The tripartite test established in *Ermelo* suggests that the Court will impose some fairly exacting dictates on SGB language policy (as well as providing guidelines as to how language instruction issues ought to be engaged by parents, learners, an SGB and a provincial HoD).

Second, while *Ermelo* confirms that SASA s 6(2) grants SGBs first call in determining school language policy, the Court observes that '[t]his grant of authority is subject to 'the Constitution, this Act and any applicable provincial law.' SASA s 6(1), which allows the Minister to issue 'norms and standards regarding for language policy in public schools' increases the polycentricity of decisions by making national and provincial government important players at the table of any discussions regarding any given school's language choice. More recently, the Constitutional Court in *Juma Masjid* recognises that state actors, private actors, parent, learners, SGBs and provincial SGBs all have a role to play in ensuring that learners receive an adequate basic education in terms of FC s 29(1).

Third, SASA 6 is not at all unusual with respect to polycentric decision-making. SASA ss 20 and 21 grant SGBs a broad array of powers that are subject to SASA, and thus by extension to the Constitution. These powers cover such privileges as adopting constitutions, mission statements and codes of conduct, to more mundane responsibilities as improving school grounds, purchasing text books and determining extra-mural activities.

Fourth, the *Ermelo* Court provides SGBs with some guidance as to how they should think about core decisions like language policy. According to the *Ermelo* Court, s 22(2) contains a substantive component. Policy in this domain must not just be rational. It must be reasonable.<sup>48</sup> The *Ermelo* Court's reasonableness criteria offer a principled rubric within which parents, learners, SGBs, HoDs, the national government and court might meaningfully engage language policies. The players must consider:

- (1) the nature of the function;
- (2) the purpose for which the function may be revoked in light of the best interest of the actual and potential learners,
- (3) the views of the school governing body;
- (4) the nature of the power sought to be withdrawn;
- (5) the likely impact of the withdrawal on the well-being of the school, its learners, parents and educators; and
- (6) the objective, normative value system made manifest in the Constitution.<sup>49</sup>

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<sup>48</sup> See M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench & the Academy* (2012) 1; A Price 'The Content and Justification of Rationality Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench & the Academy* (2012) 38. See also F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa*, 2nd Edition (2006) Chapter 11.

<sup>49</sup> *Ermelo* (note 2 above) at para 74.

Finally, after a decade of litigation around single-medium public schooling,<sup>50</sup> we now possess, post-*Ermelo*, greater clarity around four unassailable propositions regarding language choice, admissions criteria and other SGB functions: (1) the Constitution clearly bars the refusal of admission on the basis of race; (2) linguistic and associational interests may occasionally trump equity concerns where there is *no* sign of overt discrimination and where learners who wish to receive instruction in another language, say English, isiZulu or Sepedi, have meaningful access to schools that provide an equal and an adequate education to the schools from which the students have been turned away; (3) learners have *no* constitutional right to single-medium public schools under s 29(2) of the Constitution; and (4) SGB responsibilities extend beyond narrow fiduciary duties to the learners in a particular school and embrace the broader needs of a South African society that each and every school ultimately serves.

#### IV HOW RIGHTS TO EQUAL CITIZENSHIP, EQUALITY, DIGNITY, LINGUISTIC COMMUNITY, AND THE USE OF OFFICIAL LANGUAGES SHAPE OUR UNDERSTANDING OF THE FIRST ADDITIONAL LANGUAGE POLICY AND THE INCREMENTAL IMPLEMENTATION OF AFRICAN LANGUAGE POLICY

Even with all the direction that education policy documents and the Constitutional Court in *Ermelo*, *Juma Musjid*, *Welkom* and *Rivonia* have given us with respect to how FAL and IAL decisions ought to be taken by SGBs, parents, learners and HoDs, no easy algorithm can be contrived for determining the language options that ought to be made available at any given school. We live in a radically heterogeneous society still riven by mistrust based on race, culture, religion, creed, gender, language and class. Having said that, the basic law and the jurisprudence of our highest court suggests how decisions regarding First Additional Languages and the Incremental Implementation of African Languages might best be pursued (by all parties concerned).

Section 3 of the Constitution – Citizenship – tells us that all citizens are ‘equally entitled to the rights, privileges and benefits of citizenship.’ Given the long history of colonialism, racism and second class membership – forget citizenship – experienced the majority of South Africans, it comes as little surprise that ‘equal citizenship’ possesses such prominence of place in our Constitution. In terms of any discussion of FAL and IAL policies, FC s 3 reminds us that the majority of South Africa’s citizens will not receive equal benefits from their citizenship unless they possess an

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<sup>50</sup> Of course, the outcome in *Ermelo* doesn’t forestall future litigation over the same set of issues. See S Tshwete *Hundreds to Descend on Fochville Schools – Gauteng Legislature Media Statement* (17 January 2012), available at [www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=275526&sn=Marketingweb+detail&pid=90389](http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=275526&sn=Marketingweb+detail&pid=90389) (‘Gauteng Legislature’s Committee on Petitions will be visiting Fochville Hoërskool and Fochville Losberg Primary School who have in the past turned away Black students from their premises because the medium of instruction at the schools is Afrikaans. Last year, the Gauteng Legislature and Gauteng Department of Education intervened and instructed the schools to open its doors to Black learners and stop denying them their right to be instructed in English. The Fochville Hoërskool took an issue with this [order] and tried to fight this instruction by going to court in December [2011]. The case was dismissed in January.’)

equal voice in the decision-making processes that determine the contours of our democracy. We are not, it should be clear, arguing that being heard and understood in one's home language is a prerequisite for meaningfully equal citizenship (and that any conduct, policy or law that falls short of such an aim is constitutionally infirm.) That's too strong a claim: at least with respect to the intentions behind the FAL and IIAL policies. However, it seems reasonably plausible to argue that FC s 3 buttresses the claim the state ought to promote the use of African/indigenous languages by both home language speakers and non-home language speakers.

It is no surprise that s 6 of the Constitution – Official Languages – comes hot on the heels of FC s 3. It places 11 of the most prominent languages written and spoken in South Africa on (relatively) equal footing. It reverses the century long hegemony of English and Afrikaans – at least in the abstract – and expressly tells us that we must recognise

... the historically diminished use and status of the indigenous languages of our people, [and that] the state must take practical and positive measures to elevate the status and advance the use of these languages.

Both the FAL policy and the IIAL policy contain 'practical and positive measures to elevate the status and advance the use of these [historically diminished, indigenous] languages.' Given the passage of 17 years since the *Language in Education Policy* and the *Norms and Standards Regarding Language Policy* were promulgated, one might argue that both the FAL and IIAL policies are long overdue and that FC s 6 places a thumb on the scale of any debate about which languages ought to be treated as first additional languages.

Section 9 of the Constitution – Equality – tells us that we may not discriminate on the basis of language, in the public realm or the private domain. To the extent that learners do not receive an adequate basic education because their mother tongue is neither English nor Afrikaans, a *prima facie* case might, under the right circumstances, be made out that they have been subject to unfair discrimination in terms of FC s 9(3) and s 9(5).<sup>51</sup> FAL and IIAL asks us to take seriously the burden that second language English or Afrikaans speakers carry, and places schools on notice that they may have to rebut the presumption – in terms of FC s 9(5) – that unfair discrimination has taken place if an African language is not chosen as a first additional language.

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<sup>51</sup> FC s 9. Equality (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 10 of the Constitution – Dignity – tells us that we must, at a minimum, treat every individual as an end in herself, and never solely as a means.<sup>52</sup> However, if our linguistic exchanges invariably place English and Afrikaans speakers in a dominant position, and language becomes a mere tool for ordering people to undertake one task or another, then a speaker of an indigenous language will struggle for recognition as an end in herself. Dignity, moreover, demands equal concern and respect, and the capacity for both self-governance and self-actualisation. Once again, unless an individual possesses the capacity to make herself fully understood, she will likely find mutual respect,<sup>53</sup> self-governance<sup>54</sup> and self-actualisation<sup>55</sup> beyond her reach.<sup>56</sup> Human beings are creatures ‘bathed in words’. Or, put somewhat differently, we can never be fully human without the capacity for, and capabilities associated with, sophisticated use of language

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<sup>52</sup> Justice Ackermann, the Court’s original exponent of dignity, grounds the first definition of dignity in two sources: the history of apartheid and the work of Immanuel Kant: ‘[I]t is permissible and indeed necessary to look at the ills of the past which [the Constitution] seeks to rectify and in this way try to establish what equality and dignity mean ... What lay at the heart of the apartheid pathology was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination ... Who you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form intimate personal relationship was determined for you by the state ... That state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself through one’s own powers and to act freely as a moral agent pursuant to such understanding of self-definition. Blacks were treated as means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.’ LWH Ackermann ‘Equality under the 1996 South African Constitution’ in R Wolfrom (ed) *Gleichheit und Nichtdiskriminierung im Nationalen und Internationalen Menschenrechtsschutz* (2003) 547. See also *Danwood & Another v Minister of Home Affairs & Others* [2000] ZACC 8, 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 35 (O’Regan J writes: ‘The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.’)

<sup>53</sup> *President of the Republic of South Africa v Hugo* [1997] ZACC 4, 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) (‘Hugo’) at para 41 (‘[T]he purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded *equal respect* regardless of their membership in particular groups.’)

<sup>54</sup> See *August v Electoral Commission* [1999] ZACC 3, 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17 (‘The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of *dignity* and of personhood. Quite literally, it says that everybody counts.’)

<sup>55</sup> The majority in *Ferreira v Levin* rejected Justice Ackermann’s view that IC s 11(1) and FC s 12(1) contain a robust, self-standing freedom right. *Ferreira v Levin* [1995] ZACC 13, 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 170–185. The Constitutional Court accepted, subsequently, Justice Ackermann’s thesis that dignity is meant to secure the space for self-actualisation (autonomy). See, eg, *Hugo* (note 53 above) at para 41 (‘[D]ignity is at the heart of individual rights in a free and democratic society.’) See also N Haysom ‘Dignity’ in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 131–132.

<sup>56</sup> See S Woolman ‘The Architecture of Dignity’ in D Cornell, S Woolman, M Bishop, J Brickhill, S Fuller & D Dunbar (eds) *The Dignity Jurisprudence of the Constitutional Court of South Africa* (2013); S Woolman ‘Dignity’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 36.

and symbolic systems.<sup>57</sup> If we withhold this capability from a majority of our fellow South Africans, then the likelihood is that we will turn them into means, not ends, and significantly diminish their capacity for self-actualisation.<sup>58</sup> The argument from 'Dignity' may have greater force in terms of the requirement that we accord others mutual respect when we undertake the effort to speak the home languages of others. This argument buttresses the rather limited aims of the FAL policy and the IIAL policy.

FC ss 30 and 31 – 'Language and Culture' and 'Cultural, Religious and Linguistic Communities' – expressly protect the institutions that sustain our many languages.<sup>59</sup> Moreover, both sections recognise that we draw a significant degree of meaning in our lives from the ability to connect with speakers of our home language (and the rich culture often affiliated with that language).<sup>60</sup> If we

<sup>57</sup> Matthew Elton, in tying our ability to flourish to these specific capabilities, contends: 'Could it be through language, the constant trading of ideas, that we come to be creatures that see the commitment to the existence of genuine responsibility, of genuine praise and blame, genuine right and wrong, as a condition without which we would not be fully human.' M Elton *Daniel Dennett: Reconciling Science and Our Self-Conception* (2003) 265.

<sup>58</sup> See A Maslow 'A Theory of Human Motivation' (1943) 50 (4) *Psychological Review* 370. Nussbaum's core of capabilities, like Maslow's hierarchy of needs, looks very much like a ladder that climbs toward greater self-actualisation, even as it emphasises the importance of Gilligan-like relationships necessary for flourishing. M Nussbaum *Women and Human Development: The Capabilities Approach* (2000) 78–80; M Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (2006) 76–78; M Nussbaum 'Constitutions and Capabilities: "Perception" against Lofty Formalism' (2007) 121 *Harvard Law Review* 4. See also C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982).

<sup>59</sup> See S Woolman 'Community Rights: Religion, Language and Culture' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007) Chapter 58.

<sup>60</sup> The Constitutional Court in *Fourie* offers us useful guidance as to how the state ought to engage the religious, cultural and linguistic communities that make up the state and how those communities ought to engage one another. *Minister of Home Affairs v Fourie (Doctors For Life International & Others, Amici Curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs* [2005] ZACC 20, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC). In *Fourie*, the Constitutional Court found that while the state could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly-sanctioned marriages, the Final Constitution had nothing immediate to say about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership. The *Fourie* Court wrote:

[The amici's] arguments ... underline the fact that in the open and democratic society contemplated by the Constitution ... the religious beliefs held by the great majority of South Africans must be taken seriously. For many believers, their relationship with God or creation is central to all their activities. ... It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. ... For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation... . Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes... . In the open and democratic society contemplated by the Constitution there must be mutually respectful coexistence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom ... . The



diminish the ability of our fellow citizens to speak in their home language, then we deny them the ability to connect with others and to fully flourish as human beings.

These aforementioned rights – read together with rights to freedom of expression<sup>61</sup> and freedom of association<sup>62</sup> and the right to learn in a language of one's choice<sup>63</sup> – provide a powerful foundation for FAL and IIAL policies designed to bolster the use of indigenous African languages in South African schools, in particular, and in South African society, in general. But despite their legal and rhetorical force, the rights do not answer two extremely important questions. Can they be used to compel state and private actors to make good on the promise of FAL and IIAL policies? If so, how?

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objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all. *Fourie* (above) at paras 90–98. The *Fourie* Court commits itself to five propositions that are fundamental for flourishing, generally, and for religious, cultural and linguistic community rights, in particular. First, religious, cultural and linguistic communities are a critical source of meaning for the majority of South Africans. Second, religious, cultural and linguistic communities create institutions that support the material, intellectual, ethical and spiritual well-being of many South Africans. Third, religious, cultural and linguistic associations, as part of civil society, play an essential role in mediating the relationship between the state and its citizens. Fourth, while religious, cultural and linguistic associations are entitled to articulate – and make manifest through action – their 'intensely held world views', they may not do so in a manner that unfairly discriminates against other members of South African society. Fifth, although the 'intensely held world views' and practices of various religious, cultural and linguistic associations must, by necessity, exclude other members of South African society from various kinds of membership and of participation, such exclusion may not necessarily constitute unfair discrimination. The critical question – as the *Fourie* Court notes – is whether such discrimination rises to the level of an unjustifiable impairment of the dignity of some of our fellow South Africans. Again: *this enquiry turns on access to the kinds of goods that enable us to lead lives that allow us to flourish*. It would be foolish to dismantle every institution solely on the grounds that either some form of exclusion takes place or that some reinscription of privilege occurs. Almost all meaningful human labour occurs within the context of self-perpetuating social networks of various kinds. We must be alive, as Nancy Rosenblum contends, to the problem of moral and cognitive 'spillover': not all associations possess the same virtues and vices, and to assume that they do leaves us open to charges of transmission belt sociology (ie, if it's bad there, it must be bad everywhere). N Rosenblum *Membership and Morals: The Personal Uses of Pluralism in America* (1998) 48–49. Taking a sledgehammer to social institutions that create and maintain large stores of real and figurative capital is a recipe for a very impoverished polity. The hard question resolves on the extent to which religious, cultural and linguistic communities – or any strong bonding network – can engage in justifiable forms of discrimination in the furtherance of constitutionally legitimate ends and the extent to which the state and other social actors can make equally legitimate claims on the kinds of goods made available in these communal formations that cannot be accessed elsewhere.

<sup>61</sup> See, eg, *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC) (Speaks of constellation of expressive rights – FC s 15 through FC s 18 – and how they serve the three conjoined, reciprocal and covalent values' or grundnorms of dignity, equality and freedom.) See, generally, D Milo, G Pennfold & A Stein 'Freedom of Expression' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58.

<sup>62</sup> See, eg, *Taylor v Kurtstag No & Others* 2005 (1) SA 362 (W), [2004] 4 All SA 317 (W) (Court upheld the right of the Beth Din to issue a Cherem – an excommunication edict – against a member of the Jewish community who had violated the terms of the association's ruling regarding the refusal by the plaintiff to abide by an order of the Jewish ecclesiastical body.) See S Woolman and D Zeffertt 'Judging Jews: Court Interrogation of Rule-Making and Decision-Taking by Jewish Ecclesiastical Bodies' (2012) 28 *South African Journal on Human Rights* 196.

<sup>63</sup> See, eg, *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC).



V WHOSE TSHIVENDA? WHOSE SESOTHO? ARE THE FIRST ADDITIONAL LANGUAGE POLICY AND THE INCREMENTAL IMPLEMENTATION LANGUAGE POLICY EQUITABLE, PRACTICABLE, REASONABLE AND JUSTIFIABLE?

In this section, we reaffirm the proposition that members of South Africa's still nascent constitutional project will be more likely to flourish when all of us, especially members and descendants of historically elite classes, make an effort to understand one another as best as we possibly can, in various African languages we all ought to make some effort to master.

'Ought' does not imply 'can'.

It definitely doesn't mean 'must' in terms of our Constitution.

Yet why should we be relatively circumspect in giving the FAL and IIAL policies – viewed collectively – the imprimatur of constitutional approval? We have already seen how a powerful constellation of constitutional rights, values and principles appear to vouchsafe their passage into law and practice.

The answer. Were it so straightforward, it would have been done. This article would have been unnecessary. These policies raise difficult questions of 'can?' and 'how?' In standard constitutional nomenclature, those questions are about practicability, equity, historical redress, reasonableness and justifiability. Each requirement – whether articulated under FC s 29(2) or FC s 36(1) – should give us pause. The next two sections adumbrate some of the arguments that might be made on behalf of these well-intended initiatives.

**A Meaningful Engagement**

Throughout its burgeoning body of meaningful engagement jurisprudence, the Constitutional Court has demonstrated how we can go about solving complex, polycentric problems in a manner that more closely approximates pareto-optimal outcomes – rather than the usual zero sum results of binary litigation.<sup>64</sup> By

<sup>64</sup> The promise of such a process is that each participant adopts a reflexive stance toward his or her own views and attempts 'to make the interests of others their own, [and to recognize] the circumstances in which they should give moral priority to what is good for others or for the polity as a whole.' Meaningful engagement *qua* participatory bubbles facilitate processes of institutional reform that proceed within the vocabulary and the norms of the relevant institutions and communities, instead of via fiat by judicial authority. The reflexive stance of the bubbles' participants should both foster a deeper commitment to social movement based politics (and not mere court initiated change) and enhance individual and group aptitudes for experimentation and error-correction. The *Occupiers of 51 Olivia Road* Court's ingenuity at the outset of the hearing distinguished itself from its many of its previous socio-economic rights (but not only socio-economic rights) decisions. See *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC). See also *Abahlali baseMjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* [2009] ZACC 31, 2010 (2) BCLR 99 (CC). Rather than impose a decision on the parties framed by *Grootboom*-based criteria, the Court ordered the residents and the City of Johannesburg to repair to the negotiating table in order to reach a settlement that would lead to a more optimal outcome for both sides. The parties did. Their settlement then became an order of the Court. In *Joe Slovo I*, Justice Ngcobo offered the following justification for meaningful engagement as an alternative dispute mechanism in constitutional matters: "The requirement of engagement flows from the need to treat residents with respect and care for their dignity. ... It enables the government to understand the needs and concerns of individual households so that, where

setting the normative content of rights at a fairly high level of abstraction (but of sufficient content that they create discernible contours for mediation), the Court has allowed all of the litigants, affected parties and interested entities (such as legal NGOs or Chapter 9 Institutions) to repair to the problem-solving table to work out a settlement that does as much justice as possible to all concerned. The justice done takes multiple forms. The large, and broadly representative,

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possible, it can take steps to meet their concerns. . . . The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing. This can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another. . . . Ultimately, the decision lies with the government. The decision must, however, be informed by the concerns raised by the residents during the process of engagement.’ See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others*; [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC) (*Joe Slovo I*) at paras 238 and 244 (Ngcobo J, concurring). See also *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others*; [2011] ZACC 8 (*Joe Slovo II*) at paras 114, 175, 260–261, 313, 326 and 409. (The *Joe Slovo II* Court remarkably rescinds its original order in *Joe Slovo I*, at the request of the parties, because the parties discovered – after a year of working things through – that an *in situ* upgrade was to be preferred to the 15 km move to Delft. The Court recognised that the parties had greater normative legitimacy and possessed more information about the desirability of the move than any Court of 11 women and men sitting in Braamfontein could ever hope to have.) Political process reinforcement concerns were not originally what drove the Court into developing in this doctrine. The Constitutional Court has held that courts must be willing to articulate rather abstract, but still tangible, constitutional norms that enable less powerful stakeholders to have a meaningful role to play in a polycentric decision-making process. The Constitutional Court has, on numerous occasions now, set out a *very* general normative framework within which ‘meaningful engagement’ between conflicting parties can take place. The Court’s commitment to meaningful engagement possesses three features that deserve closer attention. First, they may not (necessarily) be limited to the initial parties to the litigation. Other interested stakeholders – *amici et al* – may participate in the problem-solving process. The aim, again, is two-fold: greater elicitation of information; greater normative legitimacy of any decision ultimately taken. Second, the other salient feature of these participatory bubbles is that they may not remain within the domain of the courts. We can easily imagine greater community participation in hearings called by the South African Human Rights Commission, other Chapter 9 Institutions, national or provincial legislatures, or school governing bodies in other social and political fora. The Constitutional Court has shown itself alive to the need for participatory bubbles when provincial legislatures take decisions that affect the lives of the denizens within their boundaries. South Africa, despite the limits imposed by what remains a largely one party dominant state, has the tools available to make meaningful engagement qua participatory bubbles the norm in norm-setting environments. Third, participatory bubbles lose their cohesion – and the pressure to produce better than zero-sum outcomes – if the courts fail to articulate the norms within which a preferred solution is meant to occur. If experimental constitutionalism is judged to be an attractive set of principles by which to establish constitutional norms (by widespread public agreement) and to assess best practices (by inviting as many stakeholders as possible to design an optimal remedy for a specific social problem) then the jurisprudence of avoidance in the South African vernacular must be one of the first judicial doctrines to go. Several of the Constitutional Court’s judgments in 2011 – including *Glenister* and *Blue Moonlight* – demonstrate the potential of a Constitutional Court that sets its horizons beyond a largely process-driven jurisprudence and alights upon something more substantial. *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC). These decisions model rational discourse (in a country sorely in need of it) by offering a thicker vision of the basic law that initiates discussion, engagement and action in other quarters of the Republic.

number of parties increases the normative legitimacy of the solution reached.<sup>65</sup> More importantly, however, the participation of a diverse group of interested organisations is likely to elicit information that will enable all concerned to reach results vastly superior to adversarial settings. The results should have a two-fold effect. At the level of shared constitutional interpretation, it allows the courts, the co-ordinate branches of government, private actors and other institutional players to determine, in tandem, the content of our basic law. At the level of the participatory bubble, court-structured and enforced settlement should allow best practices to take shape with respect to particular kinds of problems and thereby enable other similarly situated groups to learn from the experiences of others. The norms formed are both rolling and reflexive, as the parties look laterally to what others are doing, and forward in order to identify both the means and the ends that work better and best: even when 'best' sometimes means embracing who we already are.<sup>66</sup>

We can see how such an approach offers an attractive solution to problems associated with FAL and IAL policies. While language conflicts will rarely be identical from school to school, and community to community, the manner in which parents, learners, principals, SGBs and HoDs go about solving a given dispute will provide insight into how other schools and communities can best go about solving their own FAL and IAL policy problems. Over time, once again, two things happen. First, the normative content of principles of equal citizenship and official languages, as well as rights to dignity, equality and linguistic and cultural community practices, are filled out through their engagement with FAL and IAL policies. Second, parties who must regularly confront such disputes can learn from successful interventions elsewhere.

It would be Pollyannaish to assume that a robust form of meaningful engagement is sufficient to provide all the answers thrown up by current FAL disputes and potential IAL clashes. Such processes do not determine outcomes. What they might well do is give parties currently at odds with one another an

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<sup>65</sup> See *Shilubana v Nwamitwa* [2008] ZACC 9, 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC) (Though not technically/strictly a meaningful engagement matter, the enormous number of parties, including amici and intervenors, who participated in the Constitutional Court proceedings gave the proceedings greater normative legitimacy, and facilitated the privately ordered, democratic decision of the Valoyi community to recognise that a woman could be a Hosi ('chief' or 'leader'.) See also See R Cover '1982 Term Foreword: Nomos and Narrative' 97 *Harvard Law Review* 4, 28 (1983) (Commenting on the American Mennonites' *amicus curiae* brief in *Bob Jones University v United States*, Cover characterises the 'Mennonite understanding of the first amendment as not simply the "position" of an advocate – though it is that [as well].' According to Cover, 'the Mennonites inhabit an ongoing nomos that must be marked off by a normative boundary from the realm of civil coercion, just as the wielders of state power must establish their boundary with a religious community's resistance and autonomy.')

<sup>66</sup> See *Joe Slovo I* (note 64 above) and *Joe Slovo II* (note 64 above) (Court learns from both the experience of the parties and its own experience as to the form and substance of meaningful engagement that works best.) Compare *Occupiers of 51 Olivia Road* (note 64 above) with *Blue Moonlight* (note 64 above) (Court learns, over the course of three years, that it must create an intermediate step between meaningful engagement and the realisation of a court order in a housing/eviction matter. The right to receive adequate immediate and intermediate housing, while new forms of adequate housing are created post-eviction order results, finally, in a minimal form of core content of the right to housing.) For more on the relationship between shared constitutional interpretation and participatory bubbles, see S Woolman *The Selfless Constitution* (note 12 above).

opportunity to regularly work through problems together *and* see how other successful parties confronted with similar difficulties acted and cooperated in a manner that resolved their disputes.<sup>67</sup> Over time, we might hope to see FAL and IIAL disputes take on a far less acrimonious cast. Somewhere down the road, when FAL and IIAL disputes are understood as normal curriculum problems to be resolved amicably, we may find ourselves on the way to living in a far more integrated nation where we can truly say that we understand one another.

But before we get there ... somewhere down the road, hard questions of law will have to be forthrightly answered.

### **B Adequacy, Equity, Practicability, Reasonableness, Justifiability under FC s 29(2), FC s 29(1) and FC s 36(1)**

First, let's interrogate the requirement of equity in FC s 29(2). It's a term distinct in meaning from historical redress, though some conceptual overlap certainly exists.

So far FAL disputes have taken place in higher echelon schools where middle and upper class parents jostle with one another in a manner designed to provide the best outcome for their own children – as they understand it. Such disputes are highly unlikely to occur within schools *selected* for the IIAL pilot programme. That may change, however, if the IIAL initiative is deemed to be sufficiently efficacious to warrant enshrinement as law.

Does the request for equity – shorn of issues surrounding historical redress – make philosophical sense?

Consider Charles Taylor's ruminations on the 'Politics of Equal Dignity' and the 'Politics of Difference'.<sup>68</sup> A politics of equal dignity is predicated on the idea that each individual human being is equally worthy of respect. A politics of difference tends to revolve primarily around the claim that every group of people ought to have the right to maintain its own equally respected community. The first claim focuses on what is the same in all of us – that we all have lives and hopes and dreams, and that we should all be granted a *real* opportunity, and thus the means, to pursue them. The second claim focuses on a specific aspect of our identity, our membership in a group. According to this second demand, the body politic ought to nurture or to foster that particularity. The power of this second form of liberal politics springs largely from its involuntary character – the sense that we have no capacity to choose this aspect of our identity. It

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<sup>67</sup> One must be careful not to confuse the 'meaningful engagement' of multiple stakeholders with an SGB's statutory obligations to consult parents, learners, educators and other members of the community before it takes decisions regarding the LOLT of the school. In addition, the recent decision in *Rivonia* would appear to make the meaningful engagement contemplated in this section a constitutional obligation when various parties – parents, learners, the SGB, the provincial government and the national government – do not initially agree upon a LOLT, an FAL or an IIAL. See *Member of the Executive Council for Education in Gauteng Province & Others v Governing Body of the Rivonia Primary School & Others (Equal Education, Centre For Child Law, Suid-Afrikaanse Onderwysersunie, Amici)* [2013] ZACC 34, 2013 (6) SA 582 (CC) at para 49.

<sup>68</sup> See C Taylor 'The Politics of Recognition' in A Gutmann (ed) *Multiculturalism and the Politics of Recognition* (1996) 1.

chooses us.<sup>69</sup> One of the problems South Africa faces is that it is difficult, if not impossible, to accommodate both kinds of claim. As Taylor notes, while 'it makes sense to demand as a matter of right that we approach ... certain cultures with a presumption of their value ... it can't make sense to demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others.'<sup>70</sup>

It might appear that the advocates of FAL and IIAL policies are making the second argument – grounded in a politics of difference – when it comes to linguistic equity. Equal treatment of all 11 official languages is required in our public schools simply because these languages exist, continue to exist, and are recognised (at least notionally) as having equal status in the Constitution. However, Taylor's powerful argument puts paid to the demand that certain languages – and only pure versions of 11 official languages – can 'demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others.' Fortunately, that's not our contention here.

Our argument in support of FAL and IIAL draws its support, as we noted earlier, from a politics of equal dignity. The politics of equal dignity supports two distinct foundations for FAL and IIAL policies. First, a group of learners and parents have a legitimate basis for requesting that SGBs alter their existing FAL policy (where a sufficient number of learners articulate the request) because tuition in a home language speaks directly to dignity *qua* self-actualisation. Second, FAL and IIAL policies reflect the obligation of the state and its citizens to make good on dignity *qua* mutual respect by ensuring that African language tuition becomes more widely accessible to those learners (and other persons) who do not, as yet, speak an African language.

What of FC s 29(2)'s requirement of *practicability*? One doesn't need to be an advocate of revanchist and insular cultural politics to recognise that delivering LOTL in three languages in the foundation phase of schooling is a 'big ask'. So understood, the two policies in tandem would require all quintile 5 schools – black, white, Indian, coloured or some mix of the four – to introduce an African language at the Foundation Phase of learning (Grades R to 3) .

But that's not what FAL and IIAL require, jointly or severally, when refracted through the prism of FC s 29(2).

First, FC s 29(2) grants schools and SGBs an opportunity to explain why practicability, historical redress and equity concerns do not warrant tuition in three languages. (Grounds for non-implementation of FAL and/or IIAL – as the case law reflects – certainly exist: eg, tuition in the languages of choice in another readily accessible, equally adequate school.) Secondly, all the FAL policy actually demands is that learners be given the choice of either Afrikaans *or* African language tuition. The current curriculum policy environment requires learners to be able to read and to write in the FAL – only a *single* additional language. While the new IIAL policy may complicate matters, it's important to recall that it is designed primarily to ensure conversational competence.

<sup>69</sup> See M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67.

<sup>70</sup> Taylor 'The Politics of Recognition' (note 68 above) at 16.



Remember as well that the FAL and IIAL policies are tied to *demand* – and are not dictated curriculum outcomes irrespective of demand. In instances in which the demand exists, primary schools as diverse as Parkview Junior and Yeoville Boys – oh so different in terms of race, ethnicity, sex, and class – have demonstrated that the implementation of FAL and IIAL policies results in multilingual tuition that’s feasible, affordable, practicable and adequate. (Again, IIAL’s current status as a pilot programme lowers the threshold for reasonableness and justifiability even further – at least for the present moment.) Concerns that the number of teachers, the kinds of materials, and the costs of post provisions will make compliance with FAL and IIAL a prohibitively expensive endeavour seem somewhat overwrought.

The feasibility, affordability, practicability and adequacy of FAL and IIAL initiatives at a broad range of existing schools also dispatch concerns emanating from nascent social movements and well-established legal NGOs that we have more pressing matters when it comes to the delivery of a basic adequate education for all learners. Equal Education, the Legal Resources Centre, Equal Education Law Centre, Section 27 and the Centre for Child Law have identified a host of ‘adequacy’ obligations that the state must meet in order to discharge its responsibilities under FC s 29(1): (1) Textbooks; (2) Workbooks; (3) Teachers; (4) Non-educator personnel; (5) Infrastructure; (6) Sanitation; (7) Transport; (8) Furniture and (9) Libraries. Thus far, the demands of FAL and IIAL on the fiscus do not appear to have created a hindrance to the delivery of these other essential goods. Indeed, the rather extensive (if not fully comprehensive) acceptance of FAL and IIAL in principle and practice suggests that while the fight against language, culture and race-based exclusion may continue, here and there with respect to a small minority of schools, the state’s push for enhanced home language tuition will meet rather limited resistance.

What of any argument articulated in terms of FC s 36(1) that these policies are neither reasonable nor justifiable? As a formal or logical matter, if we can satisfy the practicability, redress and equity desiderata of FC s 29(2), questions regarding the reasonableness and the justifiability of FAL and IIAL ought never to arise.

But let’s imagine that they did.

First, let’s take the title of IIAL seriously. If the state places proper emphasis on the ‘incremental implementation’ – and the pilot programme status of IIAL smacks of the socio-economic rights discourse of ‘progressive realization’ – then the courts ought to give this nascent policy initiative their imprimatur of approval.

Second, if both FAL and IIAL are read, literally, in terms of FC s 6 – and the *elevation* and the *advancement* of historically marginalised languages are taken seriously – then the more potentially demanding requirements of redress and equity found in FC s 29(2) either never arise or can be readily finessed.

Third, given the studies undertaken by the state and academic authorities, it should not be all that difficult to convince a post-*Ermelo* court that learners (in numbers that satisfy SASA’s statistically significant cohort) will not receive an adequate basic education in terms of FC s 29(1) if they are denied tuition in both English and their home language. On this account, FAL and IIAL look more than eminently reasonable.



We therefore remain committed to our opening gambit. Learning the language of the 'other' is part of a broader process of making good on the Constitution's commitment to equal citizenship. However, this commitment comes with a strong caveat: we would never claim that it is of greater import than rights to adequate food, water, healthcare, social security or housing. Hillel's rhetorical injunction – 'if I am not for others, then who am I?' – speaks directly to the capacity of our children to create, for themselves, a society in which they are able to negotiate future relationships with one another as (relative) equals. The state's current FAL and IIAL policies provide a part, *and only part*, of the answer to Hillel's ethical imperative.



Symposium 2:  
Socio-Economic Rights: Competing  
Models of Constitutional Review



# Evictions, Aspirations and Avoidance

Brian Ray<sup>1</sup>

## I INTRODUCTION

In December 2011 four of the Constitutional Court's five socio-economic rights cases turned on evictions.<sup>2</sup> The Court decided three eviction-related cases in the 2012 term and two more in 2013.<sup>3</sup> For a Court that averages fewer than 30 decisions per term 10 decisions in less than two and a half years is an extraordinary level of attention devoted to a single area of constitutional law.<sup>4</sup>

Does this sustained attention to eviction cases harbingering a significant development in the Court's approach to the right to housing in FC s 26 and to socio-economic rights more generally? The cases provide some evidence of this possibility. One rough but important metric is the result and most of these decisions justifiably can be characterised as pro-poor.<sup>5</sup> In several cases,

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<sup>2</sup> *Pheko and Others v Ekuhuleni Metropolitan Municipality* [2011] ZACC 34, 2012 (2) SA 598 (CC), 2012 (4) BCLR 388 (CC) ('Pheko'); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC) ('Blue Moonlight'); *Occupiers of Skuurweplaat 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* [2011] ZACC 36, 2012 (4) BCLR 382 (CC) ('PPC Quarries'); and *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* [2011] ZACC 35, 2012 (2) SA 337 (CC), 2012 (4) BCLR 372 (CC) ('Golden Thread').

<sup>3</sup> In 2012: *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2, 2012 (3) SA 531 (CC), 2012 (5) BCLR 449 (CC) ('Maphango'); *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC) ('Blue Moonlight II'); and *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* [2012] ZACC 26, 2013 (1) SA 323 (CC), 2013 (1) BCLR 68 (CC) ('Schubart Park'). In 2013: *Motswagae and Others v Rustenburg Local Municipality and Another* [2013] ZACC 1, 2013 (2) SA 613 (CC), 2013 (3) BCLR 271 (CC) ('Motswagae'); and *Hattingh and Others v Juta* [2013] ZACC 5, 2013 (3) SA 275 (CC), 2013 (5) BCLR 509 (CC) ('Hattingh').

<sup>4</sup> From 2003–2012 the Court issued an average of slightly more than 28 decisions each term.

<sup>5</sup> I use the term 'pro-poor' to mean that the concrete outcome favoured the relatively economically disadvantaged party in the litigation. Others have used the term in related, but slightly different ways. See, eg, J Dugard and T Roux 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor 1995–2004' in R Gargarella, P Domingo, & T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006) 107–125 ('*Institutional Voice*'). As these analyses illustrate, the concept is more complex than my treatment here where I use it simply to point out that the Court has found ways to reach results that arguably to some extent achieve the objectives of the socio-economic rights by finding ways to protect the interests of poor people either individually or as a class while still largely avoiding substantive development of them.

the Court exercised a stronger institutional role that echoes its promising early interventions in *Government of the Republic of South Africa v Grootboom*, *Treatment Action Campaign v Minister of Health (No 2)* and *Khosa and Others v Minister of Social Development and Others*.<sup>6</sup> The Court also established important principles that could have far-reaching effects in future eviction cases and might apply outside that context. For these reasons, the newer cases mark a shift away from the deferential role the Court adopted previously in *Mazibuko v City of Johannesburg*.<sup>7</sup> In several other respects, however, these cases reflect the more conservative features of the Court's general approach to adjudicating socio-economic rights and the persistence of the separation-of-powers and institutional-competence concerns that cabin the exercise of its powers.

This article explores the tension between these two aspects of this string of decisions. On the one hand the evidence of a stronger judicial role represents a long-standing and genuine commitment to find ways to make the socio-economic rights provisions do the very difficult work of addressing the deep inequalities that the new democratic order deliberately left in place. The pro-poor outcomes and several remarkable doctrinal advances in these decisions show a court working in creative ways to fashion a jurisprudence that aspires to fulfill that promise.

In spite of the clear advances these cases make, the separation-of-powers and institutional-competence concerns that have frequently operated to limit the Court's role in its socio-economic rights decisions continue to feature prominently. These concerns generally have pushed the Court to avoid interpreting these provisions in ways that set clear and wide-reaching precedents that might have potentially significant redistributive effects.

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<sup>6</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC) ('Grootboom'); *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC) ('TAC'); and *Khosa and Others v Minister of Social Development and Others, Mabilaule and Another v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC) ('Khosa'), respectively. Stuart Wilson and Jackie Dugard have labelled these cases the 'first wave' of socio-economic rights decisions in which the Court adopted a stronger approach than in its more recent cases beginning in 2008 with *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1, 2008 (3) SA 208 (CC) ('Olivia Road'). S Wilson & J Dugard 'Constitutional Jurisprudence: The First and Second Waves' in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa* (2013) ('*First and Second Waves*'). Sandra Liebenberg has drawn a similar contrast between these earlier decisions and the Court's more recent cases. S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) ('*Socio-Economic Rights*').

<sup>7</sup> *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28, 2010 (4) SA 1 (CC) ('*Mazibuko*'). Many commentators have argued that *Mazibuko* represents the nadir of the Court's socio-economic rights decisions. See, eg, Liebenberg *Socio-Economic Rights* (note 6 above) at 480 ('The deferential and normatively thin concept of reasonableness review applied in the *Mazibuko* case weakens the capacity of socio-economic rights jurisprudence to contribute meaningfully to transformative social change.'). S Wilson & J Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 222, 236 ('*Taking Poverty*'). (Argues the Court failed 'to define and evaluate the interests at stake in *Mazibuko*' and thus 'undercut its ability to hold the City to any meaningful standard of reasonableness'.)



This countervailing impulse is evident in the Court's continued reliance on what I am describing as a set of 'avoidance' techniques.<sup>8</sup> These techniques encompass a strong preference for relying on legislative and executive measures to define the substance of these rights; creating or expanding procedural remedies (especially remedies that emphasise expanding political access); interpreting the socio-economic rights either at a highly abstract or factually specific level; and limiting direct interventions to cases featuring clearly unconstitutional conduct.

As the pro-poor results in these cases demonstrate, these techniques are not necessarily anti-poor in effect. Indeed sometimes the possibility of avoiding concrete constitutional interpretation makes the Court more willing to push further towards progressive results.<sup>9</sup> But, as a general matter, these techniques collectively tend to limit the scope of substantive constitutional development over time and circumscribe the Court's own role in that development.

I am far from the first to observe a pattern of constitutional avoidance in the Court's socio-economic rights decisions. Geo Quinot and Sandra Liebenberg succinctly summarise the core of this criticism: the Court's reasonableness review standard and its connection to an administrative-law model 'is relatively process orientated and pays little regard to developing the substance of the normative content and obligations' of socio-economic rights.<sup>10</sup> Stuart Wilson and Jackie Dugard similarly argue that the Court needs 'to exercise the power the Constitution assigns it explicitly to determine the interests socio-economic rights themselves exist to protect and advance'.<sup>11</sup>

Danie Brand attributes the Court's tendency to avoid substantive interpretations to a pervasive 'strategy of deference' to the political branches.<sup>12</sup> Brand argues that this strategy reflects a set of institutional concerns largely derived from debates over the constitutionalisation of socio-economic rights – democratic legitimacy,

<sup>8</sup> See, eg, D Bilchitz 'Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*' (2010) 127 *South African Law Journal* 591, 597; I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138, 146 ('*Judicious Avoidance*'); Dugard & Roux, *Institutional Voice* (note 5 above) at 110.

<sup>9</sup> *Mazibuko* arguably shows that sometimes squeezing the Constitution too hard – where the state has not been entirely supine – leads the Court to retreat into deference.

<sup>10</sup> G Quinot & S Liebenberg 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' ('*Narrowing*') in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 197, 197 ('*Poverty*').

<sup>11</sup> Wilson & Dugard *Taking Poverty* (note 7 above) at 227. Wilson and Dugard have argued in a similar vein that what they call the second-wave cases are characterised by a consistent refusal to develop the substance of the reasonableness test and reliance on the same techniques I include in the category of avoidance. See Wilson & Dugard *First and Second Waves* (note 6 above) at 11 (arguing 'the Court often chose to reach its desired outcome by enforcing procedural rights through directing the implementation of pre-existing policy and through directing the state to keep promises it was alleged to have made to the claimants in a particular case. Where it can, the Court has also relied on applicable legislation and policy to give content to rights.')

<sup>12</sup> D Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What are Socio-Economic Rights For?"' in H Botha, AJ van der Walt, & JC van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33, 37–43 ('*Proceduralisation*'); D Brand 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' in Quinot and Liebenberg (ed) *Taking Poverty* (note 7 above) 172, 176 ('*Deference*').

institutional competence and separation of powers.<sup>13</sup> Theunis Roux has described this tendency in related terms as motivated by an often unstated concern for preserving institutional security.<sup>14</sup>

These analyses point out the risk that uncritical avoidance will reduce the socio-economic rights to an ‘embroider[ed] version of procedural fairness’ that marginalises the Court’s role and undermines their status as justiciable rights.<sup>15</sup> Some critics have called for the Court to adopt a much more direct enforcement role, including, for example, integrating the minimum-core concept to establish a substantive baseline to assess government programmes.<sup>16</sup> More recent proposals have focused on working within the Court’s existing approach – accepting to some extent its limits while still pushing towards greater substantive engagement.<sup>17</sup>

The signs of avoidance in these more recent cases show that it is unlikely the Court will begin to develop the reasonableness test in strong substantive ways. But the pro-poor results and doctrinal advances in this set of cases also point towards approaches that allow the Court to mitigate the institutional and practical concerns that pervade its socio-economic rights decisions and still exercise greater institutional authority for interpreting and enforcing these rights.

There are benefits to an approach that seeks to channel the aspirational impulse through avoidance techniques. First, it is pragmatic. It tries to maximise the Court’s existing framework. In this respect it draws lessons from the more recent critiques I just mentioned. Pragmatism implies compromise, and I accept in part Roux’s framework where pragmatism, while necessary and even at times laudable because it secures the Court’s place as a functioning part of South Africa’s

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<sup>13</sup> Brand *Deference* (note 12 above) at 174 (Explains that the strategy reflects ‘a set of institutional concerns – concerns about the institutional capacity, legitimacy, integrity and security of courts and about classical separation of powers requirements (otherwise referred to as “comity” or “constitutional competence” ... ?).

<sup>14</sup> T Roux ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2008) 7 *International Journal of Constitutional Law* 106, 128 (‘Principle’); Brand *Deference* (note 12 above) at 175.

<sup>15</sup> Wilson & Dugard *Taking Poverty* (note 7 above) at 227. See also M Pieterse ‘On Dialogue, Translation and Voice: Reply to Sandra Liebenberg’ in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 331, 345 (‘Dialogue’) (Maintains that the Court’s approach is virtually indistinguishable from pre-constitutional administrative law and the ‘unfortunate result is that the judicial contribution to the debate over transformation is no different than it would have been in a constitutional setting where socio-economic rights had either not been entrenched at all or had functioned only as directive principles of state policy.’)

<sup>16</sup> D Bilchitz ‘Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance’ (2002) 119 *South African Law Journal* 484, 487–88. *Mazibuko* definitively rejected the minimum-core approach and cemented the Court’s more general refusal to develop the positive dimensions of socio-economic rights without considering the internal limit that most contain. See *Mazibuko* (note 7 above) at paras 53–57.

<sup>17</sup> See, eg, Quinot & Liebenberg *Narrowing* (note 10 above) at 199 (‘In this chapter we argue that an approach to reasonableness review that builds on the development of reasonableness as a standard in both administrative justice and socio-economic rights jurisprudence offers us a strong and coherent model of judicial review.’); Brand *Deference* (note 12 above) at 188–90 (Argues for a ‘judicial prudence’ that engages a range of stakeholders and maintains a more active judicial role). Cf Wilson & Dugard *Taking Poverty* (note 7 above) at 239–40. Wilson and Dugard also propose adjustments to reasonableness review, but they are deeply skeptical of the Court’s own tendency (and presumably arguments in the literature) to rely on ‘supposedly “democratic” processes beyond the Court’s purview’.

governing framework, always compromises principle.<sup>18</sup> The critical examination of the signs of avoidance in two of these cases that follows, highlights that compromise.

But pragmatism also means getting the job done. And these cases do that in ways that demonstrate that avoidance does not necessarily require the Court to adopt the deeply deferential role described in *Mazibuko* or result in a failure to advance substantive development of the socio-economic rights.

Avoidance techniques, however, assume that the democratic branches share the Constitution's reform agenda. Wilson and Dugard are justifiably skeptical of arguments highlighting the 'supposedly "democratic"' payoff in political enforcement.<sup>19</sup> They point out – as have others – that the power to *challenge* the results of the political process against an independent standard is the distinct feature of constitutional rights.<sup>20</sup> Avoidance undermines that distinctiveness because on the one hand it defers to a large extent to political choices and, on the other, it emphasises remedies that enhance participation as the principal means of challenging those choices.

By the same token, the transformed view of separation of powers that political enforcement represents opens up different configurations of judicial and legislative power. If transformation means accepting the possibility for courts to delve deeply into areas like setting policy priorities and budgets traditionally considered out of their reach, it must also accept the possibility of legislative and executive constitutional interpretation. Breaking down the divide between law and politics allows movement across both sides of that border.<sup>21</sup>

This same slippage between legal and political functions acknowledges that socio-economic rights can operate as an agenda for political action and social change as well as (and perhaps to a greater degree than) a judicially enforceable limit on the exercise of state (or even private) power. Developing this aspect requires courts to adopt an interpretive role that allows for policy to change in response to better empirical data, altered budgets and political developments. It also opens the door for courts to enforce socio-economic rights by intervening more directly in policy processes themselves. The emphasis that avoidance techniques place on procedural control and mechanisms for putting the concerns of poor people on political and policy agendas play on this.

If courts maintain a genuinely independent role when employing avoidance techniques, individual cases can, in the right circumstances, stimulate a

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<sup>18</sup> See Roux *Principle* (note 14 above) at 116.

<sup>19</sup> Wilson & Dugard *Taking Poverty* (note 7 above) at 223 & 239.

<sup>20</sup> *Ibid* at 223; Liebenberg *Socio-Economic Rights* (note 6 above) at 16–22, 482–83.

<sup>21</sup> See Liebenberg *Socio-Economic Rights* (note 6 above) at 484 (Describes 'a reconceptualised separation of powers doctrine based on a model of dialogic interaction between the three branches of government, affected communities and organisations.'). Cf S Woolman 'Humility, Michelman's Method and the Constitutional Court: Rereading the *First Certification Judgment* and Reaffirming a Distinction between Law and Politics' (2013) 24 *Stellenbosch Law Review* 281. (Court recognises that its primary role in a new multiracial, multiparty constitutional democracy is state-building: (a) ensuring accountability through free and fair elections; (b) pressing public entities and state actors to discharge their regulatory, legislative and constitutional duties; and (c) establishing the rule of law in its most basic form – governors and governed are subject to the same rules of the game.)

broader political commitment to these rights. As André van der Walt explains, because Parliament perpetrated apartheid through legislation, there is a ‘special democratic and liberating significance’ to a legislature independently taking on board constitutional principles and seeking to enforce them directly through legislation.<sup>22</sup> Where the Court uses—and sometimes broadly interprets—legislation, it recognises that significance and also that the success of the constitutional experiment depends on developing and expanding the political commitment that political enforcement represents. This also is true where the Court leaves room for political responses and even more directly when it crafts procedural remedies like engagement that seek to enhance what it calls ‘participatory democracy’.

This approach trades immediate, concrete relief and clear constitutional principles through expansive constitutional interpretation and direct court intervention for the prospect of more effective and more robust enforcement over time through increased legislative and executive activity and commitment to these rights. Experience has shown that this tradeoff is a gamble.<sup>23</sup> There are no guarantees that a more direct approach will work better.<sup>24</sup> Equally important, the Court seems committed to taking that bet and so the challenge is to find ways to hedge it by identifying ways the Court can maintain an independent role even when it relies on avoidance techniques.

Identifying ways that courts can act independently even while acknowledging legislative and executive leadership in identifying the substance of the socio-economic rights, recognises the distinction Pamela Karlan draws between a court’s own institutional authority and constitutional provisions that establish legislative power.<sup>25</sup> As Karlan explains, a court can view its own authority broadly and at the same time interpret constitutional provisions in a manner that grants broad legislative powers.<sup>26</sup> The position a court takes on each spectrum is independent of the other, but the combination of the two determines the extent to which the court views the relationship between the constitution and politics as either cooperative or antagonistic.

A court that adopts a narrow view of its own authority and broadly interprets legislative (and executive) power moves towards a position of outright deference – and reflects a view that the constitution operates primarily at the far margins of politics to police only the most obvious and egregious violations. This tracks the position of uncritical avoidance that these techniques risk. Conversely, a court that asserts extensive institutional authority and narrowly construes legislative power cuts off constitutional values from politics. The constitution either prohibits a particular political action or has nothing to say about it.

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<sup>22</sup> AJ van der Walt *Property and Constitution* (2012) 103.

<sup>23</sup> Wilson and Dugard argue that *Grootboom* has had a substantial, systematic impact (although they highlight that decision as uniquely substantive). See Wilson & Dugard *Taking Poverty* (note 7 above) at 225–227. As I discuss below, however, *Blue Moonlight* shows that the City of Johannesburg certainly failed to internalise the pro-active approach that the Court called for it to develop in *Olivia Road*.

<sup>24</sup> See D Landau ‘The Reality of Social Rights Enforcement’ (2012) 53 *Harvard International Law Journal* 190, 201.

<sup>25</sup> PS Karlan ‘Democracy and Disdain’ (2012) 126 *Harvard Law Review* 1, 12.

<sup>26</sup> *Ibid.*

Karlan advocates a more complex alternative: strong judicial authority paired with expansive legislative powers. Rather than deferring to the political process except at the margins, courts play an independent role in identifying constitutional principles and values. But recognising that the legislature has similarly broad powers, requires courts to acknowledge legislative enforcement of those principles and values. The challenge is to find concrete ways that courts can work with legislation and executive policy without deferring completely to them.<sup>27</sup>

The avoidance techniques I describe here easily lend themselves to a combination of weak institutional authority and expansive legislative (and executive) power that would marginalise the judicial role. The Court's refusal to develop the substance of socio-economic rights without considering the resource-limitation provisions, its strong preference for analysing socio-economic rights within the context of existing legislation or policy and its acceptance of a deeply limited institutional competence to deal with the complex issues that socio-economic rights present, all weaken the Court's own authority while expanding legislative and executive power to determine what these rights require. (In many instances, the coordinate branches simply ignore them.)

The Court has at times asserted much greater institutional authority while still acknowledging broad legislative and executive power. Both *Grootboom* and *TAC* exhibit this combination for different reasons. In *Grootboom*, the Court examined government policy in light of an independent constitutional standard. In *TAC*, the Court asserted independent authority to examine the government's reasons for limiting a programme of its own creation.<sup>28</sup> Likewise, *Port Elizabeth Municipality* shows a Court confidently explaining why eviction legislation satisfies the constitutional standard set by FC s 26(3).<sup>29</sup> As I explain below, while each of these cases featured avoidance techniques, the Court, in asserting greater independent authority, actively partnered with the political branches to interpret the Constitution rather than merely deferring to them.

In *Olivia Road* and *Joe Slovo* the Court has exerted a different kind of institutional authority, while largely ceding interpretive control, by creating procedures to manage the process of political enforcement.<sup>30</sup> Engagement establishes an on-going form of judicial control through a set of consultation requirements that the courts have the power to enforce irrespective of the merits of challenged policies.<sup>31</sup> *Joe Slovo's* detailed engagement order combined with continued oversight

<sup>27</sup> Karlan (note 25 above) at 55–57, 69.

<sup>28</sup> See *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*') at paras 20–46 (discussing constitutional provisions and justiciability), at paras 47–79 (evaluating the state housing programme); *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02), [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('*TAC*') at paras 22–25 (discussing justiciability), at paras 96–106 (explaining the power of the court to provide relief).

<sup>29</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) ('*Port Elizabeth*'). The Court has exhibited this same confidence in several other eviction-related cases, including *Jaftha v Schoeman* [2004] ZACC 25, 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC). I focus on *Port Elizabeth* because it established the model the Court follows in later cases.

<sup>30</sup> *Olivia Road* (note 6 above); *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* ('*Joe Slovo*') (CCT 22/08) [2011] ZACC 8, 2011 (7) BCLR 723 (CC).

<sup>31</sup> *Olivia Road* (note 6 above) at paras 32–35.



of the engagement process exerted more direct control – but control that was confined to that specific case.<sup>32</sup>

This more complex conception of the relationship between courts and the political branches overlaps in important ways with what Van der Walt has called a ‘subsidiarity approach’.<sup>33</sup> Subsidiarity incorporates a set of principles that avoid direct application of the Constitution or the common law in favour of resolving cases, where possible, on legislative grounds.<sup>34</sup> Briefly stated, the subsidiarity principles require applying legislation enacted to give effect to a constitutional right over pursuing a claim either directly under the Constitution itself or under the common law.<sup>35</sup> In Karlan’s terms, they institutionalise respect for broad legislative power under the Constitution.

Subsidiarity shares the avoidance techniques’ emphasis on democratic constitutional development.<sup>36</sup> Applied properly, subsidiarity is ‘a politics-confirming and -enhancing device that ensures interplay between constitutional principles and democratic laws, reformist initiatives and vested rights, change and stability’.<sup>37</sup> Subsidiarity also recognises the practical benefits of taking the long view that legislation and policy, not adjudication, are the real drivers of legal transformation.<sup>38</sup>

But like avoidance, subsidiarity has risks. Uncritically deployed, it either can devolve into a ‘refusal to critically reflect on and decide the difficult constitutional issues inherent in every legal dispute in post-apartheid South Africa’.<sup>39</sup> The cure for that is a ‘constitutionally driven’ interpretative approach that ‘go[es] behind the legislative text and considers whether it properly gives effect to the underlying constitutional principle or the so-called value content of the basic rights’.<sup>40</sup> In other words, an approach that actively cooperates with the legislature and executive in assessing what the Constitution requires.

<sup>32</sup> I discuss these examples below.

<sup>33</sup> AJ van der Walt ‘Normative Pluralism and Anarchy: Reflections on the 2007 Term’ (2010) 1 *Constitutional Court Review* 77, 98 (‘*Normative Pluralism*’).

<sup>34</sup> Van der Walt *Normative Pluralism* (note 33 above) at 108. Van der Walt describes what he calls an ‘embroidered’ theory of subsidiarity that draws out the implications of the principle as applied in the cases he discusses. Under this embroidered version:

direct application of the Constitution and the application and development of the common law should only come up in the absence of legislation. Some legislation will give effect to rights in the Bill of Rights more directly and some will affect existing law more explicitly and extensively, but in line with *SANDU* and *Bato Star* all legislation either fails constitutional scrutiny or triggers a subsidiarity principle according to which the right must primarily be protected via the legislation and not via direct application of the constitutional provision or the common law.

<sup>35</sup> Van der Walt *Property* (note 22 above). Van der Walt adds two provisos to these principles: first, a litigant can rely directly on the Constitution to challenge applicable legislation; and secondly, a litigant can rely directly on the common law where the legislation either was not intended to or in fact does not cover that aspect of the common law.

<sup>36</sup> *Ibid* at 91–92.

<sup>37</sup> Van der Walt *Normative Pluralism* (note 33 above) at 100.

<sup>38</sup> Van der Walt *Property* (note 22 above) at 8–9.

<sup>39</sup> *Ibid* at 99.

<sup>40</sup> *Ibid* at 102.



The analysis that follows first describes the avoidance techniques and the ways they tend to diminish the Court's interpretive authority over socio-economic rights provisions. I then argue that separating broad legislative power to enforce the socio-economic rights from the Court's own institutional authority opens up possibilities for the Court to maintain a stronger institutional role even when it relies on the avoidance techniques. First, by paying more explicit attention to the Constitution when interpreting and enforcing legislative and policy measures, the Court can maintain greater interpretive authority that partners with rather than simply deferring to the political branches. Secondly, by asserting more extensive control when relying on procedural enforcement mechanisms the Court can exercise a form of procedural authority over political and policy-making processes to reach constitutional outcomes without elaborating broad constitutional principles.

Part II describes the avoidance techniques and the ways they have reduced the Court's interpretive authority in its socio-economic rights decisions. I argue that, viewed under Karlan's framework, these techniques leave room for courts to exercise independent interpretive and procedural authority. Part III develops Van der Walt's idea of constitutionally driven subsidiarity – what I call 'thick' subsidiarity – to identify how the Court can maintain greater interpretive authority and explain how *Port Elizabeth* is a model for this interpretive approach. Parts IV and V closely examine two recent eviction decisions – *Maphango* and *Blue Moonlight* – as examples of the Court's reliance on several avoidance techniques to reach pro-poor outcomes. Both cases show how the avoidance techniques constrain the Court's interpretive role, but *Blue Moonlight* tracks *Port Elizabeth's* example of a constitutionally thicker enforcement of statutes and policy. In *Maphango* the Court went out of its way to avoid engaging with the substantive issues by relying on a legislative procedural mechanism.

Part VI returns to *Port Elizabeth* and *Maphango*. I argue that – at the same time that it features thick subsidiarity – *Port Elizabeth* also describes a judicial approach that raises avoidance to the level of constitutional strategy by emphasising the need for courts to adopt a 'managerial' role and resolve socio-economic rights cases in fact-specific, contingent ways. This pre-figured the meaningful engagement requirement in *Olivia Road* and the institutional authority courts can exercise through procedural techniques. *Maphango's* expansion of the Rental Housing Tribunal process follows that same model. Both *Olivia Road* and *Maphango* illustrate that relying on procedural control severely restricts the Court's interpretive authority. But both cases also show how the Court can exercise a different form of institutional authority that can shape and prod political enforcement. Unlike thick subsidiarity, which emphasises a legislative-judicial partnership, these procedural techniques create opportunities for courts to directly challenge government actions or policies and push for constitutionally compliant outcomes rather than to establish broad constitutional principles.<sup>41</sup>

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<sup>41</sup> *Maphango* itself represents the Court interpreting a procedure created by legislation to allow private actors to challenge private action on Constitution-related grounds.

I then examine two companion judgments issued the same day as *Blue Moonlight* that apply *Blue Moonlight*'s core constitutional holdings without expanding them in significant ways. I argue that these cases first show the potential for courts following *Blue Moonlight* to use the flexible framework of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) to exert procedural control over specific eviction processes to reach constitutionally compliant outcomes. Read this way, the substantive principles *Blue Moonlight* established are primarily tools for strengthening the case-specific managerial role *Port Elizabeth* describes. These two cases also demonstrate the potential for individual resolutions under PIE to incrementally develop stronger substantive principles over time.<sup>42</sup> The Court's analyses in each case missed that opportunity by failing to identify the relative weights and effect of the facts under PIE's test.

## II AVOIDANCE TECHNIQUES

I use the term 'avoidance' intentionally and provocatively to emphasise the ways in which the Court, even when it reaches a pro-poor outcome, frequently works in ways that avoid expansive substantive development of the socio-economic rights.<sup>43</sup> Standing alone each one of these techniques could be defended on several grounds – and to varying degrees were defensible in the cases where I identify them.<sup>44</sup> I do not intend (or, at least I do not always intend) to criticise the Court's use of them in any specific case.

Regardless, these techniques tend to push the Court away from playing an independent role in interpreting and enforcing socio-economic rights. And when the Court relies on more than one of these techniques in an individual case, it generally avoids constitutional substance to a greater degree. More troubling,

<sup>42</sup> I do not address several other significant eviction-related cases, in particular *Jaftha v Schoeman and Others* (CC174/03) [2004] ZACC 25, 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).

<sup>43</sup> My approach might be taken to be in some tension with what Frank Michelman, relying on Donald Davidson's work, describes as 'the principle of interpretive charity'. F Michelman 'On the Uses of Interpretive "Charity": Some Notes on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1, 4. Michelman originally cast his piece as a critique of Stu Woolman's 'flight from substance' reading of the Constitutional Court. See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) *South African Law Journal* 762. But the two ultimately hold only marginally different positions. See further, S Woolman 'Between Charity and Clarity: Kibitzing with Frank Michelman on How Best to Read the Constitutional Court' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy* (2012) 391; F Michelman 'Old Kibitzes Never Die: A Rejoinder to Stu Woolman' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy* (2012) 417.

<sup>44</sup> Iain Currie has articulated a range of theoretical and practical justifications for the Constitutional Court's reliance on a more general set of what he calls 'judicious avoidance' techniques. See I Currie *Judicious Avoidance* (note 8 above) at 138. Many of those same justifications could apply to the techniques I describe here. See, eg, M Kende *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 271–75 (Defends the Constitutional Court's 'pragmatic' approach to enforcing the socio-economic rights provisions). Stu Woolman has critiqued the Court's avoidance jurisprudence. See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 21–40, 42–78. See also S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 31.

where the Court deploys these techniques over time it has a tendency to move towards a position of weak institutional authority that severely constrains its capacity to act as an independent partner in developing and implementing socio-economic rights provisions.

## A Techniques

### 1 *Political Enforcement*

The Court has generally preferred to follow the lead of the legislature and executive in identifying the concrete requirements the socio-economic rights impose. FC s 26 and FC s 27 – the two core socio-economic rights that have occupied most of the Court’s attention to date – contain identical limiting provisions requiring the state to ‘take reasonable legislative and other measures... to achieve the progressive realisation of each of these rights’.<sup>45</sup> The Court’s consistent approach when considering the positive obligations of these rights is to begin with this provision rather than interpret the right in a manner that gives the right independent substance.<sup>46</sup> This interpretive approach – a form of avoidance – formalises the more general preference for relying on political branch measures.

In its strongest form this results in outright deference to legislation or policy. The Court’s analysis of the legislation and policies at issue in *Mazibuko* is the best recent example of this.<sup>47</sup> There O’Regan J articulated a general approach to positive socio-economic rights claims that ties their substance directly to state-enforcement measures and gives courts a deliberately reactive and secondary role in developing their substance.<sup>48</sup>

More moderate manifestations of this preference involve the Court cooperating with the legislature or executive either by relying on legislation that enforces the Constitution or by enforcing (sometimes more robustly than the government) existing policies or programmes. The *TAC* Court observed that it was simply enforcing the government’s own policies.<sup>49</sup> *Kbosa* directly altered extant social security law by recognising permanent residents’ entitlement to benefits. In both

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<sup>45</sup> Constitution of the Republic of South Africa, 1996. The Court also has generally interpreted the unqualified socio-economic rights provisions as implicitly limited. See, eg, Liebenberg *Socio-Economic Rights* (note 7 above) at 139–40 (On *Soobramoney*) and 236–37 (Children’s rights in *Grootboom*). Liebenberg notes that the Court has addressed FC s 26(1) directly in cases dealing with what it characterises as the ‘negative’ obligations it imposes. See Liebenberg *Socio-Economic Rights* (note 6 above) at 218.

<sup>46</sup> See *Mazibuko* (note 7 above) at paras 48–49 (Explains that the Court concluded in *Grootboom* and *TAC* that the ‘scope of the positive obligation’ is ‘carefully delineated by’ the limitation provision.)

<sup>47</sup> See Brand *Deference* (note 12 above) at 177; Liebenberg *Socio-Economic Rights* (note 6 above) at 469.

<sup>48</sup> *Mazibuko* (note 7 above) at para 61 (‘Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails...’). O’Regan J ties this approach first to the relative institutional incapacity of courts in dealing with the complexities of social conditions and budgets and secondly to the ‘democratic accountability’ loss that doing so would entail.

<sup>49</sup> *TAC* (note 28 above) at paras 117–120.

cases, the Court simply expanded existing programmes.<sup>50</sup> *TAC* expanded the Nevirapine protocol not solely on what FC s 27 requires, but primarily because the government's reasons for limiting the MTCT programme to pilot sites was unreasonable in terms of the government's own conclusions: that the drug was both safe and efficacious. The Court adopted a similar strategy in *Blue Moonlight*. The Court rejected the City of Johannesburg's decision to limit its emergency housing programme as irrational on the programme's own terms.<sup>51</sup> *Khosa* demanded a more substantive elaboration of the social security right. The Court, consistent with established precedent and the text itself, interpreted 'everyone' to mean more than 'citizen'.<sup>52</sup> However, the *Khosa* Court's departure point was still the legislation itself. The matter ultimately turned on the irrationality of excluding permanent residents from the benefits scheme.<sup>53</sup>

At the opposite end of the spectrum, this deference limits the extent of the Court's constitutional interpretation of a right and leaves ample room for the legislature or the executive to place its own gloss on the provision and create its own remedies for the defect. *Grootboom's* limited declaration that the state's housing policy was unconstitutional without prescribing criteria for compliance is one of the best examples.<sup>54</sup> The carefully crafted order in *TAC* that gave the government discretion to adopt a different protocol is a more limited version.<sup>55</sup> In each case, the Court either completely avoided giving the constitutional provision discernable content or established a highly abstract and non-remedial set of requirements for their discharge.

## 2 Procedural Creativity

The Court also sometimes avoids substantive development of socio-economic rights through creative application of its own procedures or by relying on

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<sup>50</sup> See Pieterse *Dialogue* (note 15 above) at 344 ('It is the content of legislative and other measures aimed at achieving the progressive realisation of socio-economic rights that is assessed through an analysis of reasonableness, not the content of the rights themselves.' (emphasis omitted)). Pieterse analyses both *TAC* and *Grootboom* as examples. I agree that *TAC* falls squarely in this category because, as Pieterse shows, the arguments in that case were specifically about whether the programme's own limitations were reasonable in light of the decision to go forward with the pilot sites. But, like Wilson and Dugard, I see *Grootboom* as creating a substantive, if limited, constitutional standard. See Wilson & Dugard *Taking Poverty* (note 7 above) at 227.

<sup>51</sup> *TAC* (note 28 above) at paras 39 & 80–81; *Blue Moonlight* (note 2 above) at paras 87–89. See also *Mazibuko* (note 7 above) at para 64 ('In a sense, then, all the Court did [in *TAC*] was to render the existing government policy available to all.') See also Quinot & Liebenberg, 'Narrowing' (note 10 above) at 215 (Court in *TAC* did very little to explicitly 'articulate the normative content' of s 27(1)).

<sup>52</sup> *Khosa and Others v Minister of Social Development and Others, Mabhale and Another v Minister of Social Development and Others* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*') at para 47.

<sup>53</sup> *Khosa* (note 52 above) at paras 53, 85.

<sup>54</sup> *Grootboom* (note 28 above) at paras 67, 93–99. In *Mazibuko*, O'Regan J explains that the *Grootboom* declaration was crafted specifically to minimise court intrusion into the government's role in developing policy. *Mazibuko* (note 7 above) at para 63.

<sup>55</sup> *TAC* (note 28 above) at para 135. See also *Mazibuko* (note 7 above) at para 64 (Compares the flexibility in the *TAC* order to the declaration in *Grootboom*).

remedies that expand procedural protections for poor people.<sup>56</sup> *Olivia Road* is the paradigm for this kind of procedural creativity and reflects both dimensions. The engagement order in that case – issued by an apex court with discretionary jurisdiction after oral argument – was a brand-new procedure that turned the Court into a forum for informal dispute resolution.

The *Olivia Road* Court's decision to make engagement a constitutional requirement in the final judgment and related refusal to address the issues the parties raised is another, more substantive version of that same creativity in two respects. First, as the *Maphango* majority noted, it departed from normal procedure to grant a 'novel' remedy that none of the parties sought.<sup>57</sup> Secondly, it ducked the substantive constitutional issues by refusing to further develop *Grootboom* and FC s 26 in light of the City of Johannesburg's housing policy.<sup>58</sup>

The Court's back-door incorporation of engagement as a limiting mechanism in the eviction order in *Joe Slovo* is another example.<sup>59</sup> While formally rejecting the residents' claim that the government failed to meaningfully engage with them as required by *Olivia Road*, the detailed and carefully structured engagement order that accompanied the judgment effectively expanded the scope of the requirement.<sup>60</sup> *Maphango's* stay of proceedings, as I explain below, also extends *Olivia Road* in striking ways.<sup>61</sup>

### 3 *Abstract or Fact-Specific Constitutional Deliberation*

Another important aspect of avoidance is the Court's tendency to operate at two extremes of constitutional deliberation. On one extreme the Court frequently deals with socio-economic rights at what Keith Whittington calls the 'policy-making level' of constitutional deliberation by reaching a result on fact-specific grounds frequently by relying on multi-factor balancing tests.<sup>62</sup> Operating at this

<sup>56</sup> A more mundane example is the Court's flexible approach to the admission of evidence on appeal in socio-economic rights cases. See, eg, *Mazibuko* (note 7 above) at paras 39–41; *Port Elizabeth* (note 29 above) at para 36. See also Wilson & Dugard *First & Second Waves* (note 6 above) at 22–23 (Cites this same phenomenon).

<sup>57</sup> *Maphango* (note 3 above) at fn 121. I discuss this below in Part IV.

<sup>58</sup> Liebenberg provides a detailed analysis of the substantive issues the Court refused to reach. See S Liebenberg 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of "Meaningful Engagement"' (2012) 12 *African Human Rights Law Journal* 1, 18 ('*Engaging*').

<sup>59</sup> *Joe Slovo* (note 30 above) at para 7.

<sup>60</sup> See B Ray 'Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy' (2010) 9 *Washington University Global Studies Law Review* 399, 408–12 (Analyses the innovations in the *Joe Slovo* engagement order). See Woolman (note 44 above) 460–467, 494–495 (Offers a similar analysis of the two *Joe Slovo* judgments.)

<sup>61</sup> See below at Part IV.

<sup>62</sup> KE Whittington *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999) ('*Construction*') 4. Whittington argues that when political actors either expressly or implicitly act or develop policy in light of more general constitutional principles they engage in a form of constitutional elaboration – or 'construction' that develops those principles in ways that do not extend beyond a specific situation. Lawrence Solum draws a similar distinction between what he terms 'political construction' defined as 'giving legal effect to the [constitutional] text without the aid of judicial constructions' and 'judicial construction' which is the 'translat[ion] [of] the linguistic meaning of a legal text into doctrine...'. L Solum 'The Interpretation-Construction Distinction' (2010) 27

level ‘may fulfill the promise of a constitution in governmental practice, yet it does not extend the meaning of the constitution itself’.<sup>63</sup>

When the Court operates at the policy end of this spectrum it sometimes creates ‘soft-substantive’ interpretations by providing concrete relief to the individual plaintiffs without tying that relief to any broader constitutional requirement. The result itself establishes some guidelines for what the right at issue could require on those specific facts, but the Court deliberately stops short of establishing any definitive interpretation. *Port Elizabeth Municipality’s* description of a court going ‘beyond its normal functions ... to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process’ and its emphasis on the need to reconcile competing constitutional principles ‘by a close analysis of the actual specifics of each case’ is a formula for deliberation at the policy level.<sup>64</sup>

The meaningful engagement requirement is a procedural version of this because it requires case-by-case assessment that leaves little room for the terms of any negotiated agreement having precedential effect. In *Olivia Road* the Court’s refusal to reach the more difficult question of whether the substance of the City’s revised housing policy passed constitutional muster, left *Grootboom* at an abstract level and created a mechanism – engagement – for resolving cases on a procedural basis that severely limits engagement with substantive constitutional principles.<sup>65</sup>

*Joe Slovo’s* engagement order illustrates the ways that this technique can create soft substance. As a formal matter, the Court approved both the eviction plan and the government’s engagement efforts.<sup>66</sup> But the order’s requirement that the government engage on a detailed list of specifics with each evictee created a kind of de facto precedent for future evictions in two ways. First, it set up the argument that evictees have a constitutional right to consultation on the eviction process itself (as opposed to the policy decision that resulted in eviction). Secondly, it fleshed out that requirement with a specific list of the issues that consultation should address. The procedural posture of the result disconnects these requirements from any direct constitutional mooring, leaving open the constitutional status

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*Constitutional Commentary* 95, 103–104. In my view, the Constitutional Court engages in essentially political construction when it decides socio-economic rights cases on fact-specific grounds without identifying the principles underlying its decision.

<sup>63</sup> *Whittington Construction* (note 62 above) at 4.

<sup>64</sup> *Port Elizabeth* (note 29 above) at para 35.

<sup>65</sup> L Chenwi ‘A New Approach to Remedies in Socio-Economic Rights Adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*’ (2009) 2 *Constitutional Court Review* 371, 389–390 (Argues that *Olivia Road* ‘is noteworthy for its avoidance of a number of disputed issues’ – including the City’s housing plan.)

<sup>66</sup> *Joe Slovo* (note 30 above) at paras 116–17 (Yacoob, J). Some disagreement exists among the concurring judgments on the question of whether the government’s engagement efforts were sufficient. See, eg, *Joe Slovo* (note 30 above) at para 378 (Sachs J). See also Liebenberg *Engaging* (note 58 above) at 23–24; Woolman *Selfless Constitution* (note 44 above) at 422–501.



of the order. It nonetheless created a framework for negotiation by parties and a potential model that lower courts can draw on in future cases.<sup>67</sup>

On the other end of the spectrum the Court often provides relatively abstract pronouncements on the substantive requirements of socio-economic rights. The declaration in *Grootboom* is one example. The Court ordered the state to change its housing policy to address emergency needs without specifying what measures were necessary. *Port Elizabeth's* constitutional framework for interpreting PIE is another.<sup>68</sup> These abstract pronouncements develop the law directly unlike the soft-substantive standards that emerge at the policy-making end, but they have a similar effect by failing to specify with any degree of detail what the constitutional standard requires.<sup>69</sup>

Operating at these extremes and avoiding the middle ground allows the Court to intervene in concrete ways while maintaining substantial flexibility. The emphasis on legislative and executive branch procedures that avoidance also features fills the gap in the middle. In this way, the Court is able to signal to the political branches, lower courts and individual citizens possible constitutional content while leaving the door wide open for change and also for independent constitutional development by the other branches and through civil society activism.

The problem with the Court consistently operating at these extremes – and the reason they represent avoidance – is that, even taken together, those results fail to establish a consistent or coherent constitutional framework over time. As Stuart Wilson observed following the SCA's judgment in *Blue Moonlight*: 'Both the Constitutional Court and the Supreme Court of Appeal have shown little difficulty in frustrating the enforcement of the old property law regime. Yet they have not yet set out with sufficient regularity and precision what processes and principles should replace it, at least where evictions which lead to homelessness are concerned.'<sup>70</sup> Put differently, where the Court reaches pro-poor results without

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<sup>67</sup> As I discuss in Part VI below, in *Blue Moonlight II* the occupiers sought to rely on the *Joe Slovo* order as precedent for the Constitutional Court retaining jurisdiction in *Blue Moonlight*. See also *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* [2012] ZASCA 116, 2012 (6) SA 294 (SCA), 2012 (11) BCLR 1206 (SCA) (Orders meaningful engagement).

<sup>68</sup> *Port Elizabeth Municipality* (note 29 above) at para 14–23.

<sup>69</sup> Currie makes a similar observation regarding O'Regan J's analysis of human dignity in *S v Makwanyane and Another* [1995] ZACC 3, 1995 (3) SA 591 (CC), 1995 (6) BCLR 665 (CC) 327–337. Currie *Judicious Avoidance* (note 8 above) at fn 55 (Although O'Regan J's recognition of human dignity as the 'touchstone of a new political order' is an example of reasoning from first-principles it 'lays down very little in the way of broad rules' and thus qualifies as shallow and narrow). But see S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 36 (analysing the rich and expansive dignity jurisprudence developed by the Constitutional Court over the subsequent 10 years).

<sup>70</sup> S Wilson 'Breaking the Tie: Evictions from Private Land, Homelessness and A New Normality' (2009) 126 *South African Law Journal* 270, 282.

specifying – or identifying only highly abstract – constitutional bases for those results, it substantially limits the substantive development.<sup>71</sup>

#### 4 *Policing Constitutional Margins*

Finally, the Court's tendency to operate at the outer boundaries of constitutional provisions is another aspect of avoidance. By this I mean the Court's tendency to intervene only in the face of clearly unconstitutional conduct and a corresponding reluctance to scrutinise (or develop a framework for scrutinising) less obvious violations.<sup>72</sup> This tendency works in tandem with the other avoidance techniques because it makes the Court much less likely to question, either abstractly or in the face of particular applications, legislation and executive policy if there is evidence of a genuine attempt to take seriously the obligations socio-economic rights impose.<sup>73</sup>

*Mazibuko* and *Joe Slovo* illustrate this reluctance. Both cases involved large-scale policies adopted expressly to fulfill the socio-economic rights at issue and relatively little evidence of any bad faith by the government. *Mazibuko* dealt with legislation and implementing policy designed to address a genuine problem with equitable allocation of a scarce resource. The policy reflected a sincere – if arguably flawed – effort by the state to fulfill the right to water; changing that policy potentially would have had extensive practical effects.<sup>74</sup> In *Joe Slovo* the evictions were part of a new national housing plan to provide greater access to housing, and, in contrast to *Olivia Road* and *Grootboom*, the state accepted the responsibility to provide temporary accommodation for the people it sought to evict.<sup>75</sup>

*Olivia Road*, *TAC* and, in a slightly different way, *Khosa* each featured either relatively small-scale programmes (in *TAC* at least with respect to cost) or clear indications that the government failed to seriously acknowledge the socio-economic rights obligations or both. The city's inner-city rehabilitation programme in *Olivia Road* was a general economic development programme not specifically designed to fulfill FC s 26, and its policy of relying on summary eviction procedures

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<sup>71</sup> Roux identifies this same phenomenon in the socio-economic rights cases and attributes it to an institutional-preservation strategy that leaves the Court flexibility to change course in subsequent cases where the political configuration changes. See T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013) 264 ('In the case of social rights, this meant that the Court needed to develop a review standard that would allow it, on the one hand, to signal its deference to the political branches and, on the other, to intervene where the micro-politics of the particular case allowed for this.')

<sup>72</sup> Another way of characterising the Court's tendency is, as Brand notes, its inclination to take 'easy cases'. Brand *Proceduralisation* (note 12 above) at 53. Brand argues that *Grootboom* and *TAC* both were easy cases because 'the policies were clearly not rationally coherent' and invalidating them did not require the Court to extend beyond its 'rationality comfort zone'.

<sup>73</sup> See, eg, *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 31/09) [2009] ZACC 33, 2010 (4) BCLR 312 (CC) (Relying on subsidiarity to avoid addressing constitutional claims). I am grateful to Sandra Liebenberg for this example.

<sup>74</sup> *Mazibuko* (note 7 above) at paras 78–89 (Describes the City's water policy) and 91–97 (Identifies the ways the City reviewed and revised its policy over time).

<sup>75</sup> *Joe Slovo* (note 30 above) at paras 28–31 (Describes the N2 Gateway Project and the City's negotiations with the residents regarding relocation).

with no serious attempt to provide even emergency housing to the evictees flew directly in the face of *Grootboom*.<sup>76</sup> In *TAC*, the cost of expanding the programme was substantially mitigated by the drugmaker's agreement to provide Nevirapine for free, and the government's reasons for limiting the programme were widely recognised as pretexts to mask their connection to the Mbeki administration's deeply flawed view of the science underlying HIV/AIDS.<sup>77</sup>

*Khosa* fits less easily into this model. The social-security legislation in *Khosa* was much broader and, as the dissent highlighted, expanding it to cover permanent residents had potentially significant cost implications.<sup>78</sup> The Court also altered the legislation directly rather than giving Parliament the opportunity to reassert control. The significant equality dimension of the case explains this in part. But *Khosa* fits the model because the government's actions showed signs that it was not taking its obligations under s 27 sufficiently seriously both as a matter of substance and procedure. The government's inability to provide budget justifications without seeking an extraordinary delay at the Constitutional Court, and its admission that the numbers it eventually produced were speculative, underscored the potentially discriminatory nature of the exclusion.<sup>79</sup> On procedure, the government's failure to competently defend the legislation at any point until the case reached the Constitutional Court demonstrated either the inability or an unwillingness to recognise the legal obligations FC s 27 imposes.

## B Avoidance and Institutional Authority

When viewed through Karlan's framework, the avoidance techniques generally push the Court towards a combination of relatively weak institutional authority and expansive legislative and executive power over socio-economic rights. But separating these two effects helps identify ways for a court to maintain greater institutional authority. All of these techniques imply a strong view of legislative and executive power. Political enforcement is a direct recognition of that. Relying on procedural enforcement – especially when the Court alters its own procedure to do so – reinforces the broad scope of that power by keeping the Court away from substance. Deliberating either abstractly or at the policy level leaves ample room for political-branch interpretation as does policing the margins of the socio-economic rights provisions.

In terms of institutional authority, however, only the tendency to police constitutional margins necessarily places the Court at the weak end of the spectrum. The Court could use each of the other techniques in ways that exercise

<sup>76</sup> *Olivia Road* (note 6 above) at para 19 (Evictions were the result of the City's 'Regeneration Strategy') and para 44 ('It is common cause that the City in making the decision to evict the people concerned took no account whatsoever of the fact that the people concerned would be rendered homeless.').

<sup>77</sup> See M Heywood 'Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies, and Outcomes of the *Treatment Action Campaign* Case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278, 285–86, 296–99.

<sup>78</sup> *Khosa* (note 52 above) at para 127 (Ncgobo J).

<sup>79</sup> *Ibid* at paras 20–25 (Explains the postponement) and paras 60–62 (Describes the lack of 'clear evidence' of the financial effects.).

relatively stronger institutional authority. This potential is illustrated by the pro-poor outcomes the Court reached in several cases.

Political enforcement can incorporate stronger interpretive authority that avoids complete deference if it includes independent constitutional interpretation of the kind Van der Walt advocates and that I am calling ‘thick’ subsidiarity. Karlan cites *Nevada Department of Human Resources v Hibbs*, where the US Supreme Court upheld provisions in the Family and Medical Leave Act requiring employers to permit employees to take up to 12 weeks unpaid leave to care for a family member as an example of this combination.<sup>80</sup> The FMLA was passed under section 5 of the Fourteenth Amendment, which grants Congress power to pass legislation to remedy past unconstitutional discrimination – in *Hibbs* sex discrimination. The breadth of the FMLA’s requirements combined with the fact that they applied equally to both men and women clearly went beyond what the constitution required. The majority nonetheless upheld the Act, but not as a matter of deference to Congress’ own interpretation of what the constitution required. Instead the Court relied on its own sex-discrimination precedents and held that those decisions established greater authority for Congress to set prophylactic requirements to avoid the potential for unconstitutional conduct.<sup>81</sup>

*Hibbs* shows a court exercising a particularly strong form of interpretive authority to uphold legislative power. For Karlan, the Warren Court exemplifies a more nuanced balance between the two, reflecting a view ‘that democracy requires a level of egalitarian inclusion, ... that courts should welcome the political branches’ involvement in addressing constitutional values, and that authority to enforce constitutional values should be distributed broadly.’<sup>82</sup> *Port Elizabeth* and *Blue Moonlight* illustrate ways a court can maintain an independent interpretive role that tracks Karlan’s description of the Warren Court’s approach. As I explain in more detail below, the Constitutional Court in each case primarily relied on Constitution-enforcing legislation to reach a pro-poor outcome but still independently assessed the constitutional sufficiency of the legislation and identified specific constitutional principles that the legislation satisfied.

The procedural creativity the Court employs to avoid substance can involve a different form of institutional authority. Rather than asserting control over constitutional interpretation, the Court has used procedural remedies and innovations in its own procedures to shape, prod or control in limited ways political and policy-making processes to give poor people and those who represent them a greater role. Engagement orders like those in *Joe Slovo* and *Olivia Road* created direct power in particular cases. But these procedural remedies can also provide opportunities for a court to influence broader policy as in *Olivia Road*, which essentially restructured the City of Johannesburg’s inner-city bad-building

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<sup>80</sup> Karlan (note 25 above) at 69 (citing *Nevada Department of Human Resources v Hibbs* 538 US 721 (2003)).

<sup>81</sup> *Ibid* at 69.

<sup>82</sup> *Ibid* at 13.

eviction policy.<sup>83</sup> More broadly, the requirements of meaningful engagement that the Court described in *Olivia Road* and the power it established for courts to review the adequacy of engagement independent from the substance of policy or action have the potential to insert courts more deeply into the legislative and policy-development process.

This form of institutional authority does not establish substantive constitutional principles. Instead it creates some measure of judicial influence over political constitutional enforcement. Rather than retaining authority to assess whether the substance of a particular policy meets a judicially determined constitutional standard, a court asserts some control over the procedures through which legislation or policy is developed. This more directly promotes the democratic benefits that both Van der Walt and Karlan argue attach to sharing interpretive authority with the legislature.

By asserting greater institutional authority in either way – independently interpreting the substance of the socio-economic rights provisions or influencing the policy-development process – the Court moves away from the constitutional margins and back into a true partnership with the political branches.

### III AVOIDANCE AND SUBSIDIARITY

The Court's general preference for enforcing socio-economic rights where possible through existing legislation or policy I have labelled 'avoidance' because it allows the Court to rely on the political branches to supply the substantive content of these rights. The subsidiarity approach developed by André van der Walt is built around a principle that systematises one part of this preference – courts are required to enforce applicable Constitution-enforcing legislation instead of direct Constitution- or common-law-based claims.<sup>84</sup> At first blush, these appear to be polar opposites. The idea of 'avoidance' is critical of the preference as shirking the Court's duty independently to interpret the Constitution. Subsidiarity views it as a principled, disciplined marching order for consistently sorting through overlapping (and potentially competing) legal sources to consolidate the Constitution's control.

I do not see it that way. My point in identifying political enforcement as one of the avoidance techniques is to acknowledge the strong potential it has to devolve into outright deference that fits in with a general pattern in the Court's approach to socio-economic rights. Van der Walt recognises this possibility and argues

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<sup>83</sup> In *Blue Moonlight*, the City of Johannesburg described its process for relocating occupants of 'bad' buildings through property acquisition and 'engagement with both owners and occupiers' as a 'response to the judgment in *Olivia Road*'. Heads of Argument for Applicant, City of Johannesburg at para 41; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC) (emphasis added).

<sup>84</sup> Van der Walt *Property* (note 22 above) at 35–36. It is important to note that my comparison of avoidance and subsidiarity addresses the overlap I see between this specific principle and what I have called avoidance. The subsidiarity principles do not require enforcing executive policy over the Constitution, and I do not here include subsidiarity's requirement that courts prefer legislation to common law as an aspect of constitutional avoidance. I also do not address the nuanced framework Van der Walt develops for identifying when legislation should trump a constitutional claim and as a result greatly simplify the approach.

that courts can avoid deference through constitutionally driven interpretation of legislative measures as well as by accepting the possibility of direct constitutional challenges to legislation. Van der Walt's model for this approach is *Port Elizabeth*, an early eviction case involving interpretation of the PIE Act. In this section, I describe subsidiarity and then examine how the *Port Elizabeth* model can form the basis for a thick version of subsidiarity that incorporates a more independent role for courts even when they rely on legislation or executive policy.

Van der Walt is, to a large degree, concerned about the possibility of a power struggle that features courts as conservative defenders of the common law using traditional judicial techniques to cut back reform-oriented legislation.<sup>85</sup> This concern is rooted in the conservative legal culture that most agree has persisted in the post-apartheid era. Requiring courts to seek out legislation enforcing the Constitution and to avoid resorting to the common law or direct constitutional enforcement is neatly tailored to address that risk.<sup>86</sup> It prevents courts from reflexively relying on existing common law. It also breaks up the judicial monopoly on constitutional interpretation and creates substantial room for legislative control by giving Parliament at least the first word on what the Constitution requires.

Assessments of the Court's socio-economic rights decisions feature the same concern that the Court is operating under the conservative influence of an apartheid-era approach to judging that is at odds with the new constitutional legal order. But the perceived problem in these cases is the Court's *deference to legislation and policy* and corresponding refusal to develop independent interpretations that can both guide future legislation and give footholds for litigants seeking to test the adequacy of those measures. In other words, the perceived power struggle is flipped with courts as the institutional ally of transformation and Parliament (or the executive) the likely opponent. Cast in these roles, a rule that displaces direct constitutional enforcement and gives Parliament the lead in constitutional interpretation is counterintuitive.<sup>87</sup>

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<sup>85</sup> Ibid at 6–7 and 98 ('The South African context particularly requires something in the nature of subsidiarity principles to avoid the arbitrary, unreflective and counter-constitutional tendency to privilege the common law over constitutional or constitution-inspired transformation efforts.')

<sup>86</sup> Van der Walt also focuses on situations where the choice is between enforcing (or developing) the common law and interpreting a statute that either expressly affects or could be interpreted to affect common-law property rights. In each case the legislation effectively alters common law property rights in ways required by the Constitution and enforcing it avoids the need to address the conflict between the two and the corresponding risk that courts might reflexively protect the common law. See Van der Walt, *Property* (note 22 above) at 40–57.

<sup>87</sup> There is another dimension that features prominently in the socio-economic rights cases – executive enforcement, often in the provincial or municipal sphere. Subsidiarity requires – as in *Blue Moonlight* – that courts address challenges to executive action through applicable legislation rather than directly on constitutional grounds. As O'Regan J explained in *Mazibuko*, however, this might leave room for direct constitutional challenge to enforce a provincial or municipal government's independent duty to take reasonable steps to fulfill the socio-economic rights. *Mazibuko* (note 7 above) at paras 73–74 (Asks whether, if legislation sets a 'national minimum, do other steps taken by other levels of government escape scrutiny as long as they comply with the national minimum, despite the fact that other spheres of government share the obligation to take reasonable steps?'). *Blue Moonlight* reinforces that possibility without directly endorsing it.



Van der Walt's argument that South Africa's unique history gives a 'special democratic and liberating significance' to legislative enforcement puts legislative enforcement on a different footing that goes beyond these assumptions. When Parliament assumes an independent obligation to proactively enforce the Constitution, that in itself – irrespective of the relative transformative effect of the specific legislation at issue – is transformative. Legislative enforcement turns the Constitution from a check on democratic action limiting majoritarian politics only at the margins into an affirmative political agenda. That same shift, though, requires reconfiguring the judicial role from a focus on policing legislation for constitutional violations to partnering with Parliament on advancing the constitutional agenda. Put in Karlan's framework, it calls for recognising expansive legislative power and for seeking collaborative approaches to rights enforcement.

But partnership can take many forms and a silent partnership is just another name for deference. Distinguishing between judicial institutional authority and legislative (or executive) power to enforce certain constitutional provisions can help to conceptualise ways for a court to maintain an independent interpretive and enforcement role.

Wilson and Dugard warn that arguments like these that rely on the supposed democratic-enhancing effects of political enforcement are particularly perilous in South Africa where the ANC continues to exercise de facto control of the political process. They point out that the dramatic rise in service-delivery protests begs the question 'whether the executive and the legislature are routinely ensuring a truly democratic form of socio-economic development'.<sup>88</sup> One partial answer to this is that the Court has frequently supplemented reliance on political enforcement with a consistent emphasis on techniques that aim to build what the Court has called 'participatory democracy' by creating opportunities for poor people to intervene in the policy-making (and sometimes legislative) process.

But Wilson's and Dugard's objection goes beyond the evidence that, at least so far, those efforts have not succeeded in making the political process more responsive to the needs and voices of poor people. They argue that 'the Court's job must be more than to foster further participation ... [i]t must surely also be to decide whether vital interests and needs have been overlooked in the "democratic" process.'<sup>89</sup> To do this, they say, the Court must develop an independent, normative account of what the socio-economic rights require.<sup>90</sup>

## A Thick Subsidiarity

Van der Walt's description of constitutionally inflected interpretation of legislation reflects the same concern with ensuring that the Court plays an independent role in deciding and declaring what the Constitution means rather than simply attempting to ascertain legislative intent. But it recognises the possibility of the Court exerting independent interpretive authority in the process of enforcing

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<sup>88</sup> Wilson & Dugard *Taking Poverty* (note 7 above) at 228–29.

<sup>89</sup> *Ibid* at 229.

<sup>90</sup> *Ibid* at 229–30.

legislation. I call this approach ‘thick subsidiarity’ to distinguish it from the uncritical application Van der Walt rejects but acknowledges is a possibility.

Thick subsidiarity requires courts to adopt a very different conception of their relationship with the legislature and executive than the one *Mazibuko* describes. While *Mazibuko* grounds its approach in earlier cases like *TAC* and *Grootboom*, O’Regan J’s characterisation of those cases overemphasises the degree of deference the Court employed and fails to acknowledge the independent role the Court played in them. *Mazibuko* implies that the Court can create space for legislative and executive enforcement only to the extent that it backs away from an active interpretive and enforcement role. Delinking the Court’s own authority from legislative power in the way Karlan describes both better explains the approach that the Court actually employed in its earlier cases and helps conceptualise how it can maintain that approach in future cases.

It also prevents the obfuscation that often results when the Court tries to say that it is deferring to the legislature or executive when it is clearly exercising some measure of independent authority. Viewing these two things as independent would allow the Court instead to identify the ways that it acknowledges, maintains and sometimes extends the broad scope of legislative power without diminishing its own authority.

Van der Walt emphasises that a court employing subsidiarity should not simply defer to legislation or adopt an approach that results in a ‘general avoidance of constitutional influence’.<sup>91</sup> Interpreting legislative enforcement measures necessarily brings the Constitution into play and subsidiarity also permits challenging the legislation itself as unconstitutional.<sup>92</sup>

A constitutional attack on legislation is the most obvious way to bring the Constitution into play under subsidiarity and for courts to develop independent constitutional requirements. The Court’s pattern of avoiding interventions that directly disrupt large-scale programmes show that it is unlikely the Court will uphold direct general attacks very often in socio-economic rights litigation. But *Grootboom* and *Khosa* show that it is willing to address substantial gaps under the right circumstances.

More promising is what Van der Walt describes as ‘constitutionally driven interpretation’.<sup>93</sup> Van der Walt says a court should critically assess whether legislation meets constitutional objectives.<sup>94</sup> This requires courts to distinguish between constitutional and statutory requirements in the process of enforcing a statute.

One corollary of this is a willingness to interpret legislation expansively to make it fit constitutional requirements. This extends the potential for cooperative constitutional development by giving courts a larger role and more opportunities for elaborating constitutional substance. But doing that through legislation still leaves room for the legislature to react with amendments and, possibly further court review.

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<sup>91</sup> Van der Walt *Property* (note 22 above) at 37.

<sup>92</sup> *Ibid* at 37.

<sup>93</sup> *Ibid* at 94.

<sup>94</sup> *Ibid* at 99.

As I discuss below, the Court already seems to be doing something like this when it goes out of its way to bring legislative or executive enforcement measures into play rather than engage directly with the Constitution. The Court also seems more comfortable with direct intervention and/or more expansive results when they emanate from enforcing legislation or executive policy. Both *Maphango* and *Blue Moonlight* involved expansive interpretations of legislation enforcing the Constitution, although the interpretation in *Maphango* expanded a process rather than establishing direct substantive limits. *Blue Moonlight* shows further that relying on legislative mandates reduces the perceived legitimacy concerns of stronger intervention. Both *Blue Moonlight* and *Mazibuko* dealt to a large extent with the adequacy of a government programme. In *Mazibuko* the Court framed the issue as a direct challenge to the constitutional adequacy of the programme,<sup>95</sup> but in *Blue Moonlight* the Court framed it as whether the City was fulfilling its legislative obligations under housing legislation.<sup>96</sup>

This could also include a court interpreting general terms in legislation to create judicial discretion to enforce constitutional requirements. In *Port Elizabeth Municipality*, Sachs J emphasised that the language of PIE creates precisely this kind of discretion. Yacoob J's expansive interpretation of PIE's general requirements to effectively read out PIE's distinction between short- and long-term occupation, arguably follows that same pattern.<sup>97</sup>

Challenges to provincial and municipal policies also present opportunities for courts to enforce legislation in constitutionally driven ways. For example, a court could reject a policy that does not go far enough to advance constitutional objectives even if it reflects an otherwise reasonable interpretation of the statute. This is a variation of what Van der Walt calls for. Because it is in the context of a challenge to executive action, this kind of challenge creates a clearer opportunity to distinguish between the Constitution and the legislation. It also reduces the anti-democratic nature of the review because it allows the Court to partner with Parliament to enforce the Constitution. *Blue Moonlight's* rejection of the City of Johannesburg's interpretation of housing legislation is a possible example of this.<sup>98</sup>

## **B Port Elizabeth Municipality as Thick Subsidiarity**

*Port Elizabeth Municipality*, which Van der Walt highlights as a model for constitutionally driven interpretation, features several of these techniques.<sup>99</sup> Although the Court applied PIE in the absence of a constitutional challenge, it still exerted independent interpretive authority by describing the constitutional framework for the legislation, identifying the ways that the legislation implements that framework and also adopting expansive interpretations of several provisions specifically because the legislation was intended to enforce the Constitution.

<sup>95</sup> See *Mazibuko* (note 7 above) at paras 6, 36–38.

<sup>96</sup> See *Blue Moonlight* (note 2 above) at paras 24–29.

<sup>97</sup> See below Part III.

<sup>98</sup> See below Part V.

<sup>99</sup> Van der Walt *Property* (note 22 above) at 4–5.

The case involved a challenge to Port Elizabeth Municipality's application to evict a small number of people unlawfully occupying vacant, private land. After detailing the ways in which facially neutral legislation worked in tandem with existing Roman-Dutch law to legitimate 'in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies' Sachs explained that FC s 26(3) and a new statutory framework were designed to address this legacy.<sup>100</sup>

Sachs then turned to PIE, stating that it 'was adopted with the manifest objective of overcoming the above abuses and ensuring that evictions in future took place in a manner consistent with the values of the new constitutional dispensation' and therefore that '[i]ts provisions have to be interpreted against this background'.<sup>101</sup> This led to an extensive discussion that specifically identified the ways that PIE is designed to transform eviction law to achieve the constitutional requirements.

PIE 'inverted' the apartheid legal framework in several ways. First, it decriminalised squatting and subjected the eviction process 'to a number of requirements, some necessary to comply with certain demands of the Bill of Rights'.<sup>102</sup> Secondly, it reversed the relationship between private and public law. Rather than relying on the common law to normalise the political objectives of apartheid, PIE 'temper[s]' common-law remedies with 'strong procedural and substantive protections' to acknowledge the constitutional imperative to provide homes for victims of apartheid and to treat them with dignity and respect in the interim.<sup>103</sup>

'Rescuing the courts from their invidious role as instruments directed by statute to effect callous removals, the new law guided them as to how they should fulfil their new complex and constitutionally ordained function: when evictions were being sought, the courts were to ensure that justice and equity prevailed in relation to all concerned.'<sup>104</sup>

In a subsection titled 'the broad constitutional matrix for the interpretation of PIE' Sachs then explicitly elevated the statutory analysis to a constitutional level:

PIE cannot simply be looked at as a legislative mechanism designed to restore common law property rights by freeing them of racist and authoritarian provisions, though that is one of its aspects. Nor is it just a means of promoting judicial philanthropy in favour of the poor, though compassion is built into its very structure. PIE has to be understood, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix.<sup>105</sup>

In analysing that constitutional matrix, Sachs established or reinforced several specific constitutional principles. He started by emphasising the careful balance struck by FC s 25 between protecting private rights and recognising legitimate public obligations.<sup>106</sup>

<sup>100</sup> *Port Elizabeth* (note 29 above) at para 10.

<sup>101</sup> *Ibid* at para 11.

<sup>102</sup> *Ibid* at para 12.

<sup>103</sup> *Ibid*.

<sup>104</sup> *Ibid* at para 13.

<sup>105</sup> *Ibid* at para 14.

<sup>106</sup> *Ibid* at para 19.

He then identified several aspects of the relationship between FC s 25 and FC s 26. First, FC s 25 recognises the need to provide some measure of tenure security to people living in informal settlements. Secondly, he described ‘three salient features of the way the Constitution approaches the interrelationship between land hunger, homelessness and respect for property rights’.<sup>107</sup> The land rights of dispossessed people are not unqualified or self-enforcing and in the main ‘they presuppose the adoption of legislative and other measures’ for fulfillment.<sup>108</sup> In this respect, FC s 26(3) is primarily defensive. FC s 26(3) ‘expressly acknowledge[s] that eviction of people living in informal settlements may take place, even if it results in loss of a home’.<sup>109</sup>

Finally, FC s 26(3) emphasises ‘the need to seek concrete and case-specific solutions to the difficult problems that arise’.<sup>110</sup> This reflects an intentional constitutional strategy. The mandate to take all relevant factors into account ‘is there precisely to underline how non-prescriptive the provision is intended to be’ and to leave the judicial task ‘as wide open as constitutional language could achieve ...’.<sup>111</sup>

After setting up this constitutional background, Sachs J applied it in a 23-paragraph analysis of PIE’s specific requirements. This extended analysis features an independent – and at times expansive – interpretation that reflects the constitutional principles Sachs J set up at the beginning. While it stays at a largely abstract level, this exposition nonetheless gives some concrete guidance that reveals the Court’s independent view of how this framework could further the constitutional objective of balancing private property rights and the constitutional obligation to protect people from homelessness.<sup>112</sup>

Sachs J also carved out space for greater judicial control by interpreting s 6’s requirements as ‘peremptory but not exhaustive’.<sup>113</sup> This gives the Court ‘a very wide mandate’ to bring to bear other constitutionally relevant considerations in individual cases.<sup>114</sup>

The *Port Elizabeth* model preserves opportunities for the Court to assert much greater interpretive authority over the Constitution than *Mazibuko* implies, without requiring it to take the lead in developing those principles. As I observed earlier, the avoidance techniques tend to position the Court either at a very abstract or factually specific policy-application level. *Port Elizabeth* provides examples of the Court operating at both ends of this spectrum while still adopting an active role.

At the policy-application end the Court implements constitutional objectives concretely but by tying that concreteness to specific facts rather than to more general constitutional principles, the Court does not directly elaborate constitutional principles. When Sachs J talks about exercising judicial statecraft to manage the eviction process in humane ways and also when he emphasises

<sup>107</sup> Ibid at para 20.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid at para 21.

<sup>110</sup> Ibid at para 22.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid at paras 24–47.

<sup>113</sup> Ibid at para 30.

<sup>114</sup> Ibid.

the need for fact-specific balancing of multiple constitutional principles, this is precisely what he is describing. A court can change the outcome in individual cases to promote constitutional values without either specifying precisely what those values are or why they require a particular outcome. I return to this aspect of the decision in Part VI and argue that it sets up a kind of substantively inflected procedural control similar to meaningful engagement and the Tribunal process in *Maphango*.

At the abstract end, the Court only lightly specifies general constitutional principles and leaves open a large range of options for legislative or executive action to further specify those through legislation or policy. Sachs J's extended discussion of the constitutional framework for PIE features this kind of highly abstract analysis that identifies general contours of constitutional principles and – as in the analysis of PIE's implementation of the framework – suggests relevant considerations that fit those contours. Engaging in this kind of analysis restores to the Court an active interpretive role that defers to legislative and executive choices only where those choices fit the broad constitutional sensibilities the Court itself identified. As Sachs J illustrated in his PIE analysis, those sensibilities also can be shaped by the legislation itself but, in contrast to the strong deference implied in *Mazibuko*, the Court still actively interprets and questions the balance the legislature strikes.

In both instances there is room for iterative, cooperative development between the court and the legislature or executive that advances the constitutional objective of reducing inequality. Both also are mechanisms for courts to assert independent authority. At the abstract end, a court exercises independent interpretive authority of the kind Karlan describes. At the policy-application end the court shifts into a political mode and exercises authority over the outcomes – and even the development – of legislative or executive policy. Sachs J's insistence that a court can block evictions even where they are the result of an otherwise constitutionally sound policy is one concrete example of this. The judicial management process Sachs J describes broadens that authority in ways that presaged *Olivia Road's* description of meaningful engagement, which itself creates a procedural form of judicial authority almost completely detached from the substance of socio-economic rights.

There are risks to an approach like this that calls for a court to directly acknowledge broad legislative authority and to systematically avoid direct constitutional interpretation. Van der Walt acknowledges that a rigid, formalistic application of subsidiarity could devolve into a 'refusal to critically reflect on and decide the difficult constitutional issues inherent in every legal dispute in post-apartheid South Africa'.<sup>115</sup>

This risk points out subsidiarity's connection to the other avoidance techniques I identified earlier. Each of these techniques expands political-branch authority over the socio-economic rights. If the Court views its own authority as inversely related to the authority of the political branches – a view I have suggested it seems to adopt in *Mazibuko* – then relying on these techniques will push towards the

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<sup>115</sup> Van der Walt *Property* (note 22 above) at 99.



kind of deference Brand identifies. But if the Court begins to recognise more explicitly the possibility for delinking both and the ways that it has asserted independent authority in its earlier cases, then it can establish a more robust role.

The question is whether relying on techniques like subsidiarity will systematically push courts towards the strong deference that marginalises their own role. Van der Walt argues that the risk of ‘formalist, stability-oriented adjudication’ is inherent in South African legal culture generally and subsidiarity raises no greater risk than other adjudicative approaches.<sup>116</sup> And subsidiarity has the benefit of addressing another dimension of that same risk: that courts steeped in apartheid-era-inflected common-law principles will ignore reform-oriented legislation in favour of direct, untransformed application of the common law.<sup>117</sup>

I worry somewhat more than Van der Walt that subsidiarity and the other avoidance techniques will have systematically conservative effects. This is because they offer a handy, off-the-shelf, justification for uncritical avoidance. Deploying it in this way is very easy – a court can simply cite the principle and move on. Van der Walt roundly rejects this kind of shallow application of subsidiarity, but deploying it in the constitutionally attentive manner that he advocates requires quite a bit more care and effort.<sup>118</sup> But, in keeping with my pragmatist approach, I also think that the Court is likely to continue to apply subsidiarity and related principles in socio-economic rights cases.

Theorising the kind of constitutionally driven approach that Van der Walt describes and that I have tried to expand on here is the best way to mitigate that risk. This approach recognises that judicial institutional authority and legislative power are not necessarily inversely related. Starting with Constitution-enforcing legislation, acknowledges the breadth of legislative power to develop policies to fulfill these rights but incorporating concrete ways that courts can assert independent authority while still working through legislation prevents deference.

The exposition of *Maphango* and *Blue Moonlight* that follows first identifies the risks that subsidiarity viewed as an avoidance technique poses. After analysing the Court’s reasoning in some detail, I highlight these signs of avoidance. I then turn back to subsidiarity and argue that, unlike *Maphango*, *Blue Moonlight* is an example of the kind of thick subsidiarity that *Port Elizabeth* illustrates because the Court both independently developed some of the constitutional issues and also infused its interpretation of the relevant Constitution-enforcing statutes with constitutional principles.

In Part VI, I return to *Port Elizabeth* and identify the ways that it elevates avoidance to an express constitutional ‘strategy’. This undermines to some degree the extent of interpretive authority that a court employing this strategy is able to assert. At the same time, the role Sachs J describes opens up possibilities for exerting a different kind of institutional authority through judicial control over individual cases to directly enforce the Constitution. The extent of avoidance in *Maphango* shows how this form of institutional control directly distances courts

<sup>116</sup> *Ibid* at 100.

<sup>117</sup> *Ibid*. See also Van der Walt *Normative Pluralism* (note 33 above) at 99–111.

<sup>118</sup> See K Klare ‘Legal Subsidiarity and Constitutional rights: A Reply to AJ van der Walt’ (2008) 1 *Constitutional Court Review* 129.

from the traditional task of elaborating constitutional principles but also allows them to reach constitutional-value-enforcing outcomes.

#### IV MAPHANGO AND AVOIDANCE

Before 1994 the only clogs inhibiting a lessor's common-law power of termination were those expressly legislated. But the Constitution has fundamentally changed the setting within which the rights of both lessors and lessees stand to be evaluated. Constitutionalism has wrought significant changes to private-law relationships.<sup>119</sup>

This sounds like the predicate to an extensive analysis of the complex relationship between FC s 26 and the common law of leases. The parties' papers teed up those issues. Several tenants with long-standing leases containing rent-control provisions challenged their landlord's attempt to terminate the leases solely to raise the rent. The leases contained a provision limiting rental increases to a set percentage unless the landlord sought permission from the Rental Housing Tribunal – an entity created by the Rental Housing Act to resolve landlord-tenant disputes. The leases also included a termination clause that either party could invoke with notice. The landlord argued that the termination provision – supported by long-standing common law – permitted it to terminate the existing leases and offer to each tenant a new lease with the same terms but at a higher rental rate.<sup>120</sup>

The tenants, supported by an *amicus curiae*, argued that permitting the landlord to circumvent the rent restrictions by terminating the leases violated the tenants' right to security of tenure and access to affordable housing under FC s 26(1). The Court could recognise this by interpreting 'unfair practice' in the Act to prohibit termination of these leases solely to increase rent.<sup>121</sup> Alternatively, the Court could develop the common law of contract to provide a constitutionally derived implied term in the lease limiting a landlord's termination rights in leases with protective clauses where termination would result in 'disproportionate hardship' to the tenant.<sup>122</sup>

In a majority judgment written by Cameron J, the Court sidestepped each of these arguments by relying on the Act. The Supreme Court of Appeal held that the termination could not qualify as a 'practice' under the Act because terminations were single events.<sup>123</sup> The majority rejected the SCA's interpretation, but rather than interpreting 'unfair practice' itself, the Court issued a procedurally complex order that postponed the appeal to allow either party two weeks to file a complaint with the Housing Tribunal.<sup>124</sup> If that happened, the Court retained jurisdiction to

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<sup>119</sup> *Maphango* (note 3 above) at para 31.

<sup>120</sup> *Ibid* at para 3.

<sup>121</sup> *Ibid* at paras 43–47. The Inner City Resources Centre laid out this argument in its submissions as *amicus curiae*. Heads of Argument for Inner City Resources Centre as *Amicus Curiae* paras 6.1–6.5, *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2, 2012 (3) SA 531 (CC), 2012 (5) BCLR 449 (CC).

<sup>122</sup> See Heads of Argument for Inner City (note 121 above) at paras 1.7–1.8.5.

<sup>123</sup> *Maphango* (note 3 above) at para 23.

<sup>124</sup> *Ibid* at para 57 (Rejected SCA's interpretation) & para 70 (court order).

issue further orders based on the outcome of the Tribunal process. If it did not, the appeal would be dismissed leaving the SCA judgment intact.<sup>125</sup>

The majority revived the Tribunal process even though early in the case the applicants had voluntarily abandoned their Tribunal complaint to focus on the litigation and in the face of a deeply critical partial concurrence that raised several procedural irregularities and substantive flaws with the order.<sup>126</sup> In addition, as Frank Michelman notes, bringing the Act into play required working through several ‘seemingly non-trivial’ questions about the Act’s applicability.<sup>127</sup>

Zondo J, in a partial concurrence, took the majority to task for what he viewed as this highly irregular procedural innovation that flouted rule-of-law principles and was deeply unfair to the landowner.<sup>128</sup> Zondo J spent several lengthy paragraphs explaining that the applicants had functionally abandoned the Tribunal process and arguing that reviving that process involved a reckless departure from the Court’s pleading rules and normal procedure.<sup>129</sup>

Regardless of whether these criticisms are correct (and most seem at least arguable), Zondo J’s judgment underscores three things: (1) the lengths that the majority went to bring the Tribunal process back into play; (2) the degree to which the majority avoided addressing the substance of any of the issues or arguments raised by the parties, including their arguments regarding the Act itself; and (3) the procedural irregularities required to avoid those substantive arguments.

Why, then, did the majority go to such lengths to bring the Act into play? Several features of the majority’s explanation for relying on the Act exhibit the avoidance techniques I described earlier. After mapping those out, I will turn to two alternative explanations – Van der Walt’s subsidiarity principles and Michelman’s closely related hypothesis that the result might reflect a justifiable form of inter-branch comity. Drawing on Michelman’s own misgivings over whether comity considerations were sufficiently strong in *Maphango* to justify the turn to the statute, I will argue that, in spite of the room it leaves for a pro-poor result (and the informal signals the majority sends to the Tribunal pushing in that direction), *Maphango* illustrates a more direct effort to avoid constitutional substance.

## A Avoidance Techniques

First, Cameron J cited ‘rule of law considerations’ to find that ‘it would be wrong for this Court to take a narrow view of the matter that ignores the importance and impact of the statute. That would imply that this Court could allow litigants to ignore legislation that applies to an agreement between them.’<sup>130</sup> A short concurrence by Froneman J joined by Yacoob J restated this same point more

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<sup>125</sup> Ibid at para 70.

<sup>126</sup> Ibid at para 45 (Applicants withdrew Tribunal complaint to focus on the litigation).

<sup>127</sup> Ibid at para 48 (Observes that ‘[i]n my view, neither the landlord nor the tenant fully appreciated the force of the Act’s provisions in litigating their dispute’). F Michelman ‘Expropriation, Eviction and the Gravity of the Common Law’ (note 43 above).

<sup>128</sup> *Maphango* (note 3 above) at paras 134–138.

<sup>129</sup> Ibid at paras 139–146.

<sup>130</sup> Ibid at para 48.

directly: ‘It would be a denial of constitutional responsibility for any court to decide a matter without considering legislation where it was aware of applicable legislation.’<sup>131</sup> This is a particularly strong version of the Court’s general preference for seeking out legislative enforcement mechanisms that it sometimes relies on to avoid addressing the substance of socio-economic rights directly.

Secondly, the judgment emphasises the Act’s status as ‘a post-constitutional enactment adopted expressly to give effect to the right of access to adequate housing’.<sup>132</sup> This allows for (and indeed may require) a broad interpretation of ‘unfair practice’ that potentially extends to the termination here.<sup>133</sup> Paired with the generic, rule-of-law-driven principle that a court should apply any relevant legislation to a dispute, this seems to suggest a double-ratchet in favour of legislative enforcement techniques in the case of constitutionally driven legislation.

Thirdly, the Court detailed in adjective-studded language the Act’s ‘complex, nuanced and potentially powerful system for managing disputes between landlords and tenants’.<sup>134</sup> The Act ‘expressly takes account of market forces as well as the need to protect both tenants and landlords’ and ‘is in particular sensitive to the need to afford investors in rental housing a realistic return on their capital’.<sup>135</sup> But, ‘[a]t the same time, the Act does not ignore the need to protect tenants’.<sup>136</sup> Indeed, the majority emphasised, this case focused on the Act’s ‘most potent’ provisions in this respect, the power of the Housing Tribunal to prevent a landlord (or tenant) from taking otherwise lawful action if that action constitutes an ‘unfair practice’.<sup>137</sup> Most relevant here, the Court explained, ‘the Act demands that a ground of termination must always be specified in the lease, but even where it is specified, the Act requires that the ground of termination must not constitute an unfair practice’.<sup>138</sup>

The majority went on to unpack not only the Act’s definition but also to highlight the provincial regulations promulgated under the Act. It found ‘significant’ the Act’s specific ‘formulation’.<sup>139</sup> By incorporating ‘interests’ as well as rights, the definition ‘includes all factors bearing upon the well-being of tenants and landlords’.<sup>140</sup> The provincial regulations further prohibit landlords from engaging in ‘oppressive or unreasonable conduct’.<sup>141</sup> Together these give the Tribunal the power to take into account not ‘only the common-law legal rights of a tenant or landlord, but ... also their statutory interests’.<sup>142</sup>

The availability of a constitutionally driven, legislatively crafted balancing test for protecting tenants, the Court found, made it unnecessary to reach their

<sup>131</sup> *Ibid* at para 152.

<sup>132</sup> *Ibid* at para 57 and also at para 34 (Describes the Act as a ‘prime instance’ of legislative enforcement of FC s 26).

<sup>133</sup> *Maphango* (note 3 above) at para 57.

<sup>134</sup> *Maphango* (note 3 above) at para 49.

<sup>135</sup> *Ibid*.

<sup>136</sup> *Maphango* (note 3 above) at para 50.

<sup>137</sup> *Ibid*.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Maphango* (note 3 above) at para 52.

<sup>140</sup> *Ibid*.

<sup>141</sup> *Maphango* (note 3 above) at para 54.

<sup>142</sup> *Maphango* (note 3 above) at para 53.

substantive constitutional and common-law arguments.<sup>143</sup> What is more, in spite of the majority's extensive exploration of the Act and its implementing regulations described above, it refused to decide the tenants' claim that the termination here constituted an unfair practice under the Act.

By rejecting the SCA's limited interpretation of unfair practice and finding that the constitutional connection required a broader reading, the majority's analysis started down the road the ICRC and the residents mapped out in their statutory arguments. Indeed, much of the detailed analysis in the majority judgment closely tracks their interpretations and sometimes even the language in their heads of argument. But rather than definitively interpreting unfair practice, the Court stopped short and instead 'kick-started' the Tribunal process by, in essence, remanding the case back to that body to determine, in light of the powerful balancing mechanism the legislature created, whether the terminations here were unfair.<sup>144</sup>

This mirrors a similar shift in the Court's analysis in *Blue Moonlight* from constitutional to statutory analysis that I discuss below. In both cases, the Court avoided substantive development of the constitutional provisions the parties raised by finding a constitutionally infused legislative vehicle that incorporates a context-dependent balancing test.<sup>145</sup> Here the shift allowed the Court to avoid interpreting even the statute and instead to devolve, at least initially, the actual balancing to another body, created by legislation.

In *Maphango* the majority's decision to rely on the Act allowed the Court to avoid direct constitutional (and also common-law) development. As Zondo J's partial concurrence illustrates, the majority had to work pretty hard to take the statutory path and despite doing so, still refused to resolve the parties' arguments over the correct interpretation of the Act. The majority acknowledged in a footnote that reopening the Tribunal procedure required it to craft a remedy that none of the parties sought. Tellingly, it cited *Olivia Road* as precedent for creating such a 'novel remedy'.<sup>146</sup>

Both cases show the self-reinforcing effects of multiple avoidance techniques. In both, the Court went out of its way to avoid the parties' substantive arguments by finding a Constitution-enforcing procedure that promises the possibility of resolving the dispute in a context-sensitive way. Here that procedure was one Parliament created as part of its obligation to legislatively enforce FC s 26 and so came with direct democratic credentials. In *Olivia Road*, the procedure was

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<sup>143</sup> *Maphango* (note 3 above) at para 55 ('Since in my view this dispute is best approached through the generous and powerful mechanisms the Act offers both sides to the dispute, I express no view on whether the landlord was entitled at common law to cancel the leases, nor on whether, if it was so entitled, the common law should be constitutionally developed to inhibit that power.')

<sup>144</sup> See Michelman *Expropriation* (note 43 above) at 260 (Contrasts this result with the alternative of 'kick-start[ing]' a common-law revision process). Procedurally this order was not a direct remand, but functionally it served the same purpose by giving leave to the parties to file a complaint posing that question.

<sup>145</sup> Roux has argued that the Court has a general preference for translating potentially concrete constitutional principles into context-dependent tests as a mechanism for minimising possible future conflicts with the political branches. See Roux *Principle* (note 14 above) at 133–134.

<sup>146</sup> *Maphango* (note 3 above) at fn 121.

court-crafted but still designed to promote democratic processes through citizen participation in policymaking. In both cases, the Court emphasised the democratic aspects of these procedures rather than assessing their substantive dimensions.

One key difference is that engagement is a procedurally focused remedy and so consistent reliance on it poses a greater risk of continued avoidance over time. The Tribunal process uses a set of substantive criteria that courts could use to develop constitutional principles. But the Tribunals and the Tribunal process – while far more structured than engagement – share similar procedural characteristics and an emphasis on practical resolution of specific disputes over legal development.<sup>147</sup>

## **B Subsidiarity**

Van der Walt cites *Maphango* as a useful example of how subsidiarity can work to promote constitutional values. He sees in Cameron J's emphasis on the Constitution-enforcing role of the Act and his insistence that rule-of-law concerns require applying relevant legislation even where the parties fail to rely on it, something that sounds much like the second subsidiarity principle that Constitution-enforcing legislation displaces direct reliance on the common law.<sup>148</sup>

Van der Walt recognises that invoking the Act meant sidestepping the parties' invitation to develop the common law of contract in light of FC s 26. But he argues that the majority correctly refused to abstractly define that interaction. Whether and how FC s 26 will limit a particular landlord's common-law rights, in his view, 'has to be established in every individual case, in its context, taking into consideration a large number of variables that may swing individual cases in one or the other direction'.<sup>149</sup> The Act does this and unless the balance it strikes is itself constitutionally suspect, the 'rule of law and democracy considerations' underlying subsidiarity require courts to channel their analysis through that process.<sup>150</sup>

For Van der Walt, the majority's reliance on the Act 'represents a significant effort to promote the spirit, purport and objects of the Bill of Rights' in three respects.<sup>151</sup> First, the majority recognised the general principle that FC s 26 affects private relationships, especially where the state takes measures to fulfill the right of access to adequate housing.<sup>152</sup> Secondly, the majority held that the Act could limit the common-law right to terminate a lease where doing so constitutes an unfair practice.<sup>153</sup> Thirdly, and most significantly in Van der Walt's assessment, the majority accepted the argument that the tenants' right to security of tenure

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<sup>147</sup> The Gauteng Tribunal's website describes the Tribunal as 'a quasi-judicial body, which serves a regulatory function.' The Tribunal performs three functions under the Act: it (1) 'resolves complaints through conciliatory processes such as mediation and arbitration'; (2) 'offers advice on issues related to residential leases and rentals'; and (3) 'provides consumer education which is important for informing people about their rights and duties as parties in the rental sector'. <<http://www.dlgh.gpg.gov.za/Pages/HousingRentalTribunal.aspx>>

<sup>148</sup> Van der Walt, *Property* (note 22 above) at 59.

<sup>149</sup> *Ibid* at 60.

<sup>150</sup> *Ibid*.

<sup>151</sup> *Ibid* at 58–59.

<sup>152</sup> *Ibid* at 57–58.

<sup>153</sup> *Ibid* at 58.



‘involves protection against the termination of their tenancies not just post-termination protection against eviction’.<sup>154</sup>

This was a significant development in the Court’s approach to housing rights. Up to this point, the Court had dealt with the eviction process itself and applied FC s 26(3) to mitigate the effects of that process. *Maphango* for the first time recognised a legal mechanism that could prevent eviction altogether in some circumstances. By identifying the extent of avoidance here, I do not mean to minimise that aspect of the case. Part VI returns to this and considers how this is an example of the Court interpreting legislation to create a mechanism for procedural control that exerts a form of institutional authority not directly tied to constitutional interpretation.

### C Inter-branch Comity

Frank Michelman offers a somewhat different analysis of *Maphango*. Michelman also hears echoes of subsidiarity in the majority’s insistence that the Court cannot ignore relevant legislation even if the parties themselves fail to raise it. But he notes that, as developed formally by the Court, subsidiarity is limited to preferring legislation over direct constitutional claims. He says that *Maphango* raises a very different question: whether ‘sound reasons appear for routinely favouring an arguably available statutory ground over an arguably available developed-common-law ground of relief, *in the class of cases in which (a) the Court believes that the Constitution would require the Court’s receptivity to the developed-common-law claim in the hypothetical absence of the statutory claim and (b) an apparently legally plausible, applicable development of the common law is known to exist.*’<sup>155</sup>

In Michelman’s view the majority’s decision to follow the statutory route over developing the common law raises the prospect that what he calls the ‘gravity’ of common law – a latent, conservative pull towards preserving the status quo – might have influenced the majority.<sup>156</sup> He notes that the parties’ arguments clearly set up the common-law route, and the majority had to go to some lengths to avoid that route over the Act.<sup>157</sup>

After exploring the signs of it in the majority judgment, Michelman ultimately declines to conclude that *Maphango* definitively reflects common-law gravity at work. Instead he finds plausible the alternative explanation that the Court might have ignored the common-law path relying on a form of inter-branch comity that privileges relying on – and developing through construction and interpretation – legislative measures that arguably are designed to respect, promote and fulfill constitutional rights.<sup>158</sup> In this, Michelman sees a potentially pro-transformative principle: courts might consistently prefer to interpret available legislative

<sup>154</sup> Ibid.

<sup>155</sup> Michelman *Expropriation* (note 43 above) at 258.

<sup>156</sup> Ibid at 255.

<sup>157</sup> Ibid at 260.

<sup>158</sup> Ibid at 260 (‘There is, however, a further apparent and compelling motivation for the SANDU rule in many of its applications, having to do with judicial recognition, acknowledgment, and encouragement of Parliament as a co-partner in shouldering the responsibility to respect, protect, promote and fulfill the rights in the Bill of Rights.’).

mechanisms over developing the common law because doing so will support, encourage and, in cases like *Maphango* where the interpretation that brings the statute into service is ‘plainly beyond the mundane’, even extend the parliamentary contribution to developing the Bill of Rights.<sup>159</sup> A preference like this could be justified because it recognises the shared role of the court and Parliament for constitutional development and also takes into account institutional-security concerns of the kind Roux has identified.<sup>160</sup>

The inter-branch comity principle that Michelman accepts as a defensible explanation for the majority’s reliance on the Act in *Maphango* is related to subsidiarity in that it sees independent value in courts working to enforce the Constitution through legislative mechanisms. In this respect, Michelman seems to accept Van der Walt’s view that, as a general matter, the democratic payoff from preferring Constitution-enforcing legislation over direct development of the Constitution or the common law should play some role in the way a court orders its analysis.

But Michelman cautions that the inter-branch-comity justifications for preferring a legislative route were not the only considerations in *Maphango*. Others arguably militated against avoiding the common-law route. First, the comparative transformative potential of each route did not clearly favour relying on the Tribunal. While ‘kick-starting’ the tribunals through a now constitutionally infused unfair-practice assessment could have longer-lasting transformative effects for tenants by possibly opening the door to constitutionally derived challenges to other aspects of the tenant-landlord relationship, changing the common law to limit contractual rights might have produced even broader transformative effects by setting a precedent applicable not only to other leases but across other classes of contracts.<sup>161</sup> Secondly, taking the statutory route missed the opportunity ‘to kick-start the common law judiciary into a stepped-up mode of constitutionally inflected review of the common law’ – an opportunity that, if missed too often, risks leaving the common law undeveloped.<sup>162</sup>

Michelman raises the ‘spectre’ of a third concern tied to the Court’s celebration of the ‘complex, nuanced and potentially powerful system’ for managing landlord tenant disputes that is ‘acutely sensitive to the need to balance the social cost of managing and expanding rental housing stock without imposing it solely on landlords’.<sup>163</sup> This attraction to balancing measures crafted by legislation might, Michelman worries, ‘too often tempt courts away from the hard tasks of questioning the compatibility of legislative balances with constitutional

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<sup>159</sup> *Ibid* at 259–260.

<sup>160</sup> Roux *Principle* (note 14 above) at 109–112.

<sup>161</sup> Michelman *Expropriation* (note 43 above) at 260.

<sup>162</sup> *Ibid* at 260. Michelman compares this point with Van der Walt’s argument for a ‘residuary’ principle that requires litigants to rely on common law over direct constitutional claims in the absence of relevant legislation. *Ibid* citing Van der Walt *Normative Pluralism* (note 33 above) at 116). The need for a unified system of law under the Constitution, Van der Walt argues, justifies this marching order. Van der Walt *Normative Pluralism* (note 33 above) at 116. Reaching directly for constitutional remedies over developing the common law in light of the Constitution creates unnecessary duplication and leaves the common law out of ‘the new constitutional dispensation’.

<sup>163</sup> *Maphango* (note 3 above) at para 49.

requirements and of re-examination of the common law's historically embedded balances to ensure they are in keeping with the Constitution's pro-transformative aims and values.<sup>164</sup>

## D Avoidance

The signs of avoidance in *Maphango* illustrate that risk. While I agree that the majority judgment shows a genuine concern for the constitutional principles at stake and that kick-starting the Tribunal process created a significant tool for practical protection of tenants' rights, it falls well short of a significant effort at explaining what those principles require.<sup>165</sup> Instead the Act's flexible framework provided an escape hatch for the Court simply to avoid constitutional and common-law issues at play while signaling its preference for a pro-poor outcome without saying much at all – even indirectly through statutory interpretation – about what those constitutional values are or how they should apply to these facts.

The majority's holding that termination could constitute an unfair practice opens the door to a possible limitation on a landlord's common-law rights here and in other complaints that come before a Housing Tribunal. But now, as Cameron J emphasised at length, we are talking about a limitation grounded in a set of statutory, not constitutional, considerations.<sup>166</sup> As an explicitly Constitution-enforcing statute, those considerations might – but might not – be constitutionally required.

To be fair, that will typically be the case in a constitutional framework that accepts legislative constitutional enforcement. Constitution-enforcing legislation is unlikely to expressly distinguish between its 'merely' statutory and constitutional dimensions. Nonetheless adopting a rule that systematically prefers legislative enforcement runs a greater risk of more limited constitutional development over time at least as compared to direct constitutional enforcement.<sup>167</sup> It also puts a premium on courts taking advantage of the substantially reduced opportunities that are likely to arise for identifying specific constitutional norms.

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<sup>164</sup> Michelman *Expropriation* (note 43 above) at 261. Michelman cites Klare's response to Van der Walt for the first half of this worry (note 118 above).

<sup>165</sup> I recognise that there is a difference between promoting constitutional values and explicating constitutional principles. The one emphasises achieving constitutional objectives and the other concretely identifying what the Constitution requires. The problem with avoidance techniques is specifically the failure to clearly explicate constitutional principles.

<sup>166</sup> See *Maphango* (note 3 above) at paras 52–53 (emphasising the difference between 'interests' in contradistinction to 'rights').

<sup>167</sup> Van der Walt recognises this and argues that there are clear benefits to preferring a case-by-case resolution of how these principles apply. Van der Walt *Property* (note 22 above) at 60. As I explain later, I agree that there are benefits to this approach, but I think it is important to acknowledge that realising those benefits comes with the cost of increased uncertainty over constitutional meaning. Developing the common law would not necessarily provide any more clarity than systematically relying on legislation. In both cases courts can rely on extra-constitutional considerations to decide a case. For either approach, whether and to what extent the court develops constitutional principles will depend on how the decision is drafted. Thick subsidiarity builds on precisely this point by preferring an interpretive approach that explicitly incorporates analysis of the constitutional principles a statute enforces.

Legislation, like the Act, that creates a multi-factor balancing test, compounds the lack of constitutional clarity. Resolving the tenants' claims under its test might 'display the desired characteristics and avoid the unwanted effects identified in the Constitution' but not necessarily.<sup>168</sup> The majority celebrated the even-handed way the test takes into account both market concerns and the need to protect tenants.<sup>169</sup> But that same evenhandedness could swing the result in a particular case in either direction. Whether the specific balance a Tribunal strikes on a given set of facts furthers constitutional values or not is an open question – a question that is impossible to answer because we do not know how FC s 26 intersects with the common-law right to terminate, nor does the majority in *Maphango* provide any guidance.<sup>170</sup>

*Maphango* differs from the situation where an appellate court remands a case to a lower tribunal to apply a new standard on the facts for two reasons. First, the procedural maneuvers the Court used to reopen the Tribunal process suggest that it was doing more than simply giving the Tribunal a first crack at striking this balance. Secondly, the Tribunal process itself is unlikely to provide much clarity on that interaction because it is designed specifically to resolve landlord-tenant disputes, not to settle legal questions or to produce reasoned judgments identifying the constitutional dimensions of each dispute.

Concern for inter-branch comity and democratic enforcement might, as a general matter, justify relying on the Act to resolve these disputes. As I have highlighted already, consistently applied, a rule like that will inevitably attenuate the scope of direct constitutional development at least in the short term. But that attenuation could be reduced if courts interpret Constitution-enforcing statutes with consistent and explicit attention to not only general constitutional values but also specific constitutional provisions. By identifying the aspects of the statute that reflect constitutional norms and how to apply those norms in specific factual situations (including how to weigh them against other statutory factors), courts can play an independent role in elaborating the constitutional dimensions of the Act. Van der Walt's description of the dialogue that subsidiarity can develop captures this. The majority's refusal to decide whether the terminations in *Maphango* were unfair practices (or even to provide some general guidance by evaluating the statutory factors in light of the Constitution) missed that opportunity.

To some extent these problems could relate to timing. This is the first case where the Court addressed the Act's Constitution-enforcing function and it did so in the absence of a ruling by the Tribunal. It is reasonable under those circumstances for the majority to leave open some of these questions. And it is possible that the Constitutional Court and lower courts could over time develop both the constitutional dimensions of the statutory framework and the constitutional boundaries of it. This could happen, for example, in appeals from individual cases that reject on explicitly constitutional grounds the particular

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<sup>168</sup> Van der Walt *Property* (note 22 above) at 59.

<sup>169</sup> *Maphango* (note 3 above) at para 49.

<sup>170</sup> In fairness, I think Van der Walt is arguing that the basic fact that the Act creates a statutory mechanism to challenge what under common law was an absolute right to terminate on the basis that it's unfair in itself advances the constitutional project. I do not disagree with that point.

balance the Tribunal strikes and in direct challenges to the constitutionality of particular factors in the Act or to interpretations of those factors. Subsidiarity allows for that kind of constitutional development and that is the process, I think, Van der Walt sees subsidiarity as capable of promoting.

But there is no guarantee that that kind of incremental constitutional development will happen. Instead of kick-starting a constitutionally infused Tribunal process that will gradually clarify the scope of the Constitution and its effects on the common law, we might end up with a much narrower process that leaves decisions on individual cases predominantly in the hands of the rental tribunals, features few appeals and appeals that limit themselves to straightforward questions of statutory interpretation without any reflection on – much less questioning of – whether and how either the statute itself or the balancing in individual cases meets constitutional muster.<sup>171</sup> That is the difference between subsidiarity as Van der Walt describes it and avoidance.

Consider how that risk played out here. The applicants unsurprisingly took up the Court's invitation to file a complaint with the Rental Tribunal. The Tribunal had the authority to determine whether terminating these leases to avoid the rent-increase restrictions in them was an 'unfair practice' in terms of the Act. But the first step was for the Tribunal to attempt to mediate the dispute. Here, mediation succeeded, and so the story ends with no opportunity to further develop the Act's substance or its relationship to the Constitution.<sup>172</sup>

Even if that informal resolution had failed and the case returned to the Constitutional Court for review of a decision on the merits, it is relatively easy to imagine a scenario that would have left the constitutional dimensions of the case undeveloped. Following *Maphango*, FC s 26(1) could operate as a background principle enlarging the potential scope of 'unfair practice' and, at least if the Tribunal pays attention to the majority, pushing towards some restriction on the landlord's termination rights with respect to these leases. But (as the majority describes at length) the factors that the Tribunal applies are legislatively defined and the entire process is a legislatively crafted mechanism to implement FC s 26 in a market-sensitive way. Equally important, the balancing that results under the Act involves factors that extend beyond FC s 26 and so, even if the Court reviewed the Tribunal's interpretation, it could still avoid saying anything directly about how FC s 26 affects the Act and instead merely tweak the legislative balance on the specific facts of this case.

The lengths the majority went to bring the Tribunal process back into play here heighten this concern and show the self-reinforcing effect of avoidance techniques (and possibly their interplay with Michelman's worry about common-law gravity). It is one thing to adopt a rule that requires applying relevant legislation to a dispute even where the parties missed it. As Froneman J's concurrence notes, the SCA did that and found that because the terminations could not qualify as

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<sup>171</sup> The Act provides for 'review' rather than 'appeal' of Rental Tribunal decisions in the High Court. This arguably narrows the scope of review and may further diminish the prospects for this kind of constitutional development. See [http://www.iolproperty.co.za/roller/news/entry/appeal\\_vs\\_review\\_in\\_housing](http://www.iolproperty.co.za/roller/news/entry/appeal_vs_review_in_housing).

<sup>172</sup> March 2014 email correspondence with Stuart Wilson.

an ‘unfair practice’ under the Act, that could not be a basis for holding that they were contrary to public policy under *Barkhuizen*. The majority could have done the same thing here and in the process explained the ways in which unfair practice reflected constitutional norms and values and why those required the outcome on these facts.

But the majority not only wanted to bring the substantive provisions of the statute into play, it wanted to rely on the statutory procedure as well in spite of the fact that the applicants had voluntarily abandoned that procedure.<sup>173</sup> As Michelman observes, this involved a potentially pro-poor application of the statute that could result in substantial protections for tenants in the long term. But those gains are channelled through legislation that sets up a procedure designed to avoid legal principle. This is why it looks a lot like *Olivia Road*. In both cases the Court found a way to enforce FC s 26 through a procedure that promotes informal dispute resolution over formal legal resolution.

Surely subsidiarity here would have permitted the Court to find that eviction in these circumstances was an unfair practice in terms of the Act and in doing so say something substantive about the underlying constitutional principles? That’s the model the Court used in *Port Elizabeth*, and the amicus argument provided a roadmap for doing just that. Even if the Court started with the Act, it could have applied the balancing factors *on these facts* as substantive proxies for FC s 25 and FC s 26 and said something about their connection to those constitutional principles.<sup>174</sup> Instead the Court left it to the Tribunal with no guidance on the substance.

## V BLUE MOONLIGHT

Seventeen years into our democracy, a dignified existence for all in South Africa has not yet been achieved. The quest for a roof over one’s head often lies at the heart of our constitutional, legal, political and economic discourse on how to bring about social justice within a stable constitutional democracy.<sup>175</sup>

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<sup>173</sup> Michelman explains that the Act provided both a substantive route – ie interpreting ‘unfair practice’ to prohibit the terminations here – and the procedural route the Court took of delaying judicial action on the eviction case until both parties had ‘an unhindered opportunity to place the matter before the provincial Rental Housing Tribunal for its disposition (thus allowing the Tribunal to make the primary determinations both of the “unfair practice” question and of any remedial consequence)’. Michelman *Expropriation* (note 43 above).

<sup>174</sup> Michelman notes that ‘[e]nforcing the statutory while by-passing the common-law claim then plainly carries with it a judicial judgment that the as-applied statutory protection for the constitutional rights and values in play is constitutionally sufficient in this case, while quite possibly (depending on how the Court writes the judgment) deciding nothing more about what the Constitution does or does not require.’ Michelman *Expropriation* (note 43 above) at 258. He argues that the Court could have done the same thing by developing the common law on these facts without ‘cutting a wider swathe of legislatively irreversible constitutional law ...’. I see the statutory route representing even greater constitutional avoidance than the common-law route for two reasons: First, the statute is designed in the first instance to protect tenants’ and landlords’ rights through informal compromise; and secondly, developing the common law would have involved striking a fact-specific balance between the tenants’ and the landlords’ rights (or at least stating a rule for how to strike that balance), something the Court avoided by interpreting ‘unfair practice’ only to reopen the Tribunal process.

<sup>175</sup> *Blue Moonlight* (note 2 above) at para 2.



Van der Westhuizen J opened his judgment for a unanimous Court with the acknowledgment that South Africa has not yet fulfilled the constitutional promise of a dignified existence or even reached a point where every citizen at least has a roof over his or her head. The facts of the case presented a small subset of that much larger problem. A group of 81 adults and five children, the ‘Occupiers’ in the judgment, faced eviction by a private landowner which sought to redevelop the property where they lived.<sup>176</sup>

The scenario is a familiar one for the Court. Beginning with – and directly traceable to – the landmark *Grootboom* decision where the Court held that the state in all spheres lacked an adequate plan for dealing with what it called ‘emergency’ housing needs, the Court has decided several eviction cases, each presenting a slightly different factual configuration. *Blue Moonlight* presented a novel combination of issues: (1) the extent to which FC s 26 obligates a private landowner to permit people to occupy land where evicting them would result in homelessness; (2) the interactions between FC s 26 and FC s 25’s protection of private property; (3) the rights of both the Occupiers and the landowner against the municipality where the prospect of homelessness resulted from arguable inadequacies in planning and budgeting; and (4) the obligations of municipal governments generally in relation especially to provincial but also to national government in providing emergency housing to citizens evicted from private land.<sup>177</sup>

In framing the questions in the case, however, Van der Westhuizen J found that FC s 26 – or at least its positive dimension requiring progressive realisation of access to adequate housing – was not directly on the table.<sup>178</sup> Instead, in his view, the facts primarily required interpreting ‘the principal instruments enacted to give effect to the constitutional obligations of the various organs of state in relation to housing’ – specifically the Housing Act, the National Housing Code and the City of Johannesburg’s Housing Policy.<sup>179</sup> In other words, the Court would focus on the mechanisms the government had already adopted to enforce its constitutional obligations rather than the constitutional provisions themselves.

Is this subsidiarity at work? The Court never cites subsidiarity directly and the parties certainly did not frame the case that way. The Occupiers argued that the City was obligated under FC s 26 (and *Grootboom*) to house, at least on a temporary basis, the people living on Saratoga Avenue if the landowner succeeded in evicting

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<sup>176</sup> Ibid at para 6. This paragraph is notable for the detailed description of the Occupiers’ situation, in particular the acknowledgement that ‘[t]he location of the building is crucial to the Occupiers’ income’.

<sup>177</sup> Ibid at paras 3–5. The Court had dealt with several of these issues individually or in different combinations in other cases but not this particular combination.

<sup>178</sup> Ibid at para 5 (‘This case does not deal directly with a programme, or measures, to realize progressively the right of access to adequate housing.’)

<sup>179</sup> Ibid at paras 3 and 24 (quotation is from para 24).

them.<sup>180</sup> The landowner argued that it had the right, consistent with procedures prescribed by law, to evict these people grounded squarely in s 25. It argued further that this right was unqualified by the Occupiers' potentially conflicting rights under FC s 26 citing both the Supreme Court of Appeal's and the Court's own decisions. And the City thickened the constitutional brew by positing, in its terms, the 'novel constitutional question' of 'what ... the three spheres of government's respective duties in the context of a commercially motivated eviction by a private landowner' are under ss 152 and 153.<sup>181</sup> Why, then, would the Court say that interpretation of the statutory questions was 'at the heart of the matter'?<sup>182</sup>

## A The Case

It was far from obvious that direct constitutional questions were not at the core of the case. Unlike *Maphango*, however, here the Court addressed those questions to some extent and interpreted the statutes at play in constitutionally attentive ways. It nonetheless relied on several avoidance techniques including a strong emphasis on statutory enforcement mechanisms that incorporate a context-dependent balancing mechanism and a fairly general interpretation of those mechanisms as well as the background constitutional principles that inform them in ways that limited its interpretive role. More troubling, in a follow-up proceeding where the Occupiers asked the Court to clarify and enforce its original order, the Court showed some signs of a reluctance to extend the important principles it established, which at least raises the question whether it will extend them in later cases or follow the pattern of the *Grootboom-Olivia Road* sequence and revert to more direct avoidance.

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<sup>180</sup> See *Blue Moonlight* First Respondent's Heads of Argument para 1 ('At the heart of this application is the constitutional obligation of the applicant ('the City') to provide accommodation to otherwise homeless persons who are in unlawful occupation of private property.'). See also Heads of Argument for Second Respondent, The Occupiers of Saratoga Avenue at para 5, *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC) (Cites *Grootboom* and argues that 'in order to be reasonable, a housing programme must make provision for temporary emergency accommodation for persons in desperate need'). In particular the occupiers sought as part of the order a declaration that the City's housing policy was unconstitutional (para 155.4.4). Heads of Argument for Applicant City of Johannesburg at para 1, *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC):

The novel constitutional question for determination is what are the three spheres of government's respective duties in the context of a commercially motivated eviction by a private landowner. Do occupiers of privately-owned buildings who are sought to be evicted by the owner – and not for reasons of their safety, but for that of commercial expediency – have an immediately exigible claim directly against local government for alternative housing in the context where the provincial government could not and did not make funds available therefor?

<sup>181</sup> Heads of Argument for Applicant City of Johannesburg (note 179 above) at para 1, *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC). Indeed the City of Johannesburg, in a footnote, emphasised that '[n]either [*Grootboom*] nor [*Port Elizabeth*] or any other judgment by this Court considered this question.' (fn 1) And later in its written argument the City argued that *Grootboom* should be read as absolving municipalities from this responsibility (paras 67–71).

<sup>182</sup> *Blue Moonlight* (note 2 above) at para 5.

1 *The 'Constitutional and Legal Framework'*

The Court opened its analysis, in a section titled 'Constitutional and Legal Framework', acknowledging that the case raised potentially 'compet[ing]' constitutional issues 'as well as constitutional allocation of powers' across government.<sup>183</sup> This structure mirrors *Port Elizabeth* directly. But in the next sentence the Court noted that '[p]olicy has been formulated and statutes enacted to create a scheme for the protection and realisation of these rights'.<sup>184</sup> The remainder of the section reflects that same emphasis on statutory analysis rather than the clear distinction that Sachs J drew in *Port Elizabeth* between the constitutional background and the provisions of PIE.

The Court acknowledged that Blue Moonlight relied on s 25, the Occupiers 'anchor their case in section 26', and cited Chapters 3 and 7 as setting out principles relevant to the City's role in providing housing.<sup>185</sup> But then it moved to the 'principal instruments enacted to give effect to the constitutional obligations of the various organs of state in relation to housing', the Housing Act and the National Housing Code.<sup>186</sup> The Housing Act, the Court explained, 'expressly gives effect to the Constitution' and obliges municipalities to take steps to ensure that local residents have access to housing.<sup>187</sup> This mandate intersects with the Local Government: Municipal Systems Act 32 of 2000, which specifies municipal powers and duties, thus giving effect to the constitutional distribution of powers in ss 152 and 153. Here again, the statute incorporates the substantive constitutional questions because it requires municipalities to work together with other spheres of government to progressively realise the rights in FC ss 25 and 26 as well as to give effect to the Constitution more generally through prioritising basic needs.<sup>188</sup> Returning to the Housing Code, we learn that Chapter 12 'was introduced after the decision of this Court in *Grootboom*' and the City's housing policy incorporates Chapter 12 by including a programme for emergency housing.<sup>189</sup> Finally, the Court put PIE on the table as the statutory framework for assessing evictions.<sup>190</sup>

The Court devoted most of the rest of its analysis to PIE, framing '[t]he crucial question before this Court' as whether evicting the Occupiers satisfies PIE's equitable, considering-all-circumstances test.<sup>191</sup> It turns out that this inquiry subsumed virtually every other question in the case. The Court made this clear by explaining that applying the PIE test required it to address five questions: the owner's rights, the City's obligations, the sufficiency of the City's resources to meet those obligations, the constitutionality of the City's emergency housing

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<sup>183</sup> Ibid at para 16 ('The issues to be determined require a consideration of rights enshrined in our Constitution, which may compete in circumstances where homelessness is a likely result of eviction, as well as constitutional allocation of powers and functions to municipalities and the other spheres of government.')

<sup>184</sup> Ibid.

<sup>185</sup> Ibid at paras 17–23.

<sup>186</sup> Ibid at para 24.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid at paras 25–26.

<sup>189</sup> Ibid at paras 27–28.

<sup>190</sup> Ibid at para 29.

<sup>191</sup> Ibid at para 30.

policy and ‘an appropriate order to facilitate justice and equity in the light of the conclusions on the earlier issues.’<sup>192</sup> In other words, all of the issues, both constitutional and statutory, which the parties raised, were simply aspects of the PIE analysis.

In answering these questions the Court touched on the now-subsidary constitutional issues and also established some significant principles, including that private landowners have a limited obligation to allow occupiers to remain on land where evicting them would cause homelessness and that a municipality cannot rely on a lack of resources as a defence where that lack was the result of an incorrect interpretation of its statutory obligations to provide housing. By couching those conclusions as applications of PIE – and interpretations of other statutes filtered through the PIE inquiry – however, the Court shows some signs of the conservative pull of constitutional avoidance.

## 2 *Blue Moonlight’s Rights*

The Court made surprisingly short work of Blue Moonlight’s argument that it had an unqualified right to evict the Occupiers so long as it followed legal procedure, holding that ‘[a]n owner’s right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE’.<sup>193</sup> This comes on the heels of a discussion of the interaction between FC ss 25 and 26 and the careful balance the Constitution strikes between transformation through redistribution and protecting existing property distributions against arbitrary deprivation.<sup>194</sup> From this we learn that unlawful occupation is without question ‘a deprivation of property under section 25(1)’ but also that such deprivations may ‘pass constitutional muster’ if they flow from a law of general application and they are not arbitrary.<sup>195</sup>

Although largely a concise summary of fairly well-trodden constitutional ground (which the Court acknowledged by citing both *Harksen* and *FNB*), this seems to promise the start of inquiry into the scope of s 25 and the criteria for constitutionally sufficient deprivations. Instead the Court short-circuited that discussion concluding ‘[t]herefore PIE allows for eviction of unlawful occupiers only when it is just and equitable’.<sup>196</sup> With this the Court left the Constitution and turned to PIE. Under PIE’s test, the Court explained, a private landowner, like Blue Moonlight, who purchases land with knowledge of long-standing occupation, should reasonably expect ‘the possibility of having to endure the occupation for some time’.<sup>197</sup> The Court did not ground this reasonable expectation in any specific legal source. It is possibly – but not clearly – a function of the Occupiers’ offsetting rights under FC s 26, and it is not a direct limitation on Blue Moonlight’s rights under s 25. The analysis stops with PIE and is tied specifically to the facts in this case.

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<sup>192</sup> Ibid at para 33.

<sup>193</sup> Ibid at para 40.

<sup>194</sup> Ibid at paras 34–38.

<sup>195</sup> Ibid at para 37.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid at para 40.

### 3 *The City's Obligations*

The Court spent somewhat more time analysing the City's argument that its obligations were limited to the implementation of the national and provincial housing schemes and that these require, at most, that the City seek emergency funding from the provincial government to provide emergency housing where a private party initiates an eviction. Here, again, the Court relied primarily on the statutory context – in particular Chapter 12 of the Housing Act – to find that '[t]he City has a duty to plan and budget proactively for situations like that of the Occupiers'.<sup>198</sup>

As part of its constitutional argument, the City relied on language in *Grootboom* that it claimed imposed funding obligations on only the national government, restricting local government to implementation of those decisions. In rejecting this claim, the Court expanded its *Grootboom* judgment in an important way. First, the Court quoted *Grootboom* to find that the 'duty regarding housing in section 26 of the Constitution falls on all three spheres of government – local, provincial and national – which are obliged to co-operate'.<sup>199</sup> This is a key point of the judgment: all spheres of government must be proactive in fulfilling FC s 26. Municipalities cannot hide behind buck-passing arguments as the City tried to do here.<sup>200</sup> The Court followed up by directly rejecting the City's interpretation of *Grootboom*.<sup>201</sup> This is a clarification and extension – if a modest one – of *Grootboom* necessary to deal with the City's interpretation that *Grootboom* absolved it of any responsibility.<sup>202</sup>

The Court also addressed FC ss 152 and 153 holding that municipalities bear some responsibility for service delivery beyond merely implementing national and provincial plans: 'A municipality must be attentive to housing problems in the community, plan, budget appropriately and co-ordinate and engage with other spheres of government to ensure that the needs of its community are met. Its duty is not simply to implement the state's housing programme at a local level. It must plan and carry some of the costs, as is shown below.'<sup>203</sup>

As we will see, the City's obligation to plan and budget for the housing needs of people like the Occupiers, while clearly connected to these constitutional provisions, is more specifically tied to the Housing Act. And it was the City's

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<sup>198</sup> Ibid at para 67. The Court summarised its statutory analysis in para 66: 'These provisions indicate a legislative purpose that the City ought to plan proactively and to budget for emergency situations in its yearly application of funds.'

<sup>199</sup> Ibid at para 42.

<sup>200</sup> This also is the basis for another important implication of the case: normally complex eviction cases will require joinder of all three spheres of government. Ibid at para 45.

<sup>201</sup> Ibid at para 57.

<sup>202</sup> The Court carefully formulated this principle in the negative as a rejection of the City's argument that it was *prohibited* from expending its own funds: 'There is no basis in *Grootboom* for the assertion that local government is not entitled to self-fund, especially in the realm of emergency situations in which it is best situated to react to, engage with and prospectively plan around the needs of local communities.' This leaves open the question O'Regan J posed in *Mazibuko* whether a municipality might have an independent positive obligation to go beyond the requirements of national legislation if it has sufficient resources. *Mazibuko* (note 7 above) at para 74.

<sup>203</sup> *Blue Moonlight* (note 2 above) at para 46 and fn 49.

failure to correctly interpret the Act that had the most significant repercussions here.

#### 4 *The City's Resources*

The most surprising aspects of the judgment come in the Court's discussion of the City's argument that it lacked sufficient resources to address the emergency needs of the Occupiers. Three things stand out here. First, the Court held that the City's resources argument was legally irrelevant because the City prepared its budget based on an incorrect understanding of Chapter 12 of the Housing Act: 'But the City's budget was the product of its incorrect understanding of Chapter 12... . *It is thus not strictly necessary to consider the attack on the factual findings of the Supreme Court of Appeal.*'<sup>204</sup> In other words, the Housing Act imposes an unqualified obligation on the City to plan and budget for emergency housing for people like the Occupiers. The shift into the Housing Act described above thus eliminated the need to address FC s 26's resources limitation criterion.<sup>205</sup> This made it possible for the Court to hold that a resources inquiry was technically unnecessary because the City simply misunderstood its legislatively mandated obligations under Chapter 12.

Finally, the Court faulted the City for failing to provide complete information on its entire budget.<sup>206</sup> The Court connected this back to the point that the City could not rely on its own legal error but used language that seems to touch on FC s 26: 'This Court's determination of the *reasonableness of measures within available resources* cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of *constitutional or statutory obligations*. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.'<sup>207</sup>

#### 5 *The City's Housing Policy*

The Court's definitive rejection of the City's housing policy directly on FC s 26 grounds is itself significant. The policy, at least on its face, was a reasonable, multi-faceted approach to different housing needs. It incorporated a response

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<sup>204</sup> Ibid at para 69 (emphasis added). It is notable here that the Court emphasised the procedural posture of the case as a challenge to the SCA's factual findings. This minimised the constitutional dimensions but it also constrained the Court's discretion in ways that ratcheted up the pressure on the government. Compare *Port Elizabeth* (note 29 above) at para 7 (rejecting the occupiers' characterisation of the case as essentially a challenge to the SCA's factual findings and proceeding to evaluate the claims in expressly constitutional terms).

<sup>205</sup> This also meant that the exceptions to the normal rule barring new evidence on appeal the Court has said exist in socio-economic rights cases because of the progressive realisation language did not apply here. Compare *Mazibuko* (note 7 above) at para 40 (describing two 'qualifications' to the normal appellate rule 'both of which flow from the fact that this case concerns the state's obligations in respect of a social right').

<sup>206</sup> *Blue Moonlight* (note 2 above) at para 74 ('The City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. We do not know exactly what the City's overall financial position is.')

<sup>207</sup> Ibid (emphasis added).



to the *Olivia Road* judgment in the form of a constitutionally sensitive eviction and relocation procedure and included data to justify prioritising public-eviction relocation while still setting forth a procedure for emergencies that result from private evictions. In short it was the kind of policy that the Court in the past has held falls well within the broad scope of executive authority.<sup>208</sup>

The Court nonetheless held that the policy's differentiation between private and public evictions directly violated FC s 26. The Court applied reasonableness review but explained that it was sufficient in this case to review the City's policy for bare rationality without addressing whether reasonableness requires more.<sup>209</sup> Why was a plan as complex as the City's so clearly unconstitutional that it failed even the lowest imaginable standard? The City's insistence that it had no obligation even to consider a policy covering private evictions made the rest of the housing policy irrelevant. The Court did the same thing that it had done in *Grootboom*, only here on a much smaller scale. It identified an unconstitutional policy gap: 'The City's housing policy is unconstitutional to the extent that it excludes the Occupiers and others similarly evicted from consideration for temporary accommodation. The exclusion is unreasonable.'<sup>210</sup> The holding thus does very little to expand the contours of FC s 26 other than confirming that an irrational distinction in a programme designed to implement FC s 26 obligations will fail, apparently irrespective of resources arguments.

### **B Blue Moonlight as Thick Subsidiarity**

We have in hand then a judgment that prevents, at least temporarily, a private landowner from evicting unlawful occupiers. In reaching this result the Court confirmed and developed some important aspects of FC s 25 and FC s 26. It declared that the City's formal policy of ignoring potential evictees like the Occupiers violates FC s 26. It confirmed that, while unlawful occupation is a 'deprivation' under FC s 25, the state can constitutionally impose such a deprivation by postponing eviction if application of PIE's test makes immediate eviction unjust. Finally the Court modestly expanded *Grootboom* to clarify that FC s 26 imposes at least some direct obligations on municipalities to fund emergency housing programmes and that FC s 152 and FC s 153 likewise impose independent constitutional obligations on municipalities to go beyond mere implementation of national and provincial policies.

On top of this, the Court established several important constitutionally connected legal principles. Most significant among these is that a municipality's resource-limitation arguments are irrelevant where those limitations are the result of its own misinterpretation of statutory or constitutional obligations. In addition, the Court seems to have established a substantial evidentiary burden for municipalities that requires them to demonstrate that resources are unavailable anywhere in the entire budget.

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<sup>208</sup> Compare *Joe Slovo* (note 30 above) and *Mazibuko* (note 7 above).

<sup>209</sup> *Blue Moonlight* (note 2 above) at para 87 ('Whether a policy which meets the requirements for rationality would necessarily be reasonable does not have to be decided here.').

<sup>210</sup> *Ibid* at para 95.

All of these features mark a return to the more independent approach of the Court's earlier cases. In particular, the Court's analysis followed the *Port Elizabeth* model by engaging in explicit constitutional interpretation at several points as well as by identifying the constitutional dimensions of the statutes it enforced. It also arguably applied that model in more aggressive ways by interpreting the Housing Act to impose more definitive obligations on the City than might have been possible through direct application of FC s 26. It was the Court's interpretation of the Housing Act that made the City's resources argument legally irrelevant.

To be sure, the Court largely followed the legislature's lead by relying principally on existing legislation and policy to provide the substantive framework for enforcing FC s 26 and identifying how it interacts with s 25. But it also exercised substantial independence by describing the broader constitutional principles that these measures implement, identifying specific constitutional dimensions of those measures and interpreting them in explicitly constitutional terms. The opportunity to reject the City's policy as violating the Housing Act allowed the Court to identify specific constitutional requirements that the legislature had already enforced and expanded.

What grounds, then, could even the most ardent proponent of socio-economic rights find for criticising this result?

### C A Pessimist's Reading

A pessimistic reading of *Blue Moonlight* might start with the fact that, on one level, this was an easy case. The City of Johannesburg took an extreme position that evinced a complete absence of sensitivity to general constitutional values. In essence, the City told the Court that it had no responsibility whatsoever to play an independent role in responding to the needs of people like the Occupiers.

The Supreme Court of Appeal's discussion of the City's long-standing 'entrenched' refusal to plan for private evictions is telling.<sup>211</sup> And the fact that the Constitutional Court rejected the City's position under rationality review demonstrates how extreme that position was. From this perspective, *Blue Moonlight* is another example of the Court policing the outer boundaries of constitutionally permissible conduct. The boundary at issue here was one already clarified by *Grootboom* and so policing it resulted in additional clarification that has significant practical implications. Any person threatened with homelessness from eviction can now ask a court to scrutinise the relevant municipality's budgeting process. This in itself creates important potential leverage. If that scrutiny reveals that the municipality deliberately excluded a particular group, it constitutes a prima facie violation of the Housing Act.

But what does that tell us about the substantive content of FC s 26 that can guide either policy development or litigants in future cases? *Blue Moonlight's*

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<sup>211</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZASCA 47, 2011 (4) SA 337 (SCA), [2011] 3 All SA 471 (SCA) at para 51 ('The City has for a long time been faced with emergency housing situations of all kinds. It appears to have adopted an entrenched position that excludes persons such as the occupiers from assistance. It is abundantly clear that but for this approach it could have adopted a long-term strategy, which ought to have included financial planning, to deal with such exigencies.')

reasoning does not provide any guidance on the harder issues that will inevitably arise where a municipality budgets ‘rationally’. It simply holds that municipalities are obligated by statute not to completely exclude private evictees from consideration in the budget process. If in the next case, a city’s argument goes beyond a bare disclaimer of responsibility and instead argues that exclusion was the result of competing policy priorities, *Blue Moonlight* does not say much about the constitutional standard for assessing those priorities.

The Court also clarified that a private landowner in *Blue Moonlight*’s position who purchases land with known long-standing occupiers may have to expect a reasonable delay in evicting those occupiers if doing so would render them homeless. This too establishes an extremely important tool for protecting poor people. But here again, beyond the principle itself, the judgment provides little guidance on the factors a court should consider in deciding under what circumstances and for how long a private landowner can reasonably be required to delay eviction.

Here we see the obscuring effects of deciding the case exclusively through a context-specific test like PIE’s without developing the background constitutional principles at play. The Court emphasised that the landowner purchased with knowledge of the occupation and its own housing needs were not at issue.<sup>212</sup> The fact that the Court identified these as relevant considerations creates the kind of soft-substantive guidance I discussed earlier. But because they are not specifically connected to FC s 26 and because they are only part of PIE’s multifactor balance subsequent cases even with those same facts could come out differently. What happens in a case where a city appropriately planned for its obligations to house evictees from private land and the money has run out? What about a landowner with more recent occupiers?

My point is not that the Court should have (or could have) addressed all of these eventualities. My concern is that the signs of avoidance even in this extraordinary decision contribute to the Court’s continued refusal to develop a detailed and consistent framework for evictions much less one that begins to flesh out the broader constitutional principles that undergird any such approach. I am also worried that the Court may be unwilling to take the next case that raises these more difficult issues and to build a sustained sequence of cases that extends the important principles established here in ways that prevent a retreat to deference in these harder situations. The sequence from *Grootboom* to *Olivia Road* is a good example of avoidance playing out in this way over time.

### **D *Blue Moonlight II***

*Blue Moonlight II* provides some limited support for this concern.<sup>213</sup> With the deadline for relocation fast approaching and no real communication from the City, the Occupiers filed an urgent application with the Constitutional Court

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<sup>212</sup> *Blue Moonlight (SCA)* (note 211 above) at para 39.

<sup>213</sup> *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC).

requesting that it enforce or modify its original order.<sup>214</sup> Among other things, the modifications they sought included a delay of the eviction date and a clarification that the original order required the City to meaningfully engage the Occupiers over the details of the relocation.<sup>215</sup>

The Court rejected the application on formal procedural grounds.<sup>216</sup> First, the Court relied on the procedural posture of the original order, characterising it as ‘the usual “set aside and replace” kind of order made in an appeal’ that ‘effectively became an order of the High Court’.<sup>217</sup> This allowed the Court to reject the Occupiers’ request for a direct modification of the initial order on the basis that the Occupiers ought to have approached the High Court.

To get there, however, the Court had to distinguish *Zondi*, where it retained jurisdiction over a suspended declaration of invalidity, and *Joe Slovo*, where it issued a detailed engagement order qualifying its holding that the government could proceed with eviction.<sup>218</sup> As I mentioned earlier, the engagement order in *Joe Slovo* potentially established some soft substantive guidelines in future eviction cases. At a minimum it created a basis to argue that all evictees have the general right to negotiate over the details of their alternative accommodation and possibly to insist on consultation over all of the specific items the Court identified in the *Joe Slovo* order.<sup>219</sup> The Court stopped short of rejecting that argument outright, but refused to grant such an order and questioned whether such consultation is required as a general matter.<sup>220</sup>

*Joe Slovo* and *Zondi* clearly were exceptions. The court hierarchy is designed for precisely this distribution of labour, and the Court routinely remands cases back to the High Court to implement its decisions.<sup>221</sup> But comparing this sequence with *Joe Slovo* shows that both fit the avoidance patterns I have described above. In *Joe Slovo*, the Court exerted extensive control over the case in the implementation phase through the detailed engagement order and by retaining jurisdiction to enforce that order, which it exercised in its follow-up order. The occupiers relied on this process in their arguments in *Blue Moonlight II*. The predicate for exercising

<sup>214</sup> Ibid at para 1.

<sup>215</sup> Ibid at paras 5–6.

<sup>216</sup> Ibid at paras 1–2.

<sup>217</sup> Ibid at para 8.

<sup>218</sup> Ibid at paras 10–12.

<sup>219</sup> Ibid at paras 16–18.

<sup>220</sup> Ibid at para 16 (‘Any eviction process must take place with due regard to the dignity of the persons who are being evicted. But whether that obvious requirement entails a more substantive requirement of ‘meaningful engagement’, which would entitle all evictees to contest the quality of temporary accommodation being provided to them, need not be decided here. This is because the Occupiers, on the papers before us, will be provided with accommodation and they will not be rendered homeless by the eviction.’ (cites omitted))

<sup>221</sup> This general practice distinguishes *Blue Moonlight II* from *Maphango*, where the majority ignored its own procedural rules to reopen the Tribunal process. The effect is similar sending the case back to a judicial body that easily could decide the issue on non-constitutional grounds. This is part of what makes both cases look like they may involve some avoidance. The appearance of avoidance is much stronger in *Maphango* because the Tribunal is specifically designed to settle disputes through mediation and High Court review of its decisions is procedurally limited. In *Blue Moonlight* the remand was consistent with normal procedure and involved the High Court, which has the power to consider constitutional questions.

that control, however, was a substantive decision in the government's favour that disconnected that control from constitutional principles.

*Blue Moonlight* reflects a mirror image. The Court firmly rejected the government's policy and established statutory interpretations and constitutional principles that temporarily stopped the evictions while still leaving open important questions about the extent of the City's obligation to re-house the Occupiers as well as the length of time the landowner could constitutionally be required to wait to evict them. Answering those questions and explaining how the constitutional principles at play bear on them – even indirectly as reflected through applicable legislation – will require the Court to make more difficult choices than the City's irrational policy raised in this case. The Court's somewhat limited engagement with those principles in the original judgment and refusal to expand on them with a follow-up order raise the possibility that it might not be willing to go that far. It is too soon to tell, and certainly too soon to complain given the remarkable results. But it is not too soon to raise the question and consider how to build on the Court's approach in *Blue Moonlight*.

## VI AVOIDANCE AND PROCEDURAL AUTHORITY

In spite of the features that make *Port Elizabeth* a thick version of subsidiarity – close and specific attention to the constitutional framework, independent judicial articulation and application of that framework and an interpretive approach that explains the relationship between specific legislative provisions and constitutional principles – the case rolls those features into an overall judicial approach that self-consciously seeks to avoid establishing concrete constitutional principles. The open-ended language that Sachs J identifies as the constitutional 'strategy' that FC s 26(3) prescribes is a description of constitutional interpretation at the policy-making level.

Notably, the more definitive constitutional principles that *Port Elizabeth* establishes are primarily more specific examples of this flexible strategy: FC s 26(3) is not self-enforcing and permits evictions even where homelessness will result and FC s 25 and FC s 26 strike a careful balance requiring fact-specific resolution on a case-by-case basis.<sup>222</sup> Sachs J includes substantial qualifiers throughout the judgment that hint at more concrete limits – for example noting that PIE's reference to the availability of alternative accommodation means a court should be 'reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available' even if only interim accommodation.<sup>223</sup> But the overall approach is designed to leave options open in each case.

Sachs J also emphasises that courts are required to go behind claims of general statistical progress and consider the actual circumstances of people challenging

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<sup>222</sup> *Port Elizabeth* (note 29 above) at paras 19–23.

<sup>223</sup> *Ibid* at para 28. The Court has treated the alternative-accommodation requirement as a de facto requirement in later cases, but it continues to formally maintain that courts are required to apply the PIE factors to determine whether alternative accommodation is required in each case. See Part VIII.A below.

their eviction. Here, however, the emphasis is not on establishing a broad-based FC s 26 principle for challenging government policy but instead on ‘reasonable application of judicial and administrative statecraft’ to avoid human distress.<sup>224</sup> His example is a court intervening to address the situations of individuals facing eviction under an otherwise clearly constitutional policy that houses the maximum number of people in the most efficient way but nonetheless permits short-term homelessness. That intervention would not involve addressing the policy itself, only managing the details and timing of the actual eviction to protect the human dignity of the people involved.<sup>225</sup>

The pro-poor aspects of the decision, thus, primarily come from Sachs J’s rich description of a creative and flexible judicial role that is keenly sensitive to the situation of real people facing homelessness and that actively works to mitigate that situation in individual cases. Sachs J describes powerful tools judges can use in this role, including the possibility of blocking the government from evicting a person and ordering the government to devise a humane solution. It is also significant that this emphasis on the specific situations of individuals facing homelessness incorporates a form of direct relief missing from *Grootboom*’s insistence that judicial intervention must address government action on a programmatic level.<sup>226</sup>

That same emphasis on individual situations, however, also avoids easily identifiable constitutional principles that can influence future cases. *Grootboom* issued a general programmatic remedy, but set a significant precedent that has shaped legislation, policy and a substantial jurisprudence around evictions.<sup>227</sup> *Port Elizabeth* sets up an approach designed to do the opposite. As Sachs J emphasises, PIE’s criteria ‘are not purely of the technical kind that flow ordinarily from the provisions of land law.’<sup>228</sup> As a result PIE treats the rights it enforces ‘as interactive, complementary and mutually reinforcing’ and reconciling those rights requires ‘a close analysis of the actual specifics of each case.’<sup>229</sup> Sachs J’s description celebrates the freedom from constraining principle this role creates and the practical advantages that freedom brings.

*Olivia Road*’s creation of the meaningful engagement requirement embodies that approach. Enforcing the meaningful engagement requirement creates a largely procedural role for courts divorced from the substantive discussion that makes *Port Elizabeth* a model of thick subsidiarity. Meaningful engagement asks about

<sup>224</sup> Ibid at para 29.

<sup>225</sup> Ibid. Sachs J states that the existence of a policy designed to house the maximum number of people in the most efficient way would ‘go a long way towards establishing a context that would ensure that a proposed eviction would be just and equitable. It falls short, however, *from being determinative of whether and under what conditions an actual eviction order should be made in a particular case.*’ (emphasis added).

<sup>226</sup> See *Grootboom* paras 30–40. See also Landau *Social Rights Enforcement* (note 24 above) at 196–197; Roux *Principle* (note 14 above) at 136; Wilson *Breaking the Tie* (note 70 above) at 274–75.

<sup>227</sup> Liebenberg and others have pointed out that the applicants in *Grootboom* settled prior to the Constitutional Court’s judgment thus permitting the Court to deal with only the systemic issues. S Liebenberg *Socio-Economic Rights* (note 6 above) at 399–409.

<sup>228</sup> *Port Elizabeth* (note 29 above) at para 35.

<sup>229</sup> Ibid.



only the process that produced a particular policy or action, not the outcome.<sup>230</sup> This is what makes *Olivia Road* a paradigmatic example of avoidance.<sup>231</sup> The thick subsidiarity *Port Elizabeth* and *Blue Moonlight* feature is one partial hedge against that risk but thick subsidiarity depends on the interstitial interpretive opportunities that open up when courts apply and enforce legislation or executive policies – opportunities that engagement deliberately avoids.

*Maphango* applied the Rental Housing Act to create the same kind of procedural control as meaningful engagement over the private landlord-tenant relationship. The key substantive move the Court made was interpreting ‘unfair practice’ to encompass attempted evictions. This put the Tribunal *process* to work in potentially pro-poor ways without definitively establishing anything substantive about the Act or the constitutional principles the Act enforces. It is no coincidence that the Tribunal process, like engagement, is structured to resolve disputes informally through party consensus. The result was nearly complete constitutional avoidance that contrasts starkly with the specific elaboration of the constitutional context in both *Blue Moonlight* and *Port Elizabeth*.

But that same shift to procedure introduced the possibility of judicial control over individual situations that can strike a balance among the competing constitutional values without extending that balance – or at least not immediately extending it – beyond the facts of a particular landlord-tenant dispute.

These procedural devices provide a different set of possibilities for maintaining judicial authority. Rather than re-establishing a measure of interpretive control they put courts in a position to manage specific processes and guide those processes towards constitutionally compliant resolutions. The Tribunal process restores judicial authority by giving courts the power to balance FC s 26 and FC s 25 by resolving individual landlord-tenant cases. The flexibility of the Act’s multi-factor test combined with its emphasis on informal resolution encourages Tribunals to find case-specific solutions without requiring elaboration of either those factors or the constitutional principles they implement. Meaningful engagement creates a similar process. It gives courts the power first to reject unconstitutional outcomes on procedural grounds and then to influence the subsequent party-directed process for resolving the dispute. Both processes create opportunities for courts to develop the kind of soft-substantive guidance that incorporates a form of interpretive authority – in the Tribunal process through explicit elaboration of the legislative criteria and under meaningful engagement by setting the agenda and also substantive terms for the parties’ consultation or policy-level interventions like the 70 per cent set-aside in *Joe Slovo*. But either process can successfully resolve disputes without any explicit identification of constitutional principles.

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<sup>230</sup> *Olivia Road* (note 6 above) at para 18 (‘It may in some circumstances be reasonable to make permanent housing available and, in others, to provide no housing at all. The possibilities between these extremes are almost endless.’)

<sup>231</sup> The Court illustrated this in its decision finding it unnecessary to reach any of the substantive constitutional questions the parties had briefed and argued, including the constitutionality of the City’s new housing plan, the ‘reach and applicability of sections 26(1), 26(2) and 26(3),’ and ‘the question whether PIE applies in the present case’ or ‘the relationship between section 26 and PIE’. *Olivia Road* (note 6 above) at paras 32–38.

## A *Blue Moonlight*'s Progeny: PIE as Muscular Procedure

Earlier I considered the ways that channeling the constitutional and statutory issues through PIE's multi-factor analysis circumscribed the scope of the Court's significant holding that PIE could justify limiting a private party's s 25 property rights.<sup>232</sup> *Blue Moonlight* establishes that the Constitution permits the state to require a property owner under the specific facts of that case to wait some period of time before evicting illegal occupiers, but it does not tell us much more about how to apply PIE where the facts change. This is a combination of the Court establishing a highly general constitutional principle – PIE's multifactor test under some circumstances constitutionally limits private property rights – and applying it at a policy-making level that does not clearly extend beyond the specific facts in a single case.

I now want to consider how that same combination creates the kind of procedural control I have just identified with *Olivia Road* and *Maphango* but also the possibility for incremental substantive constitutional development. PIE's multi-factor test gives courts a range of options for intervening in potential evictions to manage them in ways that protect constitutional values and achieve constitutional objectives without establishing any strong constitutional principles. Similar to the Rental Housing Act, PIE's substantive but still flexible framework also could, over time, reincorporate modest judicial interpretive authority alongside this procedural control.

The Constitutional Court issued two companion decisions to *Blue Moonlight* on the same day.<sup>233</sup> Both cases involved evictions of people who were unlawfully occupying private land in the City of Tshwane. Yacoob J drafted closely connected unanimous judgments in each, applying *Blue Moonlight*'s broad principle that PIE's analysis can limit private property rights. In *PPC Quarries*, Yacoob J ordered the City to conduct an audit of the occupiers to determine the number of people who would be rendered homeless and to provide alternative accommodation to those people one month before their eviction.<sup>234</sup> In *Golden Thread*, he remanded the case to the High Court for reconsideration and ordered the City to submit a report providing specific information that he held PIE's test required, including the availability of alternative accommodation.<sup>235</sup> The result in each case was a delay in the occupiers' eviction and an order that connected the timing of the evictions to the City's ability to provide alternative accommodation.

### 1 *Procedural Control*

Both decisions reflect the sensitive, careful judicial management of the individual consequences of eviction processes that Sachs J described in *Port Elizabeth* that establishes concrete procedural authority without expanding specific constitutional principles or using existing principles to change broad policies. The applicants filed combined heads of argument in both cases seeking several broad principles.

<sup>232</sup> See above Part V.

<sup>233</sup> *Golden Thread* (note 2 above); *PPC Quarries* (note 2 above).

<sup>234</sup> *PPC Quarries* (note 2 above) at para 16.

<sup>235</sup> *Golden Thread* (note 2 above) at para 4.

The results in both cases effectively apply those principles, but Yacoob J's analysis specifically avoids establishing those principles and instead the major substantive development is an expansive interpretation of PIE that expands the procedural authority of courts to join municipalities in all PIE-related evictions.

In *PPC Quarries* the Constitutional Court issued a direct order that relied on the general principles in *Blue Moonlight* but without expanding those principles in any easily identifiable way. The High Court ordered eviction but required the City to audit the occupiers and provide them access to land one day before the eviction.<sup>236</sup> The Constitutional Court set aside that order holding that, in light of *Blue Moonlight*, the High Court misapplied the PIE analysis. The Court's own PIE analysis spans three short paragraphs. The first paragraph is a block quote from *Blue Moonlight* stating that PIE may temporarily restrict private property rights.<sup>237</sup> In the second Yacoob J identified two facts as relevant: there was no evidence PPC Quarries planned to 'use the property gainfully in the foreseeable future' and there was no reason at that point to assume that the City would not 'take steps reasonably quickly to provide alternative accommodation' for the occupiers.<sup>238</sup> In the third, Yacoob J concluded that these facts made it 'neither just nor equitable' under PIE to evict the occupiers who would become homeless before the City provides accommodation.<sup>239</sup> The final order required the City to first survey the occupiers to determine who will become homeless and provide accommodation to those people one month before the eviction date the order sets.<sup>240</sup> The only significant difference between this and the High Court's original order is an extension from one day to one month of the time between when the City has to provide accommodation and the eviction.

*Golden Thread* features that same kind of case-specific procedural control but here the Court delegated that control back to the High Court with a detailed framework for exercising it. The occupiers argued that the Court should overturn the High Court's eviction order and establish the same set of substantive principles as in *PPC Quarries*. Yacoob J, again, ignored those arguments saying the only contention that was 'necessary to investigate' was the High Court's failure to require the City to provide information about alternative accommodation and to investigate the possibility of mediation under PIE.<sup>241</sup>

Reaching that conclusion required an important, not obvious, interpretation of PIE. PIE distinguishes between short-term (defined as less than six months) and long-term occupation and requires courts to investigate the availability of alternative accommodation only for long-term occupation.<sup>242</sup> The High Court

<sup>236</sup> *Golden Thread* (note 2 above) at para 4.

<sup>237</sup> *Ibid* at para 11.

<sup>238</sup> *Ibid* at para 12.

<sup>239</sup> *Ibid* at para 13.

<sup>240</sup> *Ibid* at para 16.

<sup>241</sup> *Ibid* at paras 12–13.

<sup>242</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 s 4(6)–(7). PIE requires a court to determine in every case whether ordering an eviction is 'just and equitable ... considering all the relevant circumstances' but where a person has occupied property for longer than six months, s 4(7) specifies that these circumstances include 'whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner ... ?'.

noted evidence that the City might be able to provide alternative land for the occupiers and expressed frustration at the City's refusal to participate in the proceedings.<sup>243</sup> It nonetheless concluded that it was powerless to order the City to do more because PIE did not require it to consider the availability of alternative accommodation.<sup>244</sup>

Yacoob J interpreted PIE's general mandate that courts consider all relevant circumstances broadly to include the availability of alternative accommodation in all cases – functionally eliminating the distinction between short- and long-term occupation.<sup>245</sup> This solved the problem in *Golden Thread* by clearly permitting a court to join municipalities in all evictions where PIE applies and to require that they provide information on their ability to provide alternative accommodation. This set up the final order that remanded the case to the High Court for reconsideration and ordered the City to submit a report identifying: the number of families who would be rendered homeless if evicted; the steps the City has taken or plans to take to provide land or accommodation for the occupiers; when the City could provide alternative land or accommodation; the likely effects on the occupiers and surrounding residents if the eviction proceeded without alternative accommodation; and steps the City could take to alleviate the effects of continued occupation on the landowner until it provided alternative accommodation.<sup>246</sup>

This follows the same pattern as *Maphango*. The Court broadly interpreted Constitution-enforcing legislation to expand the scope of a multi-factor balancing test. In each case the Court carefully avoided broad constitutional principles that could narrow the range of outcomes under the test and did not even dictate how to strike that balance on the facts of each case. Instead the statutory expansion resulted in greater procedural control over individual cases.

The results in both *PPC Quarries* and *Golden Thread* look much like what Sachs J called for in *Port Elizabeth Municipality*: a court managing a specific eviction process to mitigate its effects rather than to establish broad constitutional principles or to change an underlying policy to comply with those principles. *PPC Quarries* applies *Blue Moonlight's* core principle that courts can apply PIE to temporarily restrict private property owners' right to evict (and *Golden Thread* clearly expects the High Court will do the same).<sup>247</sup> But the effects of that application are largely limited to the occupiers in each case.

Like in *Blue Moonlight* the Court in these cases repeatedly cited the municipality's poor conduct and expressed deep concern over the failure to treat the occupiers humanely. Each judgment introduced the case with an identical, sharply worded

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<sup>243</sup> *Golden Thread Ltd v People Who Intend Invading Portion R25 of Farm Mooiplaats 355JR Tshwane, Gauteng and 2 Others* [2010] ZAGPPHC 262 at paras 11–12 ('*Golden Thread High Court*').

<sup>244</sup> *Ibid* at para 12.

<sup>245</sup> *Ibid* at paras 15–16.

<sup>246</sup> *Golden Thread* (note 2 above) at para 21.

<sup>247</sup> Yacoob J observes in *Golden Thread* that '[i]t is possible that the High Court was motivated to some extent by its view that *Golden Thread* had no obligation towards the applicants ...' and then notes in para 17 that '*Blue Moonlight* held that ownership in South Africa is not as unrestricted' followed by a block quote. The limited substantive effect of even this is muted both because Yacoob J carefully couches it in hypothetical terms and because he limited his analysis to the Court's failure to order the City to provide information.

paragraph ‘necessary’ to address ‘a matter that is cause for considerable concern’: the inappropriate characterisation of the occupiers as ‘the people who invaded’ or ‘intend invading’ certain properties.<sup>248</sup> This description ‘detracts from the humanity of the occupiers, is emotive and judgmental and comes close to criminalising the occupiers’.<sup>249</sup>

Yacoob J’s frustration with the City is evident at various points in both judgments. For example, in *PPC Quarries* he noted that the City never directly challenged the High Court’s judgment ‘except in the inept, indirect and half-hearted way already alluded to’.<sup>250</sup> *Golden Thread* includes an unusual (and not strictly relevant) aside that ‘[i]t must be pointed out now that the High Court rightly expressed misgivings about the conduct of the City during the proceedings’, followed by a block quote from the High Court’s judgment:

I have already noted during the hearing that the [City] is conspicuous in its absence. It’s a very sad state of affairs, especially as the [City] is the one body which is constitutionally bound to address the problem which exists. They have not only failed dismally in that respect and have done so for many years, but they have not even attended this hearing to assist the court to come to a decision. The [City] merely briefed counsel on a watching brief.<sup>251</sup>

*PPC Quarries* also contains some signs that the result may be as much a deal struck through informal judicial management of the situation as it is a precedent applying PIE in light of *Blue Moonlight*. While formally analysed – if thinly – in terms of PIE, the specific order tracks informal concessions the Court extracted from the occupiers and the landowner during oral argument. In summarising the arguments, Yacoob J noted that ‘[b]y the end of oral argument’ the occupiers backed away from their claim for a complete set-aside of the High Court’s order and ‘indicated their contentment’ with an order that permitted eviction but conditioned it on the City first providing alternative land.<sup>252</sup> Likewise, while *PPC Quarries* maintained that there was no legal basis for it to suffer continued occupation, in response to a question in oral argument the company said that, if the Court ordered eviction, it was willing to allow the occupiers to continue to live on the land for four months after the order.<sup>253</sup> Yacoob J’s PIE analysis does not rely on these concessions, but the order essentially adopts them.

As a result, while these cases reinforce the core principles in *Blue Moonlight*, the Court uses those principles primarily to strengthen the flexible management role *Port Elizabeth Municipality* highlights rather than to further elaborate those principles. Indeed, both cases show that the main effect of *Blue Moonlight* may be expanding the scope of that management role to privately initiated evictions. All three cases confirm that municipalities are necessary parties in privately

<sup>248</sup> *Golden Thread* (note 2 above) at para 4; *PPC Quarries* (note 2 above) at para 3.

<sup>249</sup> *Ibid* at para 4; *PPC Quarries* (note 2 above) at para 3.

<sup>250</sup> *PPC Quarries* (note 2 above) at para 12.

<sup>251</sup> *Golden Thread* (note 2 above) at para 6 (quoting *Golden Thread High Court* at para 5).

<sup>252</sup> *PPC Quarries* (note 2 above) at para 7.

<sup>253</sup> *Ibid* at para 8.



initiated evictions.<sup>254</sup> These two cases provide a template for the range of information a court can require a municipality to provide once it is joined, including the status of the potential evictees as well as its past efforts, future plans and overall capacity to provide alternative accommodation for any evictees rendered homeless. They also strongly suggest – but stop short of definitively establishing – that a court should order municipalities to provide alternative accommodation when it orders evictions from private land and sequence the orders to prevent homelessness.

The upshot is a set of principles that gives courts considerably expanded power to manage evictions. Courts now can convene all the relevant parties in a private eviction. They can obtain extensive information about a municipality's overall housing policies, its total budget, and the planning processes involved. Where appropriate, a court can use that information to craft an order that requires the municipality to provide alternative accommodation and ties the timing of the eviction to provision of that accommodation.<sup>255</sup>

## 2 *Interpretive Authority through PIE*

Both decisions reinforce two of the central constitutional principles *Blue Moonlight* established: municipalities have an obligation to provide and fund emergency housing even for people rendered homeless from privately instituted evictions and PIE may constitutionally limit private landowner's s 25 rights to evict even unlawful occupiers where those occupiers may be rendered homeless. As I argued above, because the Court recruited PIE's multi-factor test for determining both when the right to evict is restricted and the extent of that restriction it only lightly specified that principle. Individual resolutions like these operate largely at the policy-making level by applying that principle to a specific factual configuration without elaborating it much further.

But over time these individual resolutions could begin to develop broader principles either derived implicitly from constellations of overlapping factual situations with consistent resolutions or more explicitly where courts analyse cases comparatively and articulate how the similarities and differences across cases affect the final balance. This process would maintain substantial flexibility for courts across cases and – to the extent the analyses focus primarily on PIE as they did in these two cases – would also leave ample room for the legislature to exercise additional control through amending PIE. This would create the

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<sup>254</sup> Muller and Liebenberg argue that prior to *Blue Moonlight* a series of Constitutional Court and SCA cases effectively recognised that PIE requires joinder of municipalities to eviction proceedings. See G Muller and S Liebenberg 'Developing the Law of Joinder in the Context of Evictions of People from Their Homes' (2013) 29 *South African Journal of Human Rights* 554.

<sup>255</sup> Wilson has argued that all of these principles are part of the 'new normality' in eviction law and that they indicate the possibility for a stronger substantive approach to FC s 26. See S Wilson *Breaking the Tie* (note 70 above). I agree that all of these show the Court asserting greater authority to enforce these rights, but, with the possible exception of the limitation on the property owner's eviction rights, I see each of these as specific aspects of the procedural authority I just laid out rather than a substantively stronger approach.



possibility for gradual, largely court-directed, constitutional elaboration over time.

Do *PPC Quarries* and *Golden Thread* represent the beginnings of such a process (and, if so, do they provide a response to the pessimist's read of *Blue Moonlight*)? In some respects, they certainly do. If we put all three decisions together and compare their facts, we can begin to put some meat on *Blue Moonlight's* bones. When it comes to municipal obligations, *Blue Moonlight* stops with the principle that a city's complete failure to consider homelessness from private evictions during its planning process renders the resulting policy unconstitutional. In combination, *PPC Quarries* and *Golden Thread* lay the groundwork for arguing that municipalities are obligated not just to consider these situations in their budget and planning processes but actually to provide alternative accommodation through their own resources in some situations possibly irrespective of whether the planning processes were themselves constitutional.

As I noted above, for s 25, taken together all three cases establish that where there is a reasonable prospect the municipality can provide alternative accommodation in some relatively short period of time, a private landowner sometimes can be required to wait to evict until that accommodation is available.

But the decisions provide some fodder for the pessimist as well. A really narrow reading of *PPC Quarries* would note that the decision hinged on the City's procedural failure to challenge the High Court's order. This creates considerable uncertainty whether a municipality that actively participated in the proceedings and raised reasonable grounds for its inability to provide alternative accommodation should incur the same obligation.

More broadly, the accretion of soft-substantive principles into a set of harder constitutional standards that work within PIE's framework I described depends on careful and specific attention to not only the constitutional dimensions but also the statutory factors themselves. Yacoob J's analyses lack that interpretive precision and depth. In *PPC Quarries* – where the Court's direct order could have provided the most authoritative guidance – Yacoob J tells us only that the combination of a property owner with no short-term plans for using the land and the absence of evidence that the City would fail to provide alternative accommodation reasonably quickly mattered in the PIE analysis. The summary treatment of even those factors and the failure to specifically analyse other, seemingly significant but countervailing factors such as the existing interdict and the relatively short time-frame of the occupation leaves us with very little guidance as to how to balance those same factors under different circumstances. More importantly, there is no comparative analysis across the three cases at all to explain why the City in this case was required to provide accommodation.

*Golden Thread* is somewhat better on this score. Yacoob J's detailed recounting of the facts the High Court considered (with occasional commentary) gives some indirect hints that these facts were legitimate considerations, and he repeated the conclusion of *PPC Quarries* that the landowner's lack of short-term plans to use

the land should have significance in the PIE analysis.<sup>256</sup> But he explicitly refused to engage with the High Court's PIE analysis. Sweeping aside the applicants' 'various interesting submissions and criticis[ms]' of the judgment, Yacoob J said it was 'necessary to investigate' only the High Court's failure to order 'the City to provide particulars of the applicant's housing situation and whether the City could provide emergency housing' as well as the Court's failure to consider mediation under PIE.<sup>257</sup> It was these failures that justified remand and reconsideration. There is nothing in the judgment to suggest the High Court should reweigh these factors. The only real question left for the High Court was whether to order the City to provide alternative accommodation in light of its report (and *PPC Quarries* strongly suggests the likely answer there). This seems to assure a pro-poor result, but again a result that does not provide a model for careful exposition of PIE or a sense of how to weigh the same facts in another case.

On the one hand, this lack of specific analysis seems to strengthen the force of the constitutional principles at play by treating as apparently irrelevant the nuances I said limit the precedential force of individual decisions under PIE. Yacoob J's functional elimination of PIE's distinction between long- and short-term occupation in *Golden Thread* adds to this blunderbuss strengthening effect.

It might be the case that lower courts looking to this pair of cases will conclude that private landowners in all cases are required to wait to evict until the relevant municipality is able to house the occupiers. That would establish a de facto strongly pro-poor principle. The applicants in *PPC Quarries* and *Golden Thread* argued for exactly that principle, and the results in each case are consistent with it.<sup>258</sup> But Yacoob J specifically refused to take up that argument in *Golden Thread* and tied the order in *PPC Quarries* to the specific 'circumstances of this case' without saying much about which circumstances mattered or why.<sup>259</sup>

For courts trying seriously to apply PIE's factors in case-specific ways, the lack of nuanced analysis of why the City incurred the obligation to provide accommodation (or is likely to in *Golden Thread*) provides little additional guidance. It also suggests that these results may be better viewed as instances of ad hoc court management to bring some measure of dignity and humanity into messy situations, results largely attributable to informal factors such as the City's extreme and persistent recalcitrance and the parties' concessions. In either case, the failure to develop a careful analysis missed the potential for establishing an interpretive approach that could begin to develop an incremental substantive jurisprudence based on *Blue Moonlight*.

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<sup>256</sup> See *Golden Thread* (note 2 above) at para 8 (Yacoob J wrote that the High Court had 'remarked ... that it was unfortunate' the occupiers 'had not said anything about the conditions that existed whence they came'.) The *Golden Thread* Court held further that 'It is of some significance in this context that *Golden Thread* has not put the land to any use, nor is there any evidence that it intends to subject the land to use in the foreseeable future.' *Ibid* at para 18.

<sup>257</sup> *Golden Thread* (note 2 above) at paras 12–13.

<sup>258</sup> Applicants' Heads of Argument at para 72 (*Golden Thread*) and at para 88 (*PPC Quarries*).

<sup>259</sup> *PPC Quarries* (note 2 above) at para 10.

## VII CONCLUSION: EVICTIONS AS ASPIRATION AND AVOIDANCE

In the Introduction I highlighted the Court's recent focus on eviction-related cases and argued that these cases illustrate both the Court's continued aspiration to apply the socio-economic rights in pro-poor ways and the persistence of separation-of-powers and institutional-competence concerns that push towards substantively limited analyses and procedural remedies that avoid strong constitutional principles. I have since argued that both dimensions of these cases show how the Court could begin to develop an institutionally stronger role while still working within the confines of the avoidance techniques. In closing, I want to raise a broader concern that the Court's focus on evictions might result in an only truncated version of that stronger role. A version that leaves little room for even the cooperative, incremental substantive development of socio-economic rights I have described.

As Sachs J explained in *Port Elizabeth Municipality*, eviction in many ways encapsulates the essence of apartheid. Eviction – or forced removal – was the tool that created the physical separation at the core of the apartheid legal structure. If there is any indisputable dimension to the 'transformation' that the 1996 Constitution is designed to effect, it is the dismantling of that physical separation. At a minimum, that must include limiting the circumstances under which a person can constitutionally be evicted and insisting that the eviction process itself is procedurally robust and humane.

Sachs J's description of a keenly sensitive court willing to step in to protect individual dignity in every eviction case accomplishes this without entangling courts in the much messier task of assessing the constitutional adequacy of housing legislation and policy. Calling on courts to manage the *effects* of eviction on each individual pushes the constitutional analysis deep into the policy-making level. But asserting the power to deny an eviction – and especially to deny it even where there is no apparent constitutional defect in the overall legislation or policy – carves out a significant form of judicial power. In this managerial mode, courts can protect individuals and directly promote constitutional values without questioning the underlying legislative or executive policies.

On the one hand this role responds to the problem of political enforcement because it gives courts some control over the ultimate effect of legislative and executive decisions over housing and related policies. At the same time it also allows courts to exert institutional authority divorced from interpretive control that might limit the scope of legislative and executive discretion to set, revise and budget for those policies.

Evictions lend themselves particularly – perhaps uniquely – well to the exercise of this kind of case-specific procedural authority. Even where temporary accommodation is available, an eviction means displacing persons and disrupting their lives in dignity-compromising ways. Merely by delaying the eviction process, a court addresses the most urgent aspects of the constitutional claims evictions raise. That same delay also creates leverage for the threatened evictee herself to press the government for more substantive relief. By making the delay temporary – as in the cases I discussed – a court can avoid analysing both the reasons for the decision to evict as well as the policies behind that decision. This power

to grant significant, immediate relief while placing only limited and temporary constraints on executive and legislative power likely explains to a large extent both the numbers of eviction cases that come to the Court as well as its recent string of pro-poor results.

But exercising the procedural authority to delay evictions without at least articulating the case-specific factors that require a delay in each case masks the real role that the Court plays and stymies the potential for that role to incorporate even modest substantive constitutional development. Yacoob J's judgments in the two companion cases to *Blue Moonlight* illustrate this problem. The cases expand the circumstances where courts can delay evictions without elaborating either the constitutional or statutory bases for that expansion. Both cases purport to apply *Blue Moonlight's* principle that PIE's multi-factor test can sometimes justify a court limiting private property rights by temporarily delaying an eviction. But *Blue Moonlight* only started the process of analysing those factors, and, rather than elaborating that analysis, these two cases largely ignore PIE. The result is a de facto general rule – or at least a presumption – applicable in every case that courts will not order evictions from private land – regardless of the circumstances and with no reference to the PIE factors – until the municipality can provide alternative accommodation.

At first glance a strong rule like this looks much like the development I called for earlier in arguing the pragmatic benefits of working within the Court's existing reluctance to develop strong substantive interpretations in socio-economic rights cases. The Court maintains a seemingly context-limited approach that operates within the separation-of-powers and institutional-competence boundaries it has set for itself but nonetheless begins to develop a strongly pro-poor jurisprudence that extends across cases. But this unacknowledged and unanalysed strong-form approach is, in some respects, the worst of both worlds. On the one hand it eliminates the democratic benefits of a judicial-legislative partnership by effectively displacing PIE with a de facto rule that fails to even acknowledge, much less attempt to balance, the constitutional issues at play. More significantly, a rule like this misses the opportunity for the Court to build on the active interpretive role it adopted in *Blue Moonlight* and that could form the basis of a genuinely substantive approach to enforcing FC s 26 and other socio-economic rights. While this creates an important tool for protecting poor people from evictions, it provides no foothold either as a matter of judicial process or constitutional substance for extending those protections beyond the eviction context because it is not grounded in any broader set of principles.

*Blue Moonlight*, *Maphango* and these other eviction cases clearly have pushed eviction law in pro-poor directions and established important new tools for advocates representing potential evictees. In this respect, there is no question that the Court is beginning to fulfill the aspiration of the socio-economic rights. But if the Court continues to focus not only on eviction cases but also the procedural aspect of managing the eviction process over the substantive policies causing evictions it risks running into a dead end that will lead to even greater avoidance.

# The Avoidance of Substance in Constitutional Rights

Katharine G Young\*

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## I INTRODUCTION

Avoidance, on the part of the judiciary, calls to mind a number of judicial postures. We might imagine a court declining to hear a certain matter, by denying cert or dismissing a writ or refusing an appeal. Or we might imagine a court deciding a case on other grounds, avoiding a hotly contested issue by choosing to deal with an apparently more straightforward legal argument. Such avoidance techniques are entirely familiar to the comparative observer of economic and social rights. Quintessentially ‘political’, quintessentially ‘contested’, economic and social rights have long been cast as political questions or as non-judicially manageable standards or in other ways set up for familiar avoidance measures.<sup>1</sup> Avoidance calls to mind an act of refraining, refusing, rejecting: to which the judicial silence around economic and social rights – silence only really brought to an end in the past two decades, and then only in some places – attests.

Yet this is not the kind of avoidance that Brian Ray, in his lead article ‘Evictions, Avoidance and the Aspirational Impulse’, has in mind. Avoidance, for Ray, is both more subtle and more involved than this familiar use of the term. In dialogue with earlier South African commentary, Ray’s categorisation of avoidance signals an active posture of economic and social rights decision-making that limits the substantive development of constitutional doctrine, cedes to current legislation or policy the frame of rights analysis, and deliberately marginalises the judicial role.<sup>2</sup>

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<sup>1</sup> For example, in turning to the question as to whether Australia should recognise economic and social rights within a new legislative charter of human rights, the then Commonwealth Solicitor-General of Australia (now High Court Justice), and Senior Legal Advisor, suggested that economic and social rights were non-justiciable, as late as 2009: Stephen Gageler SC and Henry Burmester QC, ‘In the Matter of Constitutional Issues Concerning a Charter of Rights’ Opinion, SG No 40 of 2009, 15 June 2009 [Initial Opinion]; and Stephen Gageler SC and Henry Burmester QC, ‘In the Matter of Constitutional Issues Concerning a Charter of Rights’ Supplementary Opinion [Supplementary Opinion], SG No 68 of 2009, 7 September 2009. These opinions are reproduced in National Human Rights Consultation Committee, National Human Rights Consultation Report (2009) Appendix E (Australia).

<sup>2</sup> ‘Avoidance’ meant, in the early years of the Constitutional Court’s work, that the Court should avoid deciding matters on constitutional grounds if non-constitutional grounds were available. See *S v Mhlungu* [1995] ZACC 4, 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59; *Zantzi v Council of State, Ciskei* [1995] ZACC 9, 1995 (4) SA 615 (CC) at para 8. See also I Currie ‘Judicious Avoidance’ (1999) 15 *South African Journal on Human Rights* 138, 147 (Distinguishes certain avoidance-favouring rules of justiciability and procedure from a more general posture of minimalist avoidance in South Africa.) For further notes on the South African debates associated with decisional minimalism, see below at note 15.

Thus for Ray, the South African Constitutional Court's avoidance techniques include the use of reasonableness review, the creation of new procedural remedies, the deployment of either extremely abstract constitutional deliberation or extremely fact-specific deliberation (without, he contends, the moderate use of either), and a tendency to find infringements of the obligations attached to social rights only in the face of clearly unconstitutional conduct, or 'easy cases'<sup>3</sup>, with a retreat to deference in harder cases.<sup>4</sup>

Ray is critical of these techniques because of their cumulative effect: together, they signify avoidance because they 'tend to push the Court away from playing an independent role in interpreting and enforcing the social rights'.<sup>5</sup> By itself, each technique may be a productive contribution to social rights realisation. Indeed, Ray himself has celebrated the creative design of the meaningful engagement remedy.<sup>6</sup> Taken together, however, the techniques give the political branches the latitude to give substance to such rights, at the cost of the Court.<sup>7</sup> Over time, the use of such techniques can lead to the weakening of the Court's institutional authority, and 'severely constrains its capacity to act as an independent partner in developing and implementing the social rights provisions'.<sup>8</sup>

This is not to say that Ray clearly advocates the embrace of substance. He does not fall into the minimum core camp; which camp would advise the Court to give explicit substance to minimum levels of housing, health care or other economic and social rights and rule accordingly, whether as a rule or standard. While Ray wants a court to give an 'independent, normative account of what the socio-economic rights require',<sup>9</sup> he is ambivalent about the degree of substance that should be settled alone by the Court. He wants the Court to stop avoiding substance. Whether it should do so by adding a new technique to displace the cumulative effect of the Court's current practice, or by desisting from one or other of the current techniques, is left unstated. Ray advocates what he terms 'thick subsidiarity', building on Andre van der Walt's original proposal for aligning judicial power with democracy.<sup>10</sup>

Thick subsidiarity supports the Court's reliance on Constitution-enforcing legislation or policy, rather than the common law or the Final Constitution.<sup>11</sup> Put slightly differently, it favours statutory interpretation that allows for the elaboration of constitutional substance. This allows the Court to maintain an

<sup>3</sup> D Brand 'Proceduralisation in Rights and Democracy' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33; D Brand 'Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa' 22 *Stellenbosch Law Review* 616 (2011).

<sup>4</sup> Brian Ray, 'Evictions, Aspirations and Avoidance' (2013) 5 *Constitutional Court Review* 219.

<sup>5</sup> *Ibid* at 181.

<sup>6</sup> B Ray 'Extending the Shadow of the Law: Using Hybrid Mechanisms to Establish Constitutional Norms in Socioeconomic Rights Cases' 2009 *Utah Law Review* 797 (2009).

<sup>7</sup> Ray (note 4 above) at 174, 188.

<sup>8</sup> *Ibid* at 182.

<sup>9</sup> *Ibid* at 192.

<sup>10</sup> AJ van der Walt, 'Normative Pluralism and Anarchy' (2008) 1 *Constitutional Court Review* 77' (2008); AJ van der Walt 'The Constitutional Property Clause: Striking a Balance between Guarantee and Limitation' in (J McLean ed) *Property and the Constitution* (1999).

<sup>11</sup> Ray (note 4 above) at 190, 198, 203, 205.



expansive view of its own authority, at the same time as advancing a broad construction of a legislative power. In the evictions context, this means a pro-rights interpretation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 or the Rental Housing Act 50 of 1999 which would allow the Court both temporarily to limit private property rights (in *Blue Moonlight*<sup>12</sup> and *PPC Quarries*<sup>13</sup>) and to require evicting cities to provide alternative accommodation to any occupiers (whether they be on public or private property) within a specific timeline and prior to eviction (*Golden Thread*<sup>14</sup>). Ray is generally supportive of these recent judgments. They have managed to address the messy issues of the state's obligations in private property and public housing conflicts. That said, he remains critical of the Court's general failure to spell out more adequate guidelines for the resolution of future evictions scenarios.

Ray uses the avoidance category to castigate the Court while giving coherence to a seemingly disparate number of judicial techniques, some of which, as we know, he encourages. In this comment, I take issue with the category of avoidance, and its corollary, of substance, which I suggest complicates the descriptive and normative picture that Ray seeks to tell. I then present an alternative reading of the Court's social rights jurisprudence, by depicting a typology that encompasses the Court's ability to catalyse the resolution of the problems obstructing the right in question. I contrast this model with alternative judicial postures in comparative settings – in Colombia, India and the United Kingdom – which offer judicial role conceptions that we can heuristically understand as supremacist, engaged or detached roles respectively. I suggest that substance, and the avoidance of substance, is a blunt and misleading category distinction for this type of comparative analysis.

## II AVOIDING SUBSTANCE?

Ray's account of the Court's substance avoidance is descriptively and normatively unsettled. On descriptive grounds, the category of avoidance is difficult to attach to the various techniques of political enforcement, procedural creativity, easy cases, and adjudicating at the abstract or fact-specific extremes. Avoidance, even when delinked with the more familiar curial techniques described in the opening paragraph of this comment, implies a static posture of adjudication. It is one that deflects constitutional responsibility by non-deciding. In the South African context, avoidance is also related to the preference stated by the Constitutional

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<sup>12</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33, 2012 (2) SA 104 (CC).

<sup>13</sup> *Occupiers of Skuurweplaas 353 JR v PPC Aggregate Quarries Ltd* [2011] ZACC 36.

<sup>14</sup> *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd* [2011] ZACC 35, 2012 (2) SA 337 (CC).

Court, in its earlier decisions, for slow and incremental doctrinal development.<sup>15</sup> Avoidance is difficult to reconcile, then, with the Court's alteration of existing legislation to include a new category of welfare recipients in *Kbasa*<sup>16</sup> – surely a stunning work of non-avoidance – or the active design of a new standard of review and remedy to ensure a meaningful deliberation between rights claimants and duty-holders in *Olivia Road*.<sup>17</sup> The description of the Court's preference for ruling in easy cases, too, fails to account for the selectiveness of the litigation brought: not so much the work of an avoiding Court, as a wily public interest sector.<sup>18</sup>

On normative grounds, too, the category is opaque as prescription or criticism. For supporters, avoidance aligns with the Court's 'passive virtues' of the non-elected, counter-majoritarian, branch.<sup>19</sup> A long tradition of constitutional scholarship supports the refusal to decide cases on substantive grounds if narrower grounds exist,<sup>20</sup> the minimalist rejection of expansive pronouncements

<sup>15</sup> Eg *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para 20 (joint judgment of Ackermann J, O'Regan J and Sachs J); Currie, note 2 above. Stu Woolman has taken vigorous issue with the practice of avoidance, elevated to a principle of decisional minimalism: S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 763–764; S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 28–30, 38–40 (Suggests, among other criticisms, that the posture of avoidance subverts the dialogue and interpretive guidance otherwise available between the Constitutional Court and other courts, other branches, private parties, the legal profession, law schools and the public, and, to be an attractive theory, relies on a normative consensus lacking in South Africa); Compare with F Michelman 'On the Uses of Interpretive Charity': (2008) 1 *Constitutional Court Review* 1 (Disputes the inevitability of a connection between decisional minimalism and a flight from substance).

<sup>16</sup> See J Dugard & S Wilson 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' (2011). 22 *Stellenbosch Law Review* 664 (2011).

<sup>17</sup> *Occupiers of 51 Olivia Road Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208 (CC). For notable advancements on this theme, see *Joe Slovo I* and *Joe Slovo II. Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC) ('*Joe Slovo I*') (Court order of supervised eviction with numerous conditions, including engagement) and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2011] ZACC 8, 2011 (7) BCLR 723 (CC) ('*Joe Slovo II*') (Court rescinding eviction order). See also *Governing Body of the Juma Masjid Primary School & Others v Essay NO & Others* [2011] ZACC 13, 2011 (8) BCLR 761 (CC) (Court holding that right to basic education applied to both private parties and organs of state – both required to hammer out a solution before any final determination by the Court.)

<sup>18</sup> While the Court has signalled a receptiveness to economic and social rights litigation, this openness can appear to take the form of rhetoric, rather than doctrinal invitation. See *Mazibuko v City of Johannesburg* [2009] ZACC 28, 2010 (4) SA 1 (CC) at paras 159–165. On the connections behind earlier rhetorical strategies by the Constitutional Court and the pressures of enforcement, see T Roux *The Politics of Principle: The Constitutional Court of South Africa, 1995–2005* (2013) 383–386.

<sup>19</sup> The counter-majoritarian difficulty has a distinctive set of responses in South Africa, which depart from the conventional US terms of the debate. While here is not the place to canvas the distinctions in full, some have made the case that the Constitution's limitation clause was consciously designed to overcome the counter-majoritarian dilemma, and that dilemma is not a dilemma when the text of the Constitution itself can be traced directly back to a Constitutional Assembly (consisting of Members of Parliament) elected by all of South African citizens on 27 April 1994: see S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2006) Chapter 34. See, in particular, *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) at paras 27–30.

<sup>20</sup> See A Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

of law,<sup>21</sup> or other postures of judicial modesty or restraint.<sup>22</sup> Ray departs from this standpoint by celebrating a more maximal authority on the part of the court, but one that is shared with the other branches: thus breaking the inverse relation that inevitably equates the power of the court to a weakening of the legislature. He borrows this insight from US scholar Pamela Karlan, who notes that '[e]ven a court with an expansive view of its own authority may, as a practical matter, leave a great deal of room for the political branches' choices if it takes a broad view of enumerated powers'.<sup>23</sup>

Karlan has in mind the Warren Court in the United States: a Court with a 'distinctively optimistic view of the potential of politics to serve constitutional values',<sup>24</sup> which combined its famous exercises of counter-majoritarian enforcement of the Constitution, such as in *Brown*,<sup>25</sup> with significant deference to legislative innovations, especially in voting and election law. Karlan sets out to contrast the Warren Court to its much later successor in the Roberts Court: a Court disdainful of politics and the innovations of the legislator, which she suggests has set out to reverse the core of the Warren Court's legacy.<sup>26</sup> The Roberts Court, like the Warren Court, maintains an expansive view of judicial power yet combines this assertiveness with a narrow view of federal power. This position has clear ideological overtones: it threatens any positive realisation on the part of the state of the constitutional values of liberty, equality or dignity.<sup>27</sup>

We might expect such a contrast to have less heft in the context of the South African Constitutional Court, despite the similarities with Warren Court sensibilities.<sup>28</sup> The Warren Court was obviously a differently composed Court from the South African Constitutional Court, despite the unusual appointments made in each Court. It was also dealing with a different legislature. The Warren Court could defer to the innovations that arose from the Voting Rights Act of 1965 and the Civil Rights Act of 1964, in ways that may be more complicated for a Court dealing with the dominant-party democracy of the ANC.<sup>29</sup> In short, the interplay of maximal authority with inter-branch synergies is contingent: in the US context, as in South Africa circa 1994 and South Africa circa 2014. And where Karlan's intervention is a pointed attack on the negative constitutionalism of the

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<sup>21</sup> See C Sunstein 'Beyond Judicial Minimalism' 43 *Tulsa Law Review* 825 (2008); I Currie, note 2 above.

<sup>22</sup> See J Thayer 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129.

<sup>23</sup> P Karlan 'Foreword: Democracy and Disdain' (2011) 126 *Harvard Law Review* 1, 12 (2011).

<sup>24</sup> *Ibid* at 13.

<sup>25</sup> *Brown v Board of Education of Topeka, Kansas* 347 US 483, 74 SCt 686, 98 LEd 873 (1954) ('*Brown I*') supplemented by *Brown v Board of Education of Topeka, Kansas* 349 US 294, 75 SCt 753, 99 LEd 1083 (1955) ('*Brown II*').

<sup>26</sup> Karlan (note 23 above) at 11.

<sup>27</sup> As Karlan puts it, 'In a world where liberty, equality and dignity may depend on the provision of government services, the political branches might often be better equipped than the courts to vindicate values.' *Ibid* at 125.

<sup>28</sup> See K Young 'Provocation: The Comparative Turn: Accident, Coincidence, or Fate?' (2012) 125 *Harvard Law Review Forum* 236.

<sup>29</sup> See T Roux *The Politics of Principle: The First 15 Years of the South African Constitutional Court* (2013) 363.

Roberts Court, it follows that it possesses less traction where positive obligations on the part of the state are explicit, and are pretty well accepted.

### III CATALYSING SUBSTANCE

Let me provide an alternative reading of the Court's social rights jurisprudence. In many cases, I suggest that the Court has acted dynamically rather than statically, and actively rather than obstructively. Indeed, it has adjudicated so eclectically – by sometimes acting deferentially, other times conversationally, and on still other occasions with an experimentalist, managerialist or peremptory bent – that a typology is appropriate to capture its multifaceted role.<sup>30</sup> Hence, although the Court's coercive authority is used to a different degree in each case, this is not a simple case of weak versus strong authority or a spectrum of avoidance techniques:<sup>31</sup> the power the Court deploys in enforcing economic and social rights is multidimensional. For example, the Court may interpret the right at hand in a minimal or maximal way; it may evaluate the government's actions as against a standard or a rule or by exercising different degrees of scrutiny; it may design remedies which oversee deliberations or rewrite legislation or force new policy, conditional upon various criteria being met.

The deferential mode of review is most familiar to us, and describes the deference to the epistemic and democratic advantages of legislation or policy over judicial decision-making. Deference captures the earliest denial of social rights relief in *Soobramoney*<sup>32</sup> as well as something of the modesty shown towards housing policy in *Grootboom*.<sup>33</sup> With conversational review, the Court is instead reliant on the ability of an inter-branch dialogue to resolve the determination of rights. This goes further than deference by stressing the representative accountability of the legislature and executive to their electors, and instituting a judicial dialogue to undergird this accountability: an example of this was the Court's finding that the government's HIV policy was unreasonable and its order that the government facilitate access to the anti-retroviral drugs in question in *Treatment Action Campaign*.<sup>34</sup>

A third type of review, experimentalist review, captures the way in which the Court seeks to involve the relevant stakeholders – government, parties, and other interested groups – in solving the problem which obstructs a provisional benchmark of the right.<sup>35</sup> The remedy of meaningful engagement first devised

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<sup>30</sup> See K Young *Constituting Economic and Social Rights* 143 (2012). The following analysis draws on my recent monograph. See also K Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 *International Journal of Constitutional Law* 385.

<sup>31</sup> See M Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009).

<sup>32</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC).

<sup>33</sup> *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC).

<sup>34</sup> *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC).

<sup>35</sup> This posture displays the central features of the experimentalist programme outlined by US scholars such as Michael Dorf, Chuck Sabel and Bill Simon. See, eg, M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (1998) 103 *Columbia Law Review* 267; C Sabel & W Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1016.

in *Port Elizabeth*<sup>36</sup> is an approximate example. Managerial review occurs when the court assumes a direct responsibility for interpreting the substantive contours of the right and supervising its protection with strict timelines and detailed plans: more commonly observed in lower courts adjudicating social rights in South Africa.<sup>37</sup> Finally, preemptory review is involved when the court registers its superiority in interpreting the right, again a stance entirely familiar to us (and to critics who favour avoidance), and pretty clearly demonstrated in *Kbosa*.<sup>38</sup>

In the context of evictions, this typology provides a myriad of strategies open to the Court: whether in deferring to city zoning, nudging long-term improvements to housing policy, supervising negotiations, or dictating and managing detailed housing reforms. The Court is variously active or passive, ambitious or modest, involved or restrained. In all counts, it is not the embrace or avoidance of substance that separates the decisions. My work suggests that it is the pragmatic sense of catalysing a resolution to the problem at hand: in this case, of the Court requiring other actors – the legislature, bureaucracy, City, landlords, eviction companies, occupiers, and social movements to work together to realise the right to housing.<sup>39</sup>

The metaphor of the catalyst suggests that the Court lowers the political energy that is required to change the protection of economic and social rights, in a non-neutral way.<sup>40</sup> As the best reading that could be given to the development of South African economic and social rights jurisprudence, I argue that this catalytic mode of review has come about by a court's calibrated response to the degree of intransigence, incompetence or inattentiveness observed in the other branches of government<sup>41</sup> – postures that disrupt the work of public power and are often immune to political control. In celebrating the ability of the Court to 'shape, prod, control', Ray is himself supporting the catalytic role. Hence, the catalytic court occupies a procedural position that is substantively inflected all the way down.

<sup>36</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC).

<sup>37</sup> See *Grootboom v Oostenberg Municipality* [1999] ZAWCHC 1, 2000 (3) BCLR 277 (C).

<sup>38</sup> *Kbosa v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC).

<sup>39</sup> Woolman offers an entirely sympathetic, if not entirely identical, set of arguments regarding the nature of experimental constitutionalism, as well as its alignment with a socially democratic, judicially determined cast to substantive Bill of Rights provisions, and a very similar construction of the Court's emerging experimentalist jurisprudence, in *The Selfless Constitution* (note 15 above). Indeed, the critique of avoidance outlined in that work, and its distillation of the norms fleshed out in Amartya Sen's development theory and Martha Nussbaum's capabilities approach, bear strong parallels to my own analysis. See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) (drawing on, for example, M Nussbaum 'Constitutions and Capabilities: "Perception" against Lofty Formalism' (2007) 121 *Harvard Law Review* 4; A Sen *Development as Freedom* (1999); M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (note 35 above).

<sup>40</sup> Young *Constituting Economic and Social Rights* (note 30 above) at Chapter 6.

<sup>41</sup> See also K Roach & G Budlender, *Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?* 122 *South African Law Journal* 325, 345–350 (2005), citing C Hansen 'Inattentive, Intransigent and Incompetent' in SR Humm (ed) *Child, Parent and State* (1994) 224, 232.



## IV COMPARATIVE APPROACHES TO SUBSTANTIVE DECISION-MAKING

Such a typology is useful comparatively. Let us take the example of economic and social rights in another new constitutional democracy. Colombia's 1991 Constitution contains the protection of what it terms the social state governed by the rule of law, with important protections of rights to such goods as health care.<sup>42</sup> As in South Africa, the new Colombian Constitutional Court is seen as a key part of the new constitutional settlement. The Constitution devised new access to justice procedures, the most innovative of which is the *tutela* action, which allows any individual to seek protection of his or her constitutional rights.<sup>43</sup> A successful *tutela* can result in an injunction on any public authority. It is important to see how radical such instruments are. They are instituted in lower courts and ratified by the Colombian Constitutional Court – that Court has in fact received over a million *tutelas*. Many of these involve social rights, especially the right to health.

The Colombian Constitutional Court has embraced the substance of rights in an explicit, public way, in a form I term supremacist. In a reinterpretation of its civil law traditions, the Colombian Constitutional Court has gathered information, prepared large-scale public hearings, dictated policy and managed resources.<sup>44</sup> It has issued a substantive conception of economic and social rights, and redrawn the government's list of health entitlements to award claimants access to health treatments that they had been denied.<sup>45</sup> In a series of cases the Colombian Constitutional Court has followed a substantive, core right to health that borrows expressly from international law.<sup>46</sup> In Ray's terms, the Court is not avoiding substance: although it is also not engaging in the thick subsidiarity he commends. If we were to examine this jurisprudence through the typology above, we would find an example of managerial review – the Court has dictated which aspects of health care must be supported in the government's scheme.

Individual claimants have indeed been satisfied in seeking certain health care entitlements. Yet, what have followed have been many of the shortcomings of managerialism that we can predict – from examples in the United States.<sup>47</sup> Managerialism has taken up a huge amount of judicial resources and has led to a perception of queue jumping.<sup>48</sup> The unintended effects of the cases have included an unprecedented cost burden on the health system, a peremptory order in 2008

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<sup>42</sup> Constitution of Colombia, 1991, art 1 (social state of law, *estado social de derecho*), chapter 2 (social, economic and cultural rights).

<sup>43</sup> Constitution of Colombia, 1991, art 86.

<sup>44</sup> See, eg, Decision T-760 of 2008, C.C., (Julio 31, 2008), Sentencia T-760/08 (slip op.), available in Spanish at <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>. See, further, MJ Cepeda-Espinoza 'Transcript: Social' and Economic Rights and the Colombian Constitutional Court' (2011) 89 *Texas Law Review* 1699.

<sup>45</sup> K Young & J Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa*, 26 *Harvard Human Rights Law Journal* 179 (2013). See also A Yamin, O Parra-Vera and C Gianella 'Colombia: Judicial Protection of the Right to Health: An Elusive Promise?' in A Yamin & S Gloppen (eds) *Litigating Health Rights* (2011) 103.

<sup>46</sup> Young & Lemaitre (note 45 above).

<sup>47</sup> The resonant precursors at the appellate court level are *Brown I* and *Brown II*. See, further Young *Constituting Economic and Social Right* (note 30 above) at 156–162.

<sup>48</sup> See D Landau 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal* 198 (offering a general critique based, in part, on Colombian case studies).



by the Colombian Constitutional Court for the legislature to reform the health system, a counter-response to override the Colombian Constitutional Court through an emergency decree, followed by a heated cycle of public protest.<sup>49</sup> It is quite difficult to measure whether these dynamics have led to a greater protection of fundamental interests in health over the longer term: risks that Ray would probably not be willing to endorse.

This troubling uncertainty can be profitably contrasted with the Indian Supreme Court's inclination toward forms of conversational and experimentalist review. The Constitution of India entrenches a range of economic and social rights, predominantly as directive principles of state policy.<sup>50</sup> These rights are, or were, purportedly non-justiciable. However, the Supreme Court has interpreted the constitutional right to life broadly with reference to these principles. As a result, we see the Court adjudicating and enforcing economic and social rights in public interest litigation (PIL) cases.<sup>51</sup>

For example, the Indian Supreme Court held that particular food programmes were constitutionally required during conditions of drought, hunger and unemployment in 2001.<sup>52</sup> From its original filing in the state of Rajasthan, the Indian right-to-food litigation campaign has been expanded to apply to all state governments, and to enforce eight public food programmes, which included a Mid-Day Meal scheme to be implemented in government schools, requiring cooked meals for children within six months.<sup>53</sup> As part of ongoing interim orders, the Supreme Court appointed Commissioners, who became critical intermediaries between the court, state and central governments, campaigners and the public.<sup>54</sup> Despite a range of small-scale controversies involving the administration of the meals, commentators now report that 100 million children in India get a cooked meal at school, assisting in the realisation of educational rights. Again, it is hard to attribute the success of this campaign to the Indian Supreme Court itself – ‘success’ itself raises difficult questions of cause and effect in multi-causal scenarios.<sup>55</sup> Yet it is clear that it is not the judicial decree of a substantive doctrine that is doing the work here, so much as the engaged posture of judicial review that determines substance in cooperation with other actors.

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<sup>49</sup> Young & Lemaitre (note 45 above).

<sup>50</sup> Constitution of India, art 21 (fundamental right to life), art 21A (fundamental right to education), part IV (directive principles of state policy).

<sup>51</sup> Young *Constituting Economic and Social Rights* (note 30 above) at 200–206; *Francis Coralie Mullin v Adm'r* (1981) 2 SCR 516, 518 (Indian Supreme Court) (“The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter ...”). See, further, S Fredman *Human Rights Transformed* (2008), 124–149.

<sup>52</sup> *People's Union for Civil Liberties v Union of India, Writ Petition* (Civil) No 196 of 2001 (India) (Nov 28, 2001 interim order), available at <http://www.righttofoodindia.org/orders/nov28.html>.

<sup>53</sup> *Ibid.* For background and other orders, see <http://www.righttofoodindia.org>.

<sup>54</sup> The Supreme Court has relied on the Constitution, art 32, for authority to appoint commissioners. See *People's Union for Civil Liberties v Union of India, Writ Petition* (Civil) No 196 of 2001 (May 8, 2002 interim order); (May 2, 2003 interim order). See L Birchfield & J Corsi ‘Between Starvation and Globalization: Realizing the Right to Food in India’ 31 *Michigan Journal of International Law* 691, 728 (2010).

<sup>55</sup> Young *Constituting Economic and Social Rights* (note 30 above) 139–142 (Discussing how criteria and methodology can impact notions of ‘success’).

A last example, from courts in the United Kingdom, involves elements of detachment which draw on deferential or conversational modes of review.<sup>56</sup> We see examples of the weakest form of remedy available here: of declarations of incompatibility, where a court simply declares an aspect of a policy incompatible with the Human Rights Act 1998 (UK) ('HRA'), (which implements the obligations of the European Convention on Human Rights ('ECHR')), and waits for electoral responses to take their course.<sup>57</sup> A potentially more powerful response lies in interpreting statutes in a way that is compatible with the HRA.<sup>58</sup> The result is considerably more muted than South Africa's economic and social rights protections. However, it cannot be said that the courts are entirely avoiding the substance of the ECHR rights that have a decided impact upon housing and other material interests.

For example, in an early HRA case involving a challenge to a mandatory eviction procedure under the Housing Act 1988 (UK), as incompatible with the right to respect for family life,<sup>59</sup> the Court of Appeal considered the housing association to be a functional public authority and subject to duties under the HRA. Nonetheless, it found that there was no breach of the right to family life, because the interests of others dependent on public housing as a whole justified the system of mandatory evictions of those holding interim accommodation.<sup>60</sup> From a comparative perspective, the decision falls short of the developing South African standard, since the Court refused to interpret the Housing Act as requiring evictions only to be ordered when 'reasonable to do so',<sup>61</sup> and the Court refused to consider the different degrees of vulnerability of those in need of housing (apart from the legislative distinction between those intentionally homeless or not).<sup>62</sup> Notwithstanding this result, this and other judicial developments under the HRA are significant, and even substantive,<sup>63</sup> despite the fact that the work is done through a detached conception of the judicial role.

This variety of comparative approaches is best explained by features of institutional design as well as of constitutional culture in different legal traditions. The typology allows us to talk about both (which are of course quite different conversations).<sup>64</sup> The design elements are critical here – access to courts, standing rules, and the availability of different remedies have all influenced the meaning of economic and social rights in various jurisdictions, as well as implied or express understandings of the substance of economic and social rights.

<sup>56</sup> Ibid at 206–212.

<sup>57</sup> HRA, s 4 (Declaration of incompatibility).

<sup>58</sup> HRA, s 3 (Interpretation), outlined in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (House of Lords, UK).

<sup>59</sup> *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 3 WLR 183 (Court of Appeal in England (Civil Division) UK); HRA, s 8.

<sup>60</sup> Ibid at para 69.

<sup>61</sup> Ibid at para 77 compare with FC s 26; *Occupiers of 51 Olivia Road Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208 (CC).

<sup>62</sup> Ibid at paras 37, 67–69 compare with *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC).

<sup>63</sup> See, further, E Palmer *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007).

<sup>64</sup> For diagrammatic representations, see Young *Constituting Economic and Social Rights* (note 30 above) 168, 174, 194.

## V CONCLUSION

The Constitutional Court of South Africa has not avoided the substance of economic and social rights, despite its endorsement of reasonableness review, deliberative remedies, apparently abstract or fact-specific extremes, or easy cases. A substantive conception of economic and social rights is ubiquitous. It is in the liberal substance of the standard of reasonableness adopted in *Grootboom* and the more neo-liberal substance of the standard that was held to have been met in *Mazibuko*. Ray's distinction between pro-poor aspirations and anti-rights avoidance obscures this effect. What we are seeing, I suggest, is a series of judicial postures that catalyse a substantive notion of democracy-supporting economic and social rights (and a series of postures that have sometimes misfired). While a typology of these positions appears distinctively South African, elements of deference, conversation, managerialism, experimentalism and peremptory review are evident in other jurisdictions enforcing economic and social rights. Our evaluations are often limited by what we know about the legislative and executive branches in such jurisdictions; nonetheless, the substance given to economic and social rights is present in many findings of liability and remedy. Avoidance, I suggest, lies with the countless jurisdictions that still fail – judicially or legislatively – to recognise economic and social rights as law.

# Aggressive Weak-Form Remedies

David Landau\*

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## I INTRODUCTION

The rich debate on remedies for social rights violations is in some danger of ossifying. Recent work on socio-economic remedies has broken down into competing camps of those favoring strong-form versus weak-form review. Proponents of the former argue that it brings results; proponents of the latter tend to focus instead on the institutional and legitimacy limitations on courts. Still largely missing from this discussion is an analysis of exactly how and why different types of remedies work in different contexts.

Brian Ray's careful reconstruction of South African jurisprudence is a useful corrective.<sup>1</sup> It suggests that the South African Court's weak remedies can be usefully supplemented in various ways.<sup>2</sup> The Constitutional Court can, for example, maintain a weak remedy but offer a deeper and more detailed interpretation of a provision in the Constitution ('Final Constitution' or 'FC').

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\* Thank you to David Bilchitz, Frank Michelman, Brian Ray, Stuart Wilson, and two anonymous reviewers for comments on this essay.

<sup>1</sup> See B Ray 'Evictions, Aspirations and Avoidance' (2013) 5 *Constitutional Court Review* 173.

<sup>2</sup> Neither my argument nor Ray's implies that all of the Constitutional Court's socio-economic rights remedies have been weak. In some well-known cases, the Court has issued strong remedies. See, eg, *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) (Held that the government must provide broad access to a drug preventing transmission of HIV during pregnancy where the company agreed to make the drug freely available.) However, the Court has more readily relied on weaker remedies where the policy issues are relatively complex and need to be built up incrementally over time. Indeed, the Court's education jurisprudence thus far has reflected a 'wait and watch' approach in a domain (in all jurisdictions) notoriously resistant to ostensibly more effective new policies. See S Woolman & B Fleisch *The Constitution in the Classroom: Law and Education in South Africa, 1994–2008* (2009); S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 331–357, 471–474 (Woolman's monograph offers a view on rights and remedies – from the vantage point of experimentalism and development theory – consistent with views expounded in these pages.) See further M Dorf & C Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267; M Dorf '1997 Supreme Court Term Foreword: The Limits of Socratic Deliberation' (1998) 112 *Harvard Law Review* 4. M Dorf & B Friedman 'Shared Constitutional Interpretation' (2000) *Supreme Court Review* 61; M Dorf 'Legal Indeterminism and Institutional Design' (2004) 78 *New York University Law Review* 875; M Nussbaum 'Constitutions and Capabilities: Perception against Lofty Formalism' (2007); 121 *Harvard Law Review* 4; A Sen *Development as Freedom* (1999). The Constitutional Court has shown a dramatically more principled (or aggressive) approach to rights and remedies when issues of exclusion (on the basis of race) or access (due to contractual disputes) have undermined the various entitlements learners enjoy under FC s 29(1) and FC s 29(2). *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC) (Brings to end a decade long line of cases in which language and culture had had the effect, intentional or not, of excluding learners on the basis of race); *Governing Body of the Juma Masjid Primary School & Others v Ahmed Asruff Essay NO & Others* [2011] ZACC 13, 2011 (8) BCLR 761 (CC) (Court ensures learners' rights to basic education are not undermined by contractual disputes between private parties and the state.)

Or it can attempt to give more teeth to an ‘engagement’ remedy by controlling the process by which the government must work with groups representing, say, potential evictees.<sup>3</sup> Ray conceives of remedies on a spectrum, and argues that the South African Constitutional Court can and has taken some actions that tend to increase the impact of its remedies.<sup>4</sup>

In this brief essay, I attempt to generalise Ray’s point. Weak-form remedies are, in fact, compatible with a number of different strategies, at varying levels of aggressiveness. The essence of weak-form remedies are sometimes thought to relate to the general level of deference with which courts treat political actors. In fact, the essence of a weak-form remedy is simply that political actors, rather than courts, make substantive policy decisions. The arguments made in favor of weak-form remedies, both on democratic legitimacy and judicial competence grounds, point towards a conception of review that allows judiciaries to take aggressive action in order to incentivise political actors to act. Both capacity-based and democracy-based critiques of the judicial enforcement of social rights are skeptical that courts have the expertise or the legitimacy to establish the contours of policies (through rights-based analysis) that will have a major impact on the budget. Both critiques, however, tend to allow that courts can and should try to cajole the political branches – as well as other interested social actors – into delivering on the socio-economic imperatives spelled out and prioritised in the constitutional text.

This reconceptualisation of weak-form remedies – away from generalised deference and towards the more specific goal of allowing courts to spur politicians into action – has broad implications for the design of remedies for socio-economic rights violations. It suggests most importantly that judges can ratchet up the pressure that they place on politicians in order to induce action on socio-economic issues.<sup>5</sup> Given the standard pattern with socio-economic rights – where the political branches often have taken no action on issues that the constitution prioritises – this kind of pressure may be a key element in addressing the Achilles heel of weak-form remedies: their potential ineffectiveness.

I use the comparative experience of the Colombian Constitutional Court to explain how courts can use more aggressive strategies of enforcement while maintaining a division of labor that is consistent with the core of weak-form

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<sup>3</sup> Ray (note 1 above).

<sup>4</sup> For the ur-text on remedies under the South African Constitution, see M Bishop ‘Remedies’ in S Woolman & M Bishop (eds) in *Constitutional Law of South Africa* (2nd Edition OS, 2008) Chapter 9, 1–192.

<sup>5</sup> Nowhere has the actual room for courts to manoeuvre in South Africa – around socio-economic rights and rights generally – been expatiated with such verve, care and élan as it has in Theunis Roux’s body of work and in his recent monograph. See T Roux *The Politics of Principle: The First 10 Years of the South African Constitutional Court, 1995–2005* (2013). See also T Roux ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2009) 7 *International Journal of Constitutional Law* 106 See T Roux ‘Democracy’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10; T Roux ‘Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court’ (2003) 4 *Democratization* 10.

review. In particular, I point to two strategies used by that Court in enforcing socio-economic rights: (1) setting malleable default rules that go into effect only if the state does not take effective contrary action within a set period of time, and (2) declaring policy areas structurally deficient, issuing follow-up orders with deadlines for political action on discrete issues, and using public hearings and civil society groups to monitor compliance with those deadlines. The Colombian Court's general approach, including these two strategies, is often contrasted with the more deferential South African Constitutional Court's approach.<sup>6</sup> But as we shall see, the Colombian Court's actions are aggressive without collapsing into strong-form remedies or judicial supremacy. It often seeks to incentivise political action while avoiding to a large extent the actual design of socio-economic policy.

The rest of this essay is organised as follows: In Part II, I seek to reorient the debate around forms of review by arguing that weak-form remedies are consistent with aggressive judicial action aimed at catalysing political activity. Aggressive action aimed at spurring political activity is important in the face of a common problem of political inaction on socio-economic issues. Part III looks at the manner in which the Colombian Constitutional Court has employed aggressive weak-form remedies to spur major alterations by the state in housing, displaced persons, and healthcare policy.<sup>7</sup>

Finally, Part IV concludes by considering the relevance of a comparative conversation about socio-economic remedies in light of the widely varying political constraints on courts and the local factors that partially determine the success or failure of any particular strategy. While the design of socio-economic remedies is an inherently experimental exercise, we can use comparative work to provide guidance that work across jurisdictions. To date, comparative work has helped to clarify the set of tradeoffs between different remedies, and suggests that no remedial strategy is likely to prove ideal. This widely shared view suggests that the most effective remedies may lie somewhere on a spectrum between strong-form review and weak-form review.<sup>8</sup> The Colombian experience offers tools that South Africa might consider when constructing more effective types of weak-form review.

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<sup>6</sup> See K McLean *Constitutional Deference: Courts and Socio-Economic Rights in South Africa* (2009); K. Young & J Lemaitre 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' (2013) 26 *Harvard Human Rights Journal* 179, 180 (Contrasts the more aggressive and involved Colombian enforcement of the right to health with the less interventionist South Africa approach).

<sup>7</sup> See C Rodriguez-Garavito 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 *Texas Law Review* 1669, 1670–71 (Describe the Court's structural interventions).

<sup>8</sup> See M Tushnet 'A Response to David Landau' (2012) 53 *Harvard International Law Journal Online* 155, 161 (Argues that 'structural injunctions typically begin as weak-form injunctions with little detail' and that 'the contrast ... between [strong-form and weak-form review] may be overdrawn, or may reflect temporal rather than analytical differences').

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## II RETHINKING WEAK-FORM REMEDIES AND AGGRESSIVE ENFORCEMENT

Weak-form remedies are sometimes read in terms of judicial deference to the political branches. That is, legislatures rather than judiciaries are best placed to take the final decision on what a Constitution means.<sup>9</sup> Other scholars distinguish weak-form remedies from strong-form remedies by arguing that the former is designed to promote ‘dialogue’ between the judiciary and the political branches.<sup>10</sup> Both these formulations may be too vague to be helpful to courts actually trying to decide upon appropriate remedies. For example, they do not specify along which dimensions courts should be deferential or the kinds of dialogues courts should promote.<sup>11</sup> Part of the problem is that the weak-form remedy (and weak-form review more broadly) is a broad phenomenon, often lumping together institutional mechanisms like the ‘New Commonwealth’ model of constitutionalism as well as deferential review of socio-economic rights.<sup>12</sup> These different exercises of review may share some common elements, but they also raise distinct challenges.

When it comes to socio-economic rights, the goals of weak-form review are generally preserved when the political branches rather than courts actually set the details of policy. *Grootboom* is consistent with this model. The South African Constitutional Court held the existing housing plan deficient in not providing for those in dire short-term need, and required that the state rectify this deficiency.<sup>13</sup> Beyond that, the *Grootboom* Court merely requested a reasonable plan to address the text’s demand that adequate housing be progressively realisable. A number of more aggressive approaches also preserve the core concern of the weak-form

<sup>9</sup> See M Tushnet ‘Weak-Form Judicial Review and “Core” Civil Liberties’ (2006) 41 *Harvard Civil Rights-Civil Liberties Law Review* 1 ([W]eak-form review... allows legislatures to make their own constitutional interpretations stick even when inconsistent with relatively recent judicial interpretations.’). Like Ray’s piece, this reply deals only with remedies rather than the underlying rights themselves. Rights and remedies are conceptually separable, although they are related in ways that have not fully been explored within the socio-economic rights literature. See also D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* 150 (2007) (Notes that the weak remedy in *Grootboom* is tied to its substantive rejection of the minimum core approach in favour of reasonableness). The claim that effective remedial strategies for socio-economic rights are of necessity experimentalist and eclectic – a point which I take to be almost between dispute – does not imply that the same is true for interpretation of the underlying rights themselves.

<sup>10</sup> See C Bateup ‘Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights’ (2009) 32 *Hastings Comparative and International Law Review* 529 ([D]ialogue theorists argue that weak-form bills of rights create the potential for a collaborative and continuing conversation between the branches about the optimal way to protect and enforce rights....’).

<sup>11</sup> See Roux *The Politics of Principle* (note 5 above).

<sup>12</sup> See R Dixon ‘Weak-Form Judicial Review and American Exceptionalism’ (2012) 32 *Oxford Journal of Legal Studies* 487, 488 (Discusses the differences between American and Canadian constitutionalism as a distinction between strong-form and weak-form review, although she concludes that the practical difference may be less than is commonly supposed). The ‘New Commonwealth’ model includes a number of ways to soften judicial review by either allowing legislative overrides of judicial decisions, by allowing judiciaries only to interpret statutes in light of constitutional norms rather than striking those norms down, or by allowing judiciaries to declare statutes incompatible with a Constitution without also striking them down. See, generally, Stephen Gardbaum ‘The New Commonwealth Model of Constitutionalism’ (2001) 49 *American Journal of Comparative Law* 707.

<sup>13</sup> See *Government of the Republic of South Africa v Grootboom and Others*, [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (*Grootboom*).

model. In other words, courts can take a number of paths that hold out of the promise of incentivising political action in a given area without themselves creating programs.<sup>14</sup> As Ray notes, closer judicial management of the process through which policy is made is one way to make weak-form review more effective.<sup>15</sup> A number of other possibilities are explored in more detail below. Courts can take steps to publicise political failings on an issue, and can monitor compliance regularly over time, either on their own or with the use of civil society groups.<sup>16</sup> Similarly, courts can set short and intermediate-term deadlines for the carrying out of discrete tasks that they assign to national or local officials.<sup>17</sup> Finally, courts can set default policies that will go into effect within a certain time period unless the political branches themselves take action on an issue in the interim.<sup>18</sup> In all of these cases, courts seek to spur political action on socio-economic rights without themselves designing complex government programmes.

Many of these techniques do involve judiciaries in setting policy to an extent. In any form of weak review, the Court prods the government to prioritise constitutional issues on forms of social welfare spending that the government might otherwise ignore.<sup>19</sup> Even as the Court sets even malleable default policies, or holds the bureaucracy to more specific short- or medium-term tasks, additional policymaking power will probably be shifted from the political branches to the court. But the Court can carry out fairly aggressive activities to prod the state into action without collapsing into strong-form review. Put another way, while strong-form review and weak-form review may be useful as ideal types, in reality they lie along a spectrum with a number of intermediate points that both represent more aggressive remedies while nonetheless preserving the primary goals of weak-form remedies.

The reasons why courts would want to make weak-form remedies more aggressive are now obvious from experience. The major risk with weak-form remedies is that the political branches will not respond with alacrity to a judicial order, and that the progress the order promises will not at all materialise.<sup>20</sup> This

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<sup>14</sup> Both Rosalind Dixon and Katherine Young have made theoretical arguments along a similar vein. Dixon notes that if the purpose of judicial review in the socio-economic realm is to promote dialogue, then this might require harder action in certain circumstances, in order to counter legislative ‘blind spots’ or ‘burdens of inertia’. See R Dixon ‘Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited’ (2007) 5 *International Journal of Constitutional Law* 391, 404. Young in turn develops a catalytic model of judicial review, where courts might use widely varying approaches in order to spur political action and empower civil society. See K Young *Constituting Economic and Social Rights* 167–191 (2012).

<sup>15</sup> See Ray (note 1 above) at 185.

<sup>16</sup> See below Part III.B.

<sup>17</sup> Ibid.

<sup>18</sup> See below Part III.A.

<sup>19</sup> See M Tushnet *Weak Courts, Strong Rights* 244 (Notes that the order in *Grootboom* ‘does shift the government’s priorities to some extent’ by ‘[r]equiring the government to include a provision for “people in desperate need”’).

<sup>20</sup> See Dixon (note 14 above) at 401–403 (Points out that legislatures may often face ‘inertia’ that makes them slow to respond to socio-economic demands, especially where the claimants have little voice in the political process and thus represent legislative ‘bling spots’).

is a common (although strongly contested) critique of *Grootboom*.<sup>21</sup> It is also one of the most important dangers of judicial review of socio-economic rights. Weak-form or dialogic review of ordinary legislation normally occurs after the political branches have already set policy; the courts review that policy decision and the question is to what extent the courts have the last word.<sup>22</sup> In New Commonwealth systems like the Canadian system, the very system is built in ways – such as the legislative override provision in Canada – to soften the finality of judicial review.<sup>23</sup>

This is not the standard pattern with judicial enforcement of socio-economic rights. Instead, judiciaries often deal with situations where legislatures have not legislated with a particular priority in mind, or where legislation exists but the bureaucracy have taken few steps to implement it. The biggest risk in such situations is that the legislature will do nothing or too little. There is thus an urgent need to develop remedies that are more effective in spurring legislative action. The rest of this section demonstrates that the major goals of weak-form review – avoiding the overreach of both judicial capacity and legitimacy – are compatible with aggressive orders aimed at prodding the legislature and/or the bureaucracy into action.

The fact that some kinds of aggressive enforcement mechanisms are compatible with the primary goals of weak-form remedies does not mean that aggressive forms of enforcement are always the optimal strategy. Rather, existing work

<sup>21</sup> For some examples of critiques, see Bilchitz (note 9 above) at 149–152 (Argues that the decision achieved little and was not adequately supervised by the court); DM Davis ‘Adjudicating the Socio-Economic Rights in the South African Constitution: Towards ‘Deference-Lite’ (2006) 22 *South African Journal on Human Rights* 301. Others have noted that the decision may have catalysed the development of legislative and judicial progress on the evictions issue over time. See Elisabeth Wickeri ‘Grootboom’s Legacy: Securing the Right to Access to Adequate Housing in South Africa?’ Center for Human Rights and Global Justice Working Paper No. 5 (2004), available at <http://www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom's%20Legacy.pdf> (Takes stock of the impact of the case on South African housing policy and jurisprudence over time). Stu Woolman actually traces the policy history post-*Grootboom* and the government’s significant delivery of new units of housing (2.2 million), even as it struggles with a backlog almost identical in size. K Rust and the Centre for Affordable Housing in Africa (FinMark Trust) 2012 *YearBook on Housing Finance in Africa: A Review of some 42 of Africa’s Housing Finance Markets* (2012) While critical of the Court’s early avoidance-based techniques, he ultimately identifies a gratifying, *emerging* trend in the Court’s meaningful engagement jurisprudence. This trend, consistent with his own experimentalist and developmentalist take – on shared constitutional interpretation, participatory bubbles, reflexivity and chastened deliberation – reflects a more activist court: a court willing to provide a normative framework on socio-economic rights (and other rights) at the same time as it leaves the coordinate branches, and more directly interested and knowledgeable parties, to work out the best possible solution (practically and normatively) to the dispute (and the problems) that have seized the Court. S Woolman *The Selfless Constitution* (note 2 above) 318–331, 440–480 citing, eg, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2011] ZACC 8, 2011 (7) BCLR 723 (CC). Several contributors to this volume do not share such a rosy view of the Court’s jurisprudence or divine such a positive emerging trend. See S Wilson ‘Curing the Poor: State Housing Policy in Johannesburg after *Blue Moonlight* (2013) 5 *Constitutional Court Review* 280; J Dugard ‘Beyond *Blue Moonlight*: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing’ (2013) 5 *Constitutional Court Review* 265. Indeed, they are downright scathing when it comes to what they perceive as the Court’s failure to anticipate how and why their interventions would go awry.

<sup>22</sup> See Tushnet (note 9 above) at 4 (Contrasts strong-form and weak-form review based on whether judicial review of legislative action is final or instead subject to possible revision by political actors).

<sup>23</sup> See note 10 above.

has suggested that there is no perfect remedy for violations of socio-economic rights.<sup>24</sup> Further, the ‘best’ approach is likely to be partly a matter of specific political and social context, especially variables like the nature of the party system and the strength of civil society.<sup>25</sup> Finally, as Tushnet points out, sequence may matter a great deal when designing effective remedies in this area.<sup>26</sup> This draws off of a key point made by the experimentalist literature – remedies for complex problems are likely to be an iterative process.<sup>27</sup> Courts may for example want to begin with broader, more tentative solutions, moving towards firmer remedies as they gauge both the political reaction to their orders and as they learn more about how to respond in a complex area of policy.<sup>28</sup> But it is important for courts to realise that they can utilise more aggressive forms of enforcement without collapsing into judicial supremacy.

### A Weak-Form Remedies and Judicial Capacity

Supporters of weak-form remedies commonly argue that courts are poorly suited to design complex social programmes. First, the problems that require redress are seen as paradigmatically polycentric. The design of an adequate system of housing, for example, forces courts to engage a multitude of different issues such as construction in different sectors and for different classes, subsidies, eviction and land-clearing, land titling and restitution, expropriation, and so on.<sup>29</sup> Furthermore, attempts to resolve one of these issues piecemeal with partial fixes may have an impact on other areas either within or outside of housing policy. For example, a policy that makes it harder to evict poor citizens squatting in informal settlements on public or private land may affect the incentives to build new housing. And a system of housing subsidies may impact the budget, leaving less money for other forms of social welfare.

In addition, social issues are thought to be particularly technical: they ostensibly require expertise that judges do not possess.<sup>30</sup> Housing or health policy may depend on statistical studies about the effects of different programmes; they may also depend on complicated economic or sociological studies. Legislatures and executive bureaucracies are presumed to have access to this kind of information, and moreover the capacity (through legislative committees and specialised civil

<sup>24</sup> See D Landau ‘The Reality of Social Rights Enforcement’ (2012) 53 *Harvard International Law Journal* 190, 199–201 (Outlines tradeoffs between different remedial approaches).

<sup>25</sup> See Young (note 14 above) at 168–74 (Notes that judicial role conceptions are ‘dependent on constitutional culture [and] institutions’).

<sup>26</sup> See Tushnet (note 8 above) at 163.

<sup>27</sup> See C Sabel & W Simon ‘Destabilization Rights: How Public Law Litigation Succeeds’ (2004) 117 *Harvard Law Review* 1015, 1081 (Explains the benefits of an iterative approach to public law remedies).

<sup>28</sup> Experimentalists refer to such learning and the revision of both descriptive accounts and normative positions – by all parties, over time, courts included – as ‘reflexivity’. See Woolman (note 2 above) at 197–240.

<sup>29</sup> See J King *Judging Social Rights* 190–212 (2012) (Notes that socio-economic rights cases often involve polycentric dimensions, although arguing that such dimensions are in fact endemic to litigation across issue areas).

<sup>30</sup> *Ibid* at 212–249 (Explores the expertise critique and ways in which courts can review socio-economic rights claims despite its weight).

servants) to process it. Courts are usually thought to have much more difficulty accessing and utilising this sort of information.

These factors are not unique to socio-economic rights. But many commentators seem to think that they have particularly strong bite in this domain.<sup>31</sup> Indeed, they often lie at the heart of the case against the inclusion of justiciable socio-economic rights in constitutions.<sup>32</sup> Frank Cross finds it unthinkable that courts would carry out a robust judicial enforcement of social rights given the enormity of the tasks that they would face.<sup>33</sup> The supporters of weak-form review accept some aspects of these institutional capacity-based critiques. However, they suggest that weak-form review, properly conceived, offers a way around most of the relevant problems. Mark Tushnet argues that Cross's case against socio-economic rights is actually aimed only against strong-form review.<sup>34</sup> Courts may lack the tools to design social programmes from the ground up. (And they are rarely asked to do so.) They can, however, identify the absence of policy or the presence of violations. Courts can then ask the state to remedy both constitutionally infirm omissions and actions.

Institutional capacity constitutes a genuine concern that is real and significant. I have argued in other work, drawing off of the Colombian Constitutional Court, that courts do possess some techniques for mitigating these problems. For example, civil society groups can serve as monitors of state action and a source of technical expertise, helping to compensate for a court's own deficiencies in this regard.<sup>35</sup> Courts can also rely on other 'checking institutions', such as a Public Protector, an Auditor-General, or a Human Rights Commission, to monitor executive action and to propose new policy solutions.<sup>36</sup>

Aggressive review is compatible with the goals of weak-form review so long as it primarily incentivises the state to design or reorient policy. Of course, in incentivising the state to act along particular lines, the judiciary inevitably is

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<sup>31</sup> See M Langford 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 3, 36–39 (2008) (Notes polycentricity and capacity concerns with the socio-economic rights enforcement, but believes that they can be overcome.)

<sup>32</sup> In South Africa, such staid and standard tropes did not carry either the academic arguments or the political debates at the time the Interim Constitution and the Final Constitution were written. See E Mureinik 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464.

<sup>33</sup> See F Cross 'The Error of Positive Rights' (2001) 48 *UCLA Law Review* 857, 889 ('Courts ... avoid involving themselves in matters fundamental to the enforcement of positive rights.')

<sup>34</sup> See Tushnet (note 19 above) at 231.

<sup>35</sup> See David Landau 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard International Law Journal* 319, 362.

<sup>36</sup> Ibid at 360. South Africa's Chapter 9 Institutions serve oversight roles, mediate disputes and can assist the Court in the enforcement of its orders. See M Bishop & S Woolman 'Public Protector' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24A; S Woolman & Y Schutte 'Auditor General' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; C Albertyn 'Commission for Gender Equality' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 24D; J Klaaren 'South African Human Rights Commission' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 24C; K Govender 'The South African Human Rights Commission' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 571.



‘making’ social policy. For example, by telling the political branches in *Grootboom* that existing housing plans were unconstitutional because they did not adequately provide for those persons with the gravest short-term needs, the Court was attempting to reorient government policy.<sup>37</sup> Most academic writing and judicial decisions assume that it is acceptable for the courts to undertake this kind of prioritisation. If socio-economic rights are to have any justiciable content, then it is hard to see how it could be otherwise. Courts must have the ability to tell the political branches that they need to do better in attending to particular constitutional values and provisions.

The capacity critique seems instead to go mainly to the details and design of new public policy. The target in the US has been long-term structural interdicts that required the desegregation of schools (or engagement with curriculum content) and the micromanagement of the number of beds in prison cells.<sup>38</sup> To some extent, these critiques misunderstand the manner in which policy was generally made in these cases. Detailed policy orders were often the product of a negotiated solution among counsel for plaintiffs, defendant and experts retained by the court.<sup>39</sup> Ideas arose out of a dialogue between political, judicial and civil society actors and were usually not the product of judicial fiat. When the order is understood as the end product of such participatory bubbles, the remedy might firmly incentivise the state to act on a particular issue while leaving the design of the policy details to the politicians and bureaucrats.<sup>40</sup>

## B Weak-Form Review and Democratic Legitimacy

A second major critique of the judicial enforcement of social rights hinges on a perceived lack of democratic legitimacy. All exercises of judicial review potentially raise the ‘counter-majoritarian difficulty’ – the theoretical problem of justifying exercises of judicial overruling of decisions made by elected political actors.<sup>41</sup> But critics of the judicial enforcement of social rights argue that this problem is especially acute in the context of socio-economic rights, largely because of what Frank Michelman has called their ‘raging indeterminacy’.<sup>42</sup> They argue that while all rights lack clarity, socio-economic rights may raise an especially large judicial zone of discretion because their content is especially contested. Courts might

<sup>37</sup> See Tushnet (note 19 above) at 244.

<sup>38</sup> See R Sandler & D Schoenbrod *Democracy by Decree: What Happens When Courts Run Government* 117–122 (2003); D Horowitz *The Courts and Social Policy* 255–261 (1977).

<sup>39</sup> See M Feeley & E Rubin *Judicial Policymaking and the Modern State: How the Courts Reformed America’s Prisons* 351–361 (1998) (Recognises that judicial policymaking is constrained by adherence to doctrine and by the interests of various groups involved in litigation).

<sup>40</sup> See Bilchitz (note 9 above) at 198 (Argues for an approach in which the court sets out the ‘general standard that constitutes the minimum core of the state’ while the legislature and executive have ‘some leeway in deciding exactly what measures are to be taken to realize the right’).

<sup>41</sup> On how the South African Constitution’s limitations clause directly addresses the putative counter-majoritarian dilemma, see S Woolman and H Botha ‘Limitations’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007) Chapter 34. The internal limitations clause found in FC ss 26(2), 27(2) and 29(2) were conceived with judicial overreach clearly in mind.

<sup>42</sup> See F Michelman ‘The Constitution, Social Rights, and Liberal Political Justification’ (2003) 1 *International Journal of Constitutional Law* 13, 30.



justifiably begin from a number of different starting points, to the benefit of a number of different groups involving different issues.

Similarly, these critics often argue that decisions on socio-economic rights tend to involve sensitive matters that are generally thought to be left to political actors rather than courts. Judicial decisions on socio-economic rights often have significant budgetary effects and involve the spending of considerable amounts of money.<sup>43</sup> Again, these problems are not unique to social rights issues. Some ‘first generation’ rights, like the right to counsel as a component aspect of due process, also involve the construction of costly large-scale programmes.<sup>44</sup> But the critics argue that the enforcement of socio-economic rights is likely to involve more substantial – or at least more visible – cost than most first-generation rights.

The democratic critique of judicial enforcement of social rights is shakier than the capacity critique. It rests on a particular vision of the separation of powers that may be too dependent on North American and European theorists. It seems to have been rejected by many actors in the new ‘global south’. It may be that the configuration of political institutions in ‘global south’ countries, and systematic deficiencies or distortions in the representativeness or capacity of institutions like legislatures, means the critique has less bite.<sup>45</sup> Or it may be that the poor across the developing world are so systematically excluded from representation within their own political systems that one can construct a ‘process-based’ defence of robust judicial review on socio-economic issues.<sup>46</sup>

But even assuming *arguendo* the force of the basic critique, it again seems to aim mainly at judicial activity that itself sets social policy, rather than judicial activity aimed at incentivising politicians to set policy along the lines suggested by the Constitution. Courts possessed with powers of judicial review have the legitimacy to interpret constitutional provisions and to condemn, as constitutionally infirm, legislative action or inaction with respect to a given right. Serious problems only arise when courts themselves order the spending of substantial sums on money on particular programmes. But courts with such powers rarely wade into such choppy waters. The first 20 years of South African jurisprudence offers one example of both principled action and institutional restraint.

### III INCENTIVISING POLITICAL ACTION: APPROACHES FROM THE COLOMBIAN CONSTITUTIONAL COURT

The jurisprudence of the Colombian Constitutional Court can be used to explore the ways in which courts can use aggressive remedies that nonetheless preserve space for politicians to design the content of social programmes. Judiciaries, in

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<sup>43</sup> See, eg, Cross (note 33 above) at 890 (Contends that courts should not and would not enforce socio-economic rights because they impinge on the ‘power of the purse’.)

<sup>44</sup> See Langford (note 31 above) at 30–31.

<sup>45</sup> See Landau (note 35 above) at 323–332 (Argues that differences in the ways political institutions and party systems function give the counter-majoritarian difficulty less bite in many developing countries).

<sup>46</sup> See Dixon (note 14 above) at 405.

so doing, play what Katharine Young has called a ‘catalysing role’ – they seek to unblock dormant areas of socio-economic policy.<sup>47</sup>

The Colombian Constitutional Court is an ideal point of comparison because it has worked with a more aggressive set of remedies than the South African Court. And yet the Colombian Constitutional Court has carried out its work without necessarily collapsing into the dangers of strong-form review of socio-economic rights. Moreover, it has done so within a constitutional (although not political) context that is not so different from the context in South Africa.<sup>48</sup> Like the Final Constitution, the Colombian Constitution of 1991 was loaded with socio-economic rights to goods such as health and housing. These rights were viewed as a critical part of the new political order.<sup>49</sup> Indeed, the new constitutional order was labelled a ‘social state of right’ [*estado social de derecho*] in Article 1, a significant shift from the traditional understanding of the Colombian state as embodying the rule of law [*estado de derecho*].<sup>50</sup> The effective realisation of a broad set of rights, including socio-economic inclusion and the combatting of poverty, were seen as essential to bringing long-term peace to Colombian society.

But as in South Africa, the Colombian Court initially worked within a context where there were doubts about the extent to which social rights were judicially enforceable. The Colombian rights generally lack the built-in limitations clauses (that the state must take ‘reasonable’ measures, ‘within its available resources, to achieve the progressive realisation’ of the right) found in the South African Constitution.<sup>51</sup> Moreover, the president at the time the new constitution was adopted made speeches in which he argued that the new rights would be non-justiciable. In addition the Assembly left open key questions about the extent to which the new socio-economic rights could be judicially enforced.<sup>52</sup> Over time, the Court has tended to resolve these initial doubts in favour of aggressive judicial enforcement.

Not all of the Colombian Court’s activity can be explained within a weak-form paradigm. For example, the Court has developed a vast jurisprudence of individualised enforcement in the health and pension fields – petitioners have come to the courts by the thousands to argue that they have been unjustly denied a treatment, medicine or pension, and the Court has generally granted them a

<sup>47</sup> See Young (note 14 above) at 172 (‘The role conception of a catalytic court is one that sees itself in productive interaction with other political and legal actors.’)

<sup>48</sup> Roux might argue that the political climate is, indeed, why the two Courts have produced different outcomes. See Roux *The Politics of Principle* (note 5 above).

<sup>49</sup> See Constitution of Colombia, Arts 48 (social security), 49 (health), 51 (housing) and 67 (education).

<sup>50</sup> *Ibid* at Art 1 (‘Colombia is a social state of right, organised in the form of a unitary Republic, decentralised, with autonomy in its territorial entities, democratic, participatory and pluralist, founded on respect for human dignity, in work, and in the solidarity of the people integrating it and on the prevalence of the general interest.’).

<sup>51</sup> See FC s 26.

<sup>52</sup> For example, the constitutional provision creating the new individual complaint mechanism, called the *tutela*, held only that the mechanism was available to enforce ‘fundamental rights’ without defining which rights were ‘fundamental.’ See Constitution of Colombia Art 86. See also Art 85 (Defines certain rights as being of ‘immediate application’ without defining the significance of this term, and leaving the socio-economic rights off of this list).

remedy on an individual basis.<sup>53</sup> These kinds of remedies are difficult to square with the goals of weak-form enforcement. I will leave the Court's approach to the substantive constitutional interpretation of these socio-economic rights for another occasion.<sup>54</sup>

Instead, I focus here on two different approaches used by the Court to deal with structural deficiencies in socio-economic policy. In all of these cases, the court faced the common problem of political inaction: either the legislative framework that existed was nonexistent or deficient, or the relevant bureaucracy lacked the capacity or will to implement an extant legal framework. The Court has been creative in finding ways to spur political action in these contexts. The first approach, used in a dramatic series of housing decisions during a deep economic crisis in the late 1990s, was meant to incentivise legislative action by setting an unpleasant default policy for the political branches if they failed to design a new housing programme within a set period of time. The Court coupled this approach with a strategy of aggressively publicising the issue so as to put it more squarely on the social and political radar, and to pressure the political branches into taking effective action. The second approach, which employed structural injunctions, gave substance to the rights of displaced persons (2004) and health (2008), respectively. The Court retained jurisdiction in these matters in order to monitor bureaucratic compliance and issued follow-up orders with specific deadlines for bureaucratic action. Here too, the Court has attempted aggressively to publicise issues so as to put them on the public radar, and has used civil society groups to aid in its monitoring.

### A Incentivising Political Action by Using Default Rules

A major concern in the design of weak-form review is that the political branches may ignore the invitation to dialogue. The Colombian Constitutional Court faced this dilemma in the late 1990s, when a deep economic crisis threatened several hundred thousand homeowners with foreclosure.<sup>55</sup> The problem was that the government system to finance housing, called UPAC, indexed interest rates in a way that caused them to rise much more sharply than the rate of inflation. The economic crisis itself ensured that a significant number of families would have

<sup>53</sup> See P Rueda 'Legal and Social Change During Colombia's Economic Crisis' in J Couso, A Huneeus and R Sieder (eds) *Cultures of Legality: Judicialization and Political Activism in Latin America* 25, 40–48 (2010) ('Tracks an explosion in the amount of cases using the concept after an economic crisis in the late 1990s).

<sup>54</sup> The key concept here is the 'vital minimum doctrine,' which the Court synthesised as 'a direct consequence of the principles of human dignity and the social state of law' that are explicit in the text of the Constitution. See Decision T-426 of 1992. The right to a vital minimum provides a right to a minimum level of well-being and has at times served as a kind of linchpin or prioritisation device for Colombian jurisprudence. See D Landau 'The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures' in A Nolan (ed) *Economic and Social Rights After the Global Financial Crisis* (2014).

<sup>55</sup> See RU Yepes 'The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates' in R Gargarella et al (eds) *Courts and Social Transformation in New Democracies* 127, 136 (2006) (Notes that the crisis aggravated the situation of 800 000 borrowers and seriously threatened 200 000 borrowers with foreclosure).

difficulties in making payments. Despite the crisis, neither the president nor the Congress took action, perhaps influenced by international financial institutions aiding the country.

The Court stepped in directly in a few cases to patch problems with the system. For example, it struck down contractual clauses disallowing prepayment, as well as agreements allowing the capitalisation of interest charges.<sup>56</sup> The fundamental problem was that the Court lacked the competence and legitimacy to construct a new system. The Court thus undertook a series of responses designed to maximise the likelihood of a political response.

First, in a case challenging the constitutionality of the entire UPAC system on formal grounds, the Court called a one-day, legislative-style public hearing in which it heard from economists, members of civil society groups (including groups representing the debtors), business and banking organisations, members of Congress, the leaders of checking institutions including the Ombudsman and Attorney-General, and members of the government, including Ministers of State and the head of the Central Bank.<sup>57</sup> The hearing aired the weaknesses of the UPAC system, offered possible solutions, and acknowledged the risks of intervention. The Court held such a hearing even though the issue before the Court was primarily technical: whether the UPAC statute had been improperly promulgated by the president using emergency powers, rather than going through the normal congressional process.<sup>58</sup> In conjunction with this, members of the Court spoke to the media and otherwise publicised the issue. The Court's approach helped to raise public consciousness, to put the UPAC problem on the public agenda, and to increase pressure on the administration.

Second, the Court decided the case so as to create an unacceptable default for the government. It struck down the entire UPAC regime on procedural grounds. At the same time, it deferred the effect of the decision for about nine months (from September 1999 until June 2000), and allowed the existing legislation to remain in effect during the interim period.<sup>59</sup> The Court made it clear that although the state had retained discretion as to how it legislated, it would remain bound by the Court's own prior jurisprudence on the issue. The judgment placed the administration in a difficult position. If it failed to take action on the issue, then it would be seen as causing a collapse of the entire UPAC system. Faced with this kind of unpleasant fallback position, the president forced a bill through the legislature that altered the formula for calculating interest rates and provided bailout money for homeowners in danger of losing their home. The Court upheld the new law, although it conditioned the constitutionality of some provisions on pro-debtor principles adopted by the Court.<sup>60</sup> These changes were significant. The decision for example required that the interest rates charged to UPAC debtors

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<sup>56</sup> See Decisions C-747 of 1999 (capitalisation); C-252 of 1998 (prepayment). Further, in Decision C-383 of 1999, the Court held that tying UPAC rates to broader interest rates in the economy, rather than to rates of inflation, was unconstitutional.

<sup>57</sup> See Decision C-700 of 1999, § VI (Describes the public audience and the individuals who gave statements at that audience).

<sup>58</sup> See Decision C-700 of 1999.

<sup>59</sup> *Ibid.*

<sup>60</sup> See Decision C-955 of 2000.

be no higher than the lowest rates charged in the broader economy, and increased bailout funds for some classes of debtors.

The Court also attempted to use default rules in its recent same-sex marriage decision.<sup>61</sup> It held that the limitation of gays to common-law-like unions with property rights, rather than allowing same-sex marriage, was a ‘deficit of protection’. The Court acknowledged, at the same time, that the political branches had some discretion in how they responded to that deficit.<sup>62</sup> It thus ordered the legislature to take action on the issue within two years.<sup>63</sup> If the Congress failed to act, then notaries and local judges would have the power to formalise the unions. The Court thus attempted to offer the Congress a choice that would incentivise positive action: legislate on this issue or lose regulatory control over it. In this case, the attempt failed. The Congress debated but never approved legislation giving effect to the judicial decision within the two-year window. Notaries, lower court judges and the Columbian Constitutional Court have now begun defining the shape of the new regulatory scheme.<sup>64</sup>

The UPAC decision is not wholly consistent with the goals of weak-form remedy. The Court did give itself the last word on the design of policy on certain questions. It bound the legislature to its own prior jurisprudence on capitalisation of interest, prepayment, and other questions, and it upheld the new law only after conditioning its constitutionality on the inclusion of certain new provisions, like the one requiring that interest rates within the system be no higher than those charged anywhere else in the Colombian economy. But the core technique of spurring legislative action by otherwise suggesting that its policy would revert to an unacceptable default did ensure that the political branches carried out most of the design of the new policy.

The UPAC decision in effect is a species of what has been called a ‘penalty default’ – the intent is to ensure that action is taken by providing a penalty if it is not.<sup>65</sup> The gay marriage case in contrast is closer to what we might call an ‘honest default’ – the Court is attempting to design policy as best it can, while allowing the legislature to deviate from the judicially set rules should it choose to do so. The choice between these two kinds of default rules requires a complex calculation that is beyond the scope of this brief response. The penalty default may appear to be illegitimate judicial action. The political branches might fail to comply and then blame the judiciary for imposing an unacceptable and undesirable policy

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<sup>61</sup> Earlier decisions had given same-sex couples the same rights as heterosexual couples to form ‘unions of fact’ after living together for a set period of time, with social benefits and rights in respect of property. See Decision C-075 of 2007. The issue posed in this case was whether those unions were sufficient legal protection, or whether the state instead had to recognise same-sex marriages.

<sup>62</sup> See Decision C-577 of 2011.

<sup>63</sup> The case could hardly look more similar in issue and in outcome than its South African counterpart. *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* [2005] ZACC 20, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

<sup>64</sup> See Corte de je en firme sentencia que formaliza union gay, *El Tiempo*, July 24, 2013, available at [http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW\\_NOTA\\_INTERIOR-12946302.html](http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-12946302.html).

<sup>65</sup> See K Krawiec & S Baker ‘The Penalty Default Canon’ (2004) 72 *George Washington Law Review* 663 (Proposes a rule within American administrative law that would penalise lawmakers by striking down some delegations to administrative agencies that seemed motivated by improper motives).

– unmoored from any valid interpretation of the constitutional text – on the country. If the political branches do fail to comply, the consequences could be disastrous. Had Colombia been left without an extant policy on housing finance, the consequences would have been dire for a number of different groups. The Court would have been forced either to step in on an individual basis or allow significant suffering.

An honest default policy, in contrast, can be defended as a best judicial effort to interpret constitutional provisions. However, it may also be ineffective in spurring political action, and the default may itself become the rule, even against the wishes of the Court. This outcome is particularly likely where legislative action is costly to the politicians on broadly unpopular issues. The gay marriage decision outlined above demonstrates such a result. The Court set out a policy that was largely acceptable to the political branches. Many members of Congress preferred to let the judicial rule stand rather than remaking it. The broader point is that the judicious use of default policies can be an effective way to advance socio-economic policy without requiring that a court itself have the last word on the content of policy design.<sup>66</sup>

## **B Monitoring and Cajoling Political Action in Structural Cases**

A second model has been used by the Columbian Court in its two major structural cases. These two structural injunction cases, as well as other structural injunction cases from places like India, have normally been contrasted with the weak-form review found in cases like *Grootboom*. But as I show in this section, the techniques used by the Colombian Court in its structural cases are largely compatible with the capacity and legitimacy critiques at the base of weak-form review. They can be constructed so as to leave the essence of policymaking in the hands of the bureaucracy, while the courts use a combination of techniques to try and impel steady progress.

One of the Court's distinguishing features has been its willingness to use structural remedies to tackle large-scale socio-economic rights issues in an environment that entirely lacked a political response or suffered from a horribly deficient political reaction. The Court has used this device – which it calls the 'state of unconstitutional conditions' – twice in recent years: once in 2004 to deal with internally displaced persons, and the second time in 2008 to deal with structural failures in the healthcare system.<sup>67</sup> Both cases display a similar toolkit. The Court maintains jurisdiction over the cases, puts a particular panel of judges

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<sup>66</sup> The 'default' approach has often been used in South Africa as well. See *Minister of Home Affairs v Fourie* [2005] ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) (Rewrites the marriage statutes to include gay marriage but suspending the decision for one year to allow Parliament to legislate on the issue); *President of the Republic of South Africa v Modderklip* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (Orders that the state was required to compensate a private landowner for infringements on his property rights due to impoverished squatters who lacked alternative accommodations, and thus potentially incentivising the state to develop its housing policies by making it internalise some of the costs of its deficient policy). FC s 172(b)(ii) gives courts exercising judicial review the power to suspend 'the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect'.

<sup>67</sup> See Landau (note 24 above) at 223–229.



in charge of monitoring compliance, issues a large number of follow-up orders, holds periodic public hearings, and carves out a role for civil society in monitoring compliance. Both cases are still ongoing.

The internally displaced persons (IDP) case originally involved roughly three million Colombians who had been forced from their homes because of ongoing, low-intensity civil violence, and were living somewhere else within the country.<sup>68</sup> The Congress had passed a law providing some support for these individuals, but the law had not been implemented by the bureaucracy. As a result IDPs were living without any network of social services – a particularly precarious state within a particularly poor country.<sup>69</sup> They did not receive any healthcare, food, access to housing and job training, or restitution. Some of these individuals brought individual complaints, often aided by a limited network of civil society supporters. This same network pushed the Court towards adopting a more global solution to the problem.<sup>70</sup> The orders focused initially on creating a realistic set of indicators to gauge progress and on developing a coherent bureaucracy with a substantial budget. More recently, the Court has tried to prod the bureaucracy to be attentive to the special needs of certain vulnerable groups (children, women, indigenous groups, the handicapped, and Afro-Colombians), as well as to make progress on more complex issues like access to land as a form of restitution.<sup>71</sup>

The health case was even bigger by some metrics: it encompassed the entire national healthcare system. This case was spurred by a huge number of individual complaints, as well as by concerns within the Court about the equity effects of huge numbers of individual remedies.<sup>72</sup> The Court held that health was in itself a fundamental right and issued structural orders requiring the bureaucracy to rework and clarify the lists of covered benefits, to change the way in which benefits are financed, and to equalise benefits between the ‘contributory system,’ which includes formal sector workers, and the ‘subsidized system,’ which includes the unemployed and those in the informal sector.<sup>73</sup> Historically, the contributory system possessed a far larger package of benefits than the subsidised system. The goal was to force the national authorities to fix the long-standing structural problems across the system that had contributed to the avalanche of individual lawsuits.<sup>74</sup>

This section does not focus broadly on the results of these cases. They have been covered in much more detail elsewhere. Both cases have cost the court significant

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<sup>68</sup> See M Espinosa ‘The Constitutional Protection of IDPs in Colombia’ in Rodolfo Arango Rivandeira (ed) *Judicial Protection of Internally Displaced Persons: The Colombian Experience* 1, 4 (2009) (Notes that current estimates fluctuate between 1.9 and 3.9 million people).

<sup>69</sup> Ibid at 6–7 (Notes the importance of Law 387 of 1997, which attempted to regulate the issue but which had not been implemented).

<sup>70</sup> See Landau (note 35 above) at 360 (Notes that the Court received a ‘flood’ of tutelas from displaced persons before issuing its decision).

<sup>71</sup> See Rodriguez-Garavito (note 7 above) at 1682.

<sup>72</sup> See text accompanying note 52 above.

<sup>73</sup> See Decision T-760 of 2008.

<sup>74</sup> See, generally, AE Yamin & O Parra-Vera ‘Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates’ (2010) 33 *Hastings International and Comparative Law Review* 431, 433–45.

time and resources, and progress has been painfully slow. But real progress has been achieved. In the displaced persons case, the Court did contribute to the construction of a more coherent public policy on the question, including a large increase in the size of the budget and the bureaucracy.<sup>75</sup> Moreover, progress has been achieved across some major indicators. The results provide at least limited support for structural remedies.

Instead, the focus here is on the techniques used by the Court. First, the Court has made use of its ability to publicise these cases in order to increase their visibility with political groups and with the public. The Court holds periodic public audiences on both structural injunctions.<sup>76</sup> The major recent audiences have been televised. It uses these events to give civil society groups a voice, to track compliance and cajole the bureaucracy into moving more quickly, and to crystallise public opinion around important issues. In 2011, for example, the Court brought in new personnel to move the long-stalled healthcare case forward, and held a prominent public audience in order to try and achieve progress on the difficult goals it sought to achieve.<sup>77</sup> The audience appeared to have some effect. Congress and the state bureaucracy finally attempted to equalise the packages of benefits enjoyed by poorer citizens with those enjoyed by the middle class.<sup>78</sup> In the displaced persons context, the Court was able to take an issue that was not really on the public or political radar and make it a much more central issue.<sup>79</sup>

Secondly, the Court has used a set of techniques across both cases that are a species of the tight procedural control recommended by Ray.<sup>80</sup> As Cesar Rodriguez-Garavito notes, these techniques have generally set specific deadlines for compliance with a specific task, and then requiring the state to report back upon compliance.<sup>81</sup> The Court then reviews the state's activity to ensure that it meets constitutional standards. The Court generally has broken each case down into a set of discrete tasks. It has then issued a series of orders focusing on each issue.<sup>82</sup> For example, in an order in the displaced persons case from 2008, the Court focused on special risks faced by women. It identified a series of 12 risks faced especially by women (eg, sexual violence), and ordered the construction of

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<sup>75</sup> See C Rodriguez-Garavito & D Rodriguez-Franco *Cortes y Cambio Social: Como la Corte Constitucional Transformo el Desplazamiento Forzado en Colombia* 212 tbl.1 (Shows large increases in the budget.).

<sup>76</sup> One such public audience in the displaced persons case is described by Cesar Rodriguez-Garavito. C Rodriguez-Garavito (note 7 above) at 1669–1670.

<sup>77</sup> Video of this audience, as well as another audience in the health case held in 2012, are available on the Court's webpage at <http://www.corteconstitucional.gov.co/T-760-08/audiencias.php>.

<sup>78</sup> See Young & Lemaitre (note 6 above) at 196.

<sup>79</sup> See C Rodriguez-Garavito & D Cortes y Cambio Social: Como la Corte Constitucional Transformo el Desplazamiento Forzado en Colombia 97–100 (Finds that the decision increased media coverage of the problem of displaced persons in major outlets).

<sup>80</sup> See Ray (note 1 above) at 223.

<sup>81</sup> See Rodriguez-Garavito (note 7 above) at 1676 (Defines this model under the heading of 'dialogic activism').

<sup>82</sup> A list of the court's most important follow-up orders in the displaced persons case through 2009 can be found in Rodriguez-Garavito & Rodriguez-Franco (note 75 above) at 88–89.

13 specific programmes to confront these risks within a set timeframe.<sup>83</sup> These programmes were identified and worked out through extensive dialogue between the Court, the state, and civil society groups. They were not simply mandated by the Court. Moreover, the programmes adumbrated by the Court left the state in control over the details of policy.<sup>84</sup>

Thirdly, the Court has made use of organs of civil society to reduce its own burden. Colombian civil society (advocacy groups, labour unions, student groups, etc) has historically been quite weak. However, the period since 1991 has seen an increase in the activity of civil society groups. Many of these groups have viewed the Court as a forum for action. Abortion-rights and gay-right groups, for example, largely bypassed the political process and sought to use the Court to achieve their aims. In the social rights area, the Court has had some success integrating civil society into its enforcement strategies. In the displaced persons case, the Court established a Monitoring Commission (*Comision de Seguimiento*) composed of NGOs, groups representing IDPs, ex-magistrates of the court, and other officials.<sup>85</sup> The Commission was charged with monitoring state compliance and reporting back to the Court periodically. Members of the Commission, along with the state, participate in periodic, televised public hearings examining the overall condition of compliance. The Commission has played a major role in enforcement. It goes well beyond mere information-gathering. It has served as the source of many of the ideas that have been subsequently turned into orders of the court. It remains a source for statistical and policy information that the Court would not otherwise possess.<sup>86</sup>

The Court's efforts in these two structural cases obviously lie somewhere on an intermediate point in between weak-form and strong-form review, oscillating depending on the particular issue and the prior resistance faced by the Court. In particular, one observes a sequence across both cases where the Court begins with relatively open-ended orders, both in terms of content and timeframe for compliance. If these orders prove ineffective, the Court becomes more willing to give more detailed orders or directly to impose solutions. The course of negotiations between the Court, the state, and the Monitoring Commission on the construction of indicators for displaced persons are a case in point. The Court began by allowing the state to propose a set of statistical indicators on different issues such as healthcare, housing, family reunification, etc.<sup>87</sup> It initially rejected most of these indicators. In a subsequent hearing the Court accepted some of them but continued to reject others.<sup>88</sup> In a third hearing, it accepted some indicators

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<sup>83</sup> See Auto 092 of 2008, available at <http://www.corteconstitucional.gov.co/relatoria/autos/2008/a092-08.htm>.

<sup>84</sup> For example, the Court ordered the creation of a 'Program for the Prevention of Sexual Violence Against Displaced Women and For Full Attention to its Victims,' but did not detail the exact size or scope of such a programme.

<sup>85</sup> See Decision 025 of 2004.

<sup>86</sup> See Rodriguez-Garavito & Rodriguez-Franco (note 75 above) at 85 (Describes the Commission and its work).

<sup>87</sup> See Auto 109 of 2007 (Explains the significance of a system of indicators and adopting some indicators, while deferring action in other areas).

<sup>88</sup> See Auto 233 of 2007.

proposed by the Monitoring Commission as an alternative to those proposed by the state and adopted its own indicators in two areas.<sup>89</sup>

Structural remedies in the mold of the displaced persons and healthcare decision are not without costs. They require courts to set policy to a meaningful degree: And they are expensive. The Court has employed large teams working across a range of issues both cases. Without these teams, it would prove difficult for the Court to handle many of the issues raised in these cases at the same time.<sup>90</sup> These kinds of cases reflect slow efforts at improving policy and bureaucratic competence. The Court has retained jurisdiction of the displaced persons case for over 10 years. The healthcare case has now entered in its sixth year.

Despite this extensive engagement, the approach taken by the Court preserves considerable space for the political branches to design policy. While the Court's more detailed orders have required the undertaking of discrete tasks within set periods of time, they have still outlined programmes in only general terms, leaving the details of design to the bureaucracy. Moreover, in practice the progress of the case has been dialogic. The politicians have often declined to fully comply with judicial orders. They have then been forced to defend these decisions at subsequent public audiences.<sup>91</sup> The Court has rethought or reworked its policies in light of bureaucratic responses. In this sense, the Court's orders have been iterative in the experimental vein: the Court has adjusted its orders in light of feedback received from both state actors and civil society groups, learning and thus improving responses through time.<sup>92</sup> In short, the Court's big structural cases have maintained some key benefits of weak-form remedies and have not simply collapsed into strong-form enforcement.

#### IV CONCLUSION: A MORE GUIDED EXPERIMENTALISM

Comparative work in the socio-economic rights field, and especially on remedies, raises questions about the utility of cross-country comparisons. Courts are embedded in political contexts that restrain them, and these constraints may be especially powerful when dealing with questions like socio-economic remedies. The strong-form Colombian approach, outlined below, is at least partly a product of the fragmented and weak party system that dominated that country in the period after 1991.<sup>93</sup> It is probably not realistic to expect it to be exported to

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<sup>89</sup> See Auto 116 of 2008.

<sup>90</sup> See Landau (note 24 above) at 225.

<sup>91</sup> Ibid at 226 (Notes that the Court has often faced problems of compliance with its large-scale orders).

<sup>92</sup> This process of shared constitutional interpretation, participatory bubbles, flattened hierarchies, and reflexivity provides hallmarks of the experimental constitutional literature mentioned in passing above. See Woolman *The Selfless Constitution* (note 2 above); M Dorf 'The Domain of Reflexive Law' (2003) 103 *Columbia Law Review* 384; M Dorf & C Sabel 'Drug Treatment Courts and Emergent Experimentalist Government' (2000) 53 *Vanderbilt Law Review* 831.

<sup>93</sup> See Landau (note 35 above) at 341–344 (Contends that the shape of the Constitutional Court's role in Colombia is in significant part a product of the political context in which the Court operates).

political contexts like the South African one, which is very different.<sup>94</sup> Moreover, the design of remedies in socio-economic rights questions seems inevitably to be experimental in nature. Effectiveness depends on a number of variables that tend to vary from country to country and even issue by issue – the likely nature of the political response and the strength and cohesiveness of civil society.

The purpose of cross-national work, then, must be more modest than developing a ‘best’ model for enforcement. Indeed, existing work has largely confirmed that there is no best model, and has instead clarified a set of tradeoffs between different kinds of approaches. Nor should comparative work be aimed at developing models for wholesale import into different contexts. It may be politically infeasible that the South African Constitutional Court, working in a political environment that is substantially more constraining than the Colombian Constitutional Court, adopt an equally aggressive enforcement approach. Nor is it clear that such an approach would be as effective in a very different political environment.

Comparative work is helpful in clarifying the trade-offs among types of remedies. Existing work suggests for example that some types of review, like the individualised enforcement model so common in Latin America, are unlikely to achieve widespread change. It also suggests that both pure types of strong-form review and weak-form review have serious weaknesses. Strong-form structural review, where a court effectively sets socio-economic policy across a policy area, is likely to drive the court up against real constraints on its capacity and will probably provoke a political backlash in most types of systems. Weak-form review in the *Grootboom* mold may prove ineffective at spurring real political action. This suggests that courts would be well-served by searching for intermediate points between pure strong-form and weak-form review.

In the South African context, ratcheting up weak-form review by increasing the pressure placed on the political branches seems like a necessity, and the Colombian experience suggests that it can be done without dissolving key elements of the Court’s approach. Ray discusses two ways to increase the force of deferential or weak-form review: increasing control over process, and increasing the depth of substantive constitutional interpretation. On the procedural model, Ray, for example, discusses the companion cases to *Blue Moonlight*, which exercised control over the process leading up to evictions of the poor.<sup>95</sup> Ray identifies both of these techniques as a way to move along the spectrum between weak-form and strong-form review, albeit by two different routes. Micro-procedural control is an attempt to give weak-form review more teeth and to increase the likelihood of compliance by forcing the state to consider particular constitutional values. Thickened constitutional interpretation works differently – it may increase the ability of a judiciary to speak beyond a particular case, by infusing the political culture with constitutional principles that will inform political decision-making.

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<sup>94</sup> See T Roux ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2009) 7 *International Journal of Constitutional Law* 106 (Claims that the political context places important constraints on the actions of the South African Constitutional Court).

<sup>95</sup> See Ray (note 1 above) at 223–227.

The Colombian experience suggests that the South African Court could become bolder without collapsing into the strong-form model. While wholesale importation of a remedial model used elsewhere is generally unwise, specific elements of the Colombian approach might be useful for the South African courts in seeking to overcome problems of political intransigence. Various elements of weak-form remedies might well be suitable for transplant across countries.

For example, courts undertaking a more robust form of procedural review might also consider the techniques developed in the Colombian context. Courts can take action to raise the profile of their decisions by publicising the progress of major cases in a way that will garner social and media attention. The Colombian technique of using televised public audiences with broad civil society and political participation, for example, is one that could be transplanted to weaker remedies like the procedural control outlined by Ray. These may both increase the likelihood of compliance in the individual cases and amplify the broader effects of a judicial decision. Similarly, a more robust procedural control along the lines recommended by Ray may need to include tighter and more ongoing judicial supervision of a case: courts may need to set deadlines for compliance with particular issues and use resources to monitor compliance with those deadlines. A model in which the court instead depends on litigants to bring problems to the court's attention may both be too irregular to catch non-compliance and unfair in failing to aid those who are less likely to seek redress in the courts.

Similarly, courts might consider ways in which they can empower civil society and give it leverage vis-à-vis the bureaucracy. Of course, the South African Court's engagement with civil society has been important in some key cases. The *Treatment Action Campaign* litigation, for example, was driven by organised civil society groups, and the engagement remedies issued by the Court in *Joe Slovo* and in other cases, require the state to 'meaningfully engage' with groups of evictees and their supporters.<sup>96</sup> The Court might also consider techniques like the civil society organisations used in the Colombian structural injunction cases. Such entities can be a useful way to strengthen the court's ability to gather information, to propose solutions, and to garner compliance. The courts gain a powerful agent, and civil society in turn gains increased leverage over the state. Many of the trademark weaknesses of weak-form remedies can be mitigated through the effective use of civil society associations.

The development of effective remedies for socio-economic rights is bound to be an experimental process. Ray rightly points towards a middle ground: improved remedies are likely to resemble weak forms of enforcement with far more teeth than most current versions. Cross-national experience can help to expand the range of the possible. Indeed, as we have seen, the goals of weak-form enforcement are often compatible with a range of aggressive approaches aimed at incentivising politicians to carry out the constitutional duties they too often ignore.

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<sup>96</sup> For a discussion of the Treatment Action Campaign litigation and the role of civil society, see W Forbath 'Cultural Transformation, Deep Institutional Reform, and ESR Practice: South Africa's Treatment Action Campaign' in L White & J Perelman (eds) *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (2011) 51.



# Beyond *Blue Moonlight*: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing

Jackie Dugard\*

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## I INTRODUCTION

Domestically and internationally, the South African Constitutional Court is rightly celebrated for having explicitly declared socio-economic rights justiciable<sup>1</sup> and developing a standard of review in terms of which the government is required to have a reasonable programme to realise each socio-economic right. It certainly cannot be said that the South African Constitutional Court is anti-poor or anti-transformative. Yet, while acknowledging what Brian Ray refers to as the Court's 'aspirational impulse' – the 'long-standing and genuine commitment to find ways to make the socio-economic rights provisions do the very difficult work of addressing the deep inequalities'<sup>2</sup> still existing in South Africa – over the years, many scholars have pointed to critical failings in the Constitutional Court's jurisprudence that limit the transformative potential of socio-economic rights.<sup>3</sup>

From a pro-transformation perspective, such critiques have identified a number of problems with the Court's approach, including a failure to develop the content and meaning of socio-economic rights, a reluctance to deal with any broad structural issues raised in a case, and an unwillingness to exercise ongoing

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<sup>1</sup> See, eg, *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC) ('*Grootboom*') at para 20.

<sup>2</sup> B Ray 'Evictions, Aspirations and Avoidance' (2013) 5 *Constitutional Court Review* 174.

<sup>3</sup> For a discussion of the transformative potential of the Constitution generally, see for example K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146. For critiques of the failings of the Constitutional Court see, for example, D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 121 *South African Law Journal* 484; D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; J Dugard and T Roux 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995–2004' in R Gargarella, P Domingo and T Roux (eds) (2006) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* 107;

oversight of cases.<sup>4</sup> Collectively, these issues can be traced to what Iain Currie has described as an adjudicative style of ‘judicious avoidance’,<sup>5</sup> the main characteristic of which is a reticence by the Court to pronounce on any issue that does not have to be decided for the purpose of deciding the case, or to play any wider or more long-term role than delivering the judgment.<sup>6</sup> However, in light of the adverse consequences of this adjudicative style for poor people (some highlighted in this article), the ‘judiciousness’ of the Constitutional Court’s approach can be called into question. Instead, it might be more fitting to refer simply to the Court’s style of *judicial* avoidance, which also neatly encapsulates the Court’s separation-of-powers and institutional-competence concerns. As noted by Ray, such concerns have led the Court to avoid interpreting the Constitution in ways ‘that set clear and wide-reaching precedents that might have potentially significant redistributive effects’. The consequence of this reluctance has been to ‘limit the scope of substantive constitutional development over time and circumscribe the Court’s own role in that development’.<sup>7</sup>

This article takes as its starting point an analysis of *Blue Moonlight*<sup>8</sup> to engage in an examination of the negative consequences for poor people evicted from

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K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009); K Pillay ‘Addressing Poverty through the Courts: How Have We Fared in the First Decade of Democracy?’ 23–25 January 2004 (On file with author); S Liebenberg and G Quinot ‘Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa’ in S Liebenberg and G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012); S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010); S Wilson and J Dugard, ‘Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights’ (2011) 22 *Stellenbosch Law Review* 664.

<sup>4</sup> It should be noted that there are some notable exceptions across each of these axes of criticism. For example, on the issue of supervisory jurisdiction, in granting an eviction order in *Joe Slovo*, the Court required the parties to meaningfully engage and to report back to the Court on the progress made regarding the relocation (*Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16, 2010 (3) SA 454 (CC) (*Joe Slovo I*)). The government of the Western Cape did not adhere to the reporting timeline and ultimately abandoned the eviction, leading the Constitutional Court on 31 March 2011 to discharge the eviction order (*Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2011] ZACC 8, 2011 (7) BCLR 723 (CC) (*Joe Slovo II*)). See also *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1, 2008 (3) SA 208 (CC) (*Olivia Road*), in which the Court granted an interim order on 30 August 2007 (some six months before the final order) requiring the parties to meaningfully engage with each other regarding the provision of alternative accommodation for the unlawful occupiers.

<sup>5</sup> I Currie ‘Judicious Avoidance’ (1999) 15 *South African Journal on Human Rights* 138. See also I Currie & J de Waal *The Bill of Rights Handbook* (2006). Currie offers both a description of and a prescription for adjudicating constitutional matters in South Africa. Whether he follows Cass Sunstein’s line of thinking accurately is another matter. See C Sunstein *One Case at a Time* (1996). Subsequent empirically grounded work by Sunstein suggests a signal misreading. See C Sunstein *Infotopia* (2007); R Thaler and C Sunstein *Nudge* (2008); C Sunstein *Why Nudging* (2014). For a rebuttal of Currie’s and the Court’s position, and avoidance jurisprudence generally, see S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (2013); S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 128 *South African Law Journal* 762; S Woolman ‘Application’ in S Woolman & M Bishop *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 31.

<sup>6</sup> The Court’s expresses a general reluctance to exercise continued oversight over cases. Subsequent judgments that do, say *Olivia Road*, thus look rather anomalous.

<sup>7</sup> Ray (note 2 above) at 173, 174.

<sup>8</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* [2011] ZACC 33, 2012 (2) SA 104 (CC) (*Blue Moonlight*).

inner-city Johannesburg buildings of the Court's avoidance techniques in *Blue Moonlight* and subsequent related judgments. More generally, the article offers a critique of the Court's refusal to define the content of socio-economic rights and its unwillingness to exercise any more oversight than strictly required to decide the matter at hand.

## II BLUE MOONLIGHT

The Constitutional Court has dealt with more housing-related cases than any other socio-economic rights issue. The trajectory of housing rights cases decided before *Blue Moonlight*<sup>9</sup> (*Grootboom*,<sup>10</sup> *PE Municipality*,<sup>11</sup> *Olivia Road*<sup>12</sup> and *Joe Slovo I and II*<sup>13</sup>) firmly established that the government must have a plan to address the housing needs of the most vulnerable and that, where poor people face eviction from public land, the state must meaningfully engage with residents and provide alternative accommodation if the eviction would otherwise render them homeless. Focused as they were on evictions where the state was seeking to evict, these cases did not address the situation of evictions by private landlords. However, in *Blue Moonlight*, the issue of private evictions fell to be decided by the Court and the Court addressed the new set of issues squarely, if not optimally.<sup>14</sup>

*Blue Moonlight*,<sup>15</sup> an application brought by 86 desperately poor people living in a disused industrial property at 7 Saratoga Avenue in Berea (Johannesburg), concerned the legal questions of whether it is just and equitable to evict poor, unlawful occupiers from private property and what (if any) state obligations are entailed by such practice. In 2006, the residents were sued for eviction by a new owner of the property, Blue Moonlight Properties 39 (Pty) Ltd. It had bought the property (knowing that it was occupied by poor people) to develop it for commercial gain. Securing legal assistance, the residents opposed the application, arguing that they could not be evicted until the City of Johannesburg had discharged its constitutional obligation to provide them with temporary alternative accommodation pending ultimate access to formal housing as part of the national housing programme. They joined the City of Johannesburg (the

<sup>9</sup> Ibid.

<sup>10</sup> *Grootboom* (note 1 above).

<sup>11</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) ('PE Municipality').

<sup>12</sup> *Olivia Road* (note 4 above).

<sup>13</sup> *Joe Slovo I* (note 4 above).

<sup>14</sup> To be entirely accurate, the Constitutional Court had previously considered the matter of private evictions. Although ultimately not granting an eviction order (in this case private eviction proved impossible due to the large number of occupiers living on the private land and the fact that the state had not made any alternative land available to the occupiers), in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC) the Court effectively held that, where the state's failure to fulfil its FC s 26(1) and (2) obligations to implement a reasonable housing programme infringed private land-owners' rights to use and enjoy their property, the state might be liable for constitutional damages to compensate the land-owners for any deprivation of their property rights. In actual fact, the Court decided the matter, not on FC s 25 or FC s 26 grounds (as had the Supreme Court of Appeal), but in terms of FC s 1(c), the rule of law, as read with FC s 34, the access to courts.

<sup>15</sup> *Blue Moonlight* (note 8 above).

City) to the proceedings and sought an order compelling the City to discharge its obligations.<sup>16</sup>

The South Gauteng High Court had ruled the City's housing policy to be unconstitutional in that it excluded any consideration of the status and the alternatives persons evicted from private land.<sup>17</sup> The court granted the eviction and ordered the residents to vacate the property: however, it simultaneously directed the City to either provide temporary accommodation or pay each of the residents R850 per month towards the cost of finding their own accommodation. The City appealed to the Supreme Court of Appeal (SCA) against the declarations of constitutional invalidity and the order to provide the residents with temporary accommodation or to pay them a monthly allowance. The residents cross-appealed against the eviction order and the obligation imposed upon the City.<sup>18</sup> The SCA declared the City's housing policy irrational, discriminatory and unconstitutional, and directed the City to provide temporary emergency accommodation to the residents by 1 June 2011. The City again appealed, and the appeal was heard in the Constitutional Court on 11 August 2011.

In an unanimous judgment handed down on 1 December 2011,<sup>19</sup> the Constitutional Court rejected the City's arguments that it had no obligation to plan and to budget around private evictions. Finding that the City has the same obligations towards poor residents evicted by private landlords as it has regarding residents evicted from public land, the Court ruled that, to the extent that it failed to take into consideration private evictees, the City's housing policy was unconstitutional. The Court granted an eviction order to the property owners if the residents did not vacate the building before 15 April 2012 (allowing a period of more than five months after the judgment).<sup>20</sup> However, to ensure that the residents were not rendered homeless, the Court ordered the City to provide the

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<sup>16</sup> In *Sailing Queen Investments v Occupants La Colleen Court* [2008] ZAGPHC 15, 2008 (6) BCLR 666 (W) the Court held that in respect of applications for private evictions, no eviction order would be just and equitable if the municipality were not joined. The High Court found that FC s 26 imposes the provision of alternative accommodation to evictees who would otherwise be rendered homeless and that the obligation lies primarily with the state rather than with private parties. See also *Lingwood and Another v Unlawful Occupiers of Erf 9 Highlands* [2007] ZAGPHC 231, 2008 (3) BCLR 325 (W).

<sup>17</sup> *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] ZAGPJHC 3, [2010] JOL 25031 (GS) ('*Blue Moonlight High Court*').

<sup>18</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd. and Another* [2011] ZASCA 47, 2011 (4) SA 337 (SCA) ('*Blue Moonlight SCA*').

<sup>19</sup> *Blue Moonlight* (note 8 above).

<sup>20</sup> In seeking to strike an appropriate balance between the right of property owners to use and develop their property as they want, and the rights of residents to adequate housing, the Court pointed out that private property owners do not incur the same positive obligations to provide access to housing that the state does but noted, nonetheless, that in circumstances in which poor people have no alternative shelter and have to wait until the state provides such, owners might have to endure some degree of inconvenience while the state lines up emergency shelter options (see especially para 40 of the *Blue Moonlight* judgment).

Blue Moonlight residents with temporary accommodation ‘in a location as near as possible to the area where the property is situated on or before 1 April 2012.’<sup>21</sup>

At the time it was delivered, *Blue Moonlight* was praised for appropriately balancing the rights of property owners to develop their properties, with the rights of occupiers to adequate shelter. However, subsequent developments, as set out in this article, have highlighted shortcomings of the Court’s avoidance-oriented approach to socio-economic rights, exposing loopholes through which the City of Johannesburg has been able to frustrate legal processes and compromise housing-related rights.

### III BEYOND THE *BLUE MOONLIGHT* JUDGMENT

Following the judgment, and mindful that they were to be evicted by 15 April 2012, the residents of 7 Saratoga Avenue were keen to begin discussions with the City about alternative accommodation. Expectations to be ‘meaningfully engaged’ regarding the accommodation options were relied on from the Court’s previous jurisprudence, particularly its judgments in *PE Municipality*<sup>22</sup> and *Olivia Road*.<sup>23</sup> Yet, despite multiple attempts by the residents’ lawyers to meet with the City to discuss options, as the date of the eviction loomed, no meeting between the City and the residents had taken place. Concerned about the City’s failure to act and fearing that their clients would be evicted onto the streets, on 8 March 2012 (three weeks prior to the date set for the eviction), the residents’ lawyers (from the Centre for Applied Legal Studies (CALS) and SERI) pre-emptively launched an urgent application in the Constitutional Court. In this urgent application, the lawyers asked the Court to order the City to engage meaningfully with the residents in order to give effect to the judgment of 1 December 2011, and to vary the eviction order to ensure the residents were not evicted before alternative accommodation was appropriately lined up.

As explained by residents’ attorney, Kathleen Hardy:

We have been trying to engage with the City for three months regarding the provision of accommodation to our clients. Yet it has refused to provide any meaningful information about what it intends to do to comply with the order of the Constitutional Court. If the City does not comply with the order, the occupiers will be evicted onto the streets. Regrettably, because the City has done nothing to engage with us or our clients, it has

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<sup>21</sup> *Blue Moonlight* (note 8 above) para 104(e)(iv). The reference to the location of alternative housing in *Blue Moonlight* is one of the clearest indications to date of the Constitutional Court reading the importance of location into the right to housing, in line with the United Nations Committee on Economic, Social and Cultural Rights General Comment number 4 on the right to adequate housing (1991), para 8. General Comment 4, as with all General Comments of the Committee on Economic, Social and Cultural Rights, is not legally binding (and in the South African context the non-binding nature is more pronounced as South Africa has not ratified the International Covenant on Economic, Social and Cultural Rights (1966)) but it is persuasive in respect of interpreting the right.

<sup>22</sup> *PE Municipality* (note 11 above).

<sup>23</sup> *Olivia Road* (note 4 above).

become necessary to approach the Constitutional Court again. The City only has itself to blame for this.<sup>24</sup>

In the face of the urgent application, the City offered accommodation to some of the residents in an undisclosed location for an undisclosed period and in gender-segregated dormitories. Rejecting this offer, the residents persisted with their application in the Constitutional Court, which was set down for a hearing on 30 March 2012. Responding to this rejection, two days before the case was to be heard, the City offered to revisit its plans and to provide accommodation to all the residents and to allow for the accommodation of families living together. But it signalled that it would need a further two months in order to provide such accommodation. The residents were willing to accept this offer. However, the owner of the property, Blue Moonlight Properties, would not agree to the two-month extension.

Thus, on the eve of the Constitutional Court hearing, there was a stand-off between the parties, which, arguably, should have been foreseen by the Court in its 1 December 2011 judgment and, even if not foreseen, seemed ripe for adjudication by the Court. Indeed, in the interim order in respect of *Olivia Road*,<sup>25</sup> the Court had not only insisted on meaningful engagement as a precursor to eviction, but had retained supervisory jurisdiction over the matter until it had been appropriately resolved. It was therefore a profound shock to the residents' lawyers when at the 30 March 2012 hearing the Constitutional Court dismissed the urgent application, explaining that its reasons would follow in due course.<sup>26</sup> This dismissal was all the more surprising given the property owners' concession in court that no urgency existed regarding developing the land. Responding to the dismissal, a CALS and SERI issued the following press release:

The Constitutional Court's approach risks undercutting the rights it granted to the residents in its *Blue Moonlight* judgment. The Court's ruling could lead to the residents becoming homeless. This is unnecessary because Blue Moonlights's counsel said in Court that it did not need the land before July and that the extension the residents sought would cause it little difficulty. We are also concerned that this ruling does not give effect to the City's obligations to meaningfully engage. The Court appears reluctant to oversee such engagement and to ensure remedies are appropriately implemented.<sup>27</sup>

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<sup>24</sup> Joint CALS and SERI Press Release (9 March 2012) 'City of Johannesburg Set to Breach Constitutional Court Order – Residents Go Back to Constitutional Court to Compel City to Identify Alternative Accommodation and Engage Meaningfully': available at <[http://www.seri-sa.org/images/stories/saratoga\\_pressrelease\\_final.pdf](http://www.seri-sa.org/images/stories/saratoga_pressrelease_final.pdf)>.

<sup>25</sup> *Olivia Road* (note 4 above) at para 5.

<sup>26</sup> On 24 May 2012, the Constitutional Court delivered its reasons for dismissing the urgent application, holding that the Constitutional Court is not the appropriate forum to enforce or vary the orders it gives on appeal, unless it declares a statute unconstitutional or makes a detailed supervisory order that may require variation in light of changed circumstances (see *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9, 2012 (9) BCLR 951 (CC)). In all other instances, a party should approach the court in which the case was first considered (in the case of *Blue Moonlight*, this was the South Gauteng High Court).

<sup>27</sup> Joint CALS and SERI Press Release (30 March 2012) 'ConCourt Ruling Could Make Residents Homeless': available at <[http://www.seri-sa.org/images/stories/saratoga\\_press\\_release\\_final\\_30mar12.pdf](http://www.seri-sa.org/images/stories/saratoga_press_release_final_30mar12.pdf)>.



On 13 April, two days before the eviction order was due to be executed, the City had still not provided accommodation to the residents. Facing imminent eviction and homelessness, the residents' legal team approached the South Gauteng High Court on an urgent basis to seek essentially the same relief it had requested in the dismissed Constitutional Court urgent application. Recognising the severity of the situation, the High Court temporarily suspended the execution of the eviction order until 2 May 2012, and ordered the City to provide shelter to the residents by 30 April 2012, as well as to report back to the Court on its progress and to organise a site visit for all parties to examine the proposed new accommodation.<sup>28</sup> Following the 13 April order by the High Court, the City identified and prepared several housing units for the residents and, on 30 April 2012, the residents moved into the temporary accommodation provided by the City, in the MBV Building (one of the buildings residents from the *Olivia Road*<sup>29</sup> case had moved to in 2006, located on the corner of Hancock and Quartz Streets in Hillbrow) and the Ekuthuleni Shelter run by Metro Evangelical Services (MES) (corner of Nugget and De Villiers Streets in Hillbrow).

As satisfactory as this outcome might have seemed on the surface, serious problems existed with the accommodation arrangements from the outset and, almost immediately, the City began to fail to comply with similar orders for temporary accommodation that had been backing up as parties waited for *Blue Moonlight*<sup>30</sup> to be decided. Regarding the accommodation offered to the Blue Moonlight residents, two issues emerged. First, the Ekuthuleni accommodation was gender-segregated, requiring men to live separately from women and babies/children, and imposed a lock-out rule during the day, meaning residents had to vacate their rooms from 8:00 am to 5:30 pm. Second, because the Ekuthuleni option was so stark, many residents felt pressured into opting for the MBV Building. However, in order to be allocated space in the MBV Building, residents had to sign sworn affidavits at a police station that they were able to afford the R600 per month rental fee. Many could not afford this rental. Indeed, once they moved into MBV Building, many residents have not paid rent. Given the restrictive housing alternatives imposed in Ekuthuleni, it is not surprising that many people did what they could to secure the MBV accommodation.

While the refusal of the Constitutional Court to exert oversight over *Blue Moonlight*<sup>31</sup> — including the reluctance to ensure meaningful engagement in line with its decision in *Olivia Road*<sup>32</sup> — can be understood as part of the Court's historical reluctance to maintain a supervisory role, the fact that residents were left with such problematic choices of accommodation can be traced to the Court's refusal to provide any substantive content to the right to housing. Certainly,

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<sup>28</sup> Unreported order of *Occupiers of Saratoga Avenue and Others v City of Johannesburg and Others*, South Gauteng High Court case no: 2012/13253 (13 April 2012). Arguably this was a brave and progressive move of the South Gauteng High Court, which, even before the Constitutional Court had handed down its reasons for dismissing the application, was prepared to hear the applicants' application to vary the eviction order and grant the required relief.

<sup>29</sup> *Olivia Road* (note 4 above).

<sup>30</sup> *Blue Moonlight* (note 8 above).

<sup>31</sup> *Ibid.*

<sup>32</sup> *Olivia Road* (note 4 above).

the Court's washing of its hands following the initial *Blue Moonlight*<sup>33</sup> order has provided the space for the City to offer inhumane accommodation and/or fail to uphold orders to provide alternative accommodation. This perhaps unintended but foreseeable consequence has led to the rise of more and more litigation by inner city residents, as discussed below.

## A Dladla

Of the two accommodation options offered to the Blue Moonlight residents, Ekuthuleni posed the greatest risk to residents' constitutional rights. Residents at Ekuthuleni had to live in gender-differentiated units that separated men from women and children thereby violating their rights to dignity, privacy, association and family life, and all were subject to draconian rules that encompassed lock-out during daylight hours and a clause allowing the City to unilaterally evict the residents without a court order.<sup>34</sup>

Representing 33 of the former residents of 7 Saratoga Avenue who ended up at Ekuthuleni, in April 2013, SERI launched an application in the South Gauteng High Court to challenge the City's implementation of *Blue Moonlight*<sup>35</sup> with respect to the clearly unconstitutional character of the accommodation at Ekuthuleni. The application contained two parts.<sup>36</sup> Part A sought the suspension of certain rules of the shelter and to interdict the City and MES from evicting the residents without an order of court pending the outcome of Part B, as well as to direct the City and MES to allow residents to reside in rooms with their families. Part B contains an application to deal with the substantive issues raised by these issues, along with other related issues. Part B requests the High Court to declare that the respondents' refusal to permit the residents to reside in communal rooms with their families constitutes an unjustifiable infringement of the residents' constitutional rights to dignity, privacy and access to adequate housing, as enshrined in FC ss 10, 14 and 26.<sup>37</sup> It also seeks a declaration from the High Court that the accommodation at Ekuthuleni does not constitute 'Housing Assistance in Emergency Circumstances' within the meaning of the Emergency Housing Programme contained in Part 3 of the 2009 National Housing Code.<sup>38</sup>

Part A of the application was heard in the South Gauteng High Court on 10 April 2013.<sup>39</sup> Satchwell J granted an interim order stating that, pending the finalisation of Part B of the application, the Ekuthuleni house rules should be relaxed to the extent that the occupiers are permitted to remain in the shelter

<sup>33</sup> *Blue Moonlight* (note 8 above).

<sup>34</sup> Other rules include: lights and music must be switched off after 10pm, the manager reserves the right to search all residents and their possessions at any time, and no visitors are allowed inside the building except with prior permission.

<sup>35</sup> *Blue Moonlight* (note 8 above).

<sup>36</sup> *Dladla and Others v City of Johannesburg and MES*, South Gauteng High Court Case No: 39502/2012 (*Dladla* application: Part A and Part B).

<sup>37</sup> *Dladla and Others v City of Johannesburg and MES*, South Gauteng High Court Case No: 39502/2012 (*Dladla* application: Part B especially at paras 2 and 4).

<sup>38</sup> *Ibid* (*Dladla* application: Part B) at para 7.

<sup>39</sup> *Dladla and Others v City of Johannesburg and MES* South Gauteng High Court Case No: 39502/2012 (10 April 2013) (*Dladla*: application Part A).

during the day; the cut-off time for entering the shelter at night is 22:00 (subject to MES's discretion to allow people to enter at a later time by prior arrangement); and for families to be permitted to occupy separate rooms at the shelter. In June 2013, the City filed its answering affidavit and on 30 August 2013 the applicants filed their response. This response contained an affidavit from a clinical psychologist setting out the inappropriateness of the Ekuthuleni regime as part of an intervention aimed at assisting recently-evicted and relocated people. The application for final relief is still to be heard.<sup>40</sup>

If the ongoing litigation that has been necessary to ensure adequate housing for the remaining former *Blue Moonlight* residents highlights the consequences of the limits of the Constitutional Court's definition (or lack thereof) of the right to housing, three related cases (*Tikwelo House*, *Chung Hua Mansions* and *Hlophe*) reveal how the City has responded to the Constitutional Court's reluctance to exercise a supervisory role over the problematic housing situation in Johannesburg. It has stalled, obfuscated, tried to offer the same accommodation to various different sets of litigants and, ultimately, done everything in its power to fail to implement subsequent and/or related orders for alternative accommodation. All of these cases, as with the original *Blue Moonlight*,<sup>41</sup> underscore a serious problem with the City of Johannesburg's housing plans and practices. This is a problem that the Constitutional Court could well have grappled with more meaningfully in *Blue Moonlight*.<sup>42</sup> However, it might also be seen as part of an ongoing pattern of avoidance. The constitutionality of the City's housing policy in light of the approximately 67 000 homeless people trying to eke out a living in Johannesburg's inner city was first addressed, and neatly sidestepped, by the *Olivia Road*<sup>43</sup> Court.<sup>44</sup> That fancy footwork remains one of the most palpable, and disappointing, features of the Court's housing jurisprudence.

## **B Tikwelo House**

In 2007, Changing Tides Pty (Ltd) (Changing Tides) bought Tikwelo House. The House was formerly a warehouse but had become disused and was occupied by approximately 100 unlawful occupiers at the time Changing Tides bought the property. Wanting to redevelop the property, the owners sought to evict

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<sup>40</sup> Recently, one of the City's responses to the *Dladla* matter has been to launch an application on 20 January 2014 in the South Gauteng High Court: *Ex parte City of Johannesburg Metropolitan Municipality In re All Pending Eviction Matters Where The Occupiers' Eviction May Lead To Homelessness As Set Out in Annexure A Hereto*, South Gauteng High Court Case No: 1176/2014). The application attempts to join and stay all pending final eviction applications by private landowners (that might lead to homelessness) pending the final determination of *Dladla*. At the time of writing, this application had not yet been heard.

<sup>41</sup> *Blue Moonlight* (note 8 above).

<sup>42</sup> *Ibid.*

<sup>43</sup> *Olivia Road* (note 4 above).

<sup>44</sup> See K McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 151. McLean argues that the Court's failure in *Olivia Road* to decide whether the City of Johannesburg's housing policy was constitutional, and particularly in the context of the demonstrated extent of homelessness, amounts to more than an avoidance of anything but the narrow issue before it. It amounts to the Court being unwillingness to decide the *main* issue.

the residents. Having failed in such an attempt during 2008, on 6 April 2011 Changing Tides commenced new evictions proceedings. It succeeded in an unopposed application in the South Gauteng High Court to obtain an eviction order. That order was combined with an order requiring the City to provide emergency accommodation to the residents.<sup>45</sup>

The City appealed the judgment and, on 12 October 2011, shortly before the Constitutional Court handed down its judgment in *Blue Moonlight*,<sup>46</sup> the High Court granted leave to appeal to the SCA. In the SCA, the residents, represented by the Legal Resources Centre (LRC) and SERI, was granted leave to intervene as *amicus curiae*. Because the High Court's eviction order had not adequately investigated the residents' circumstances and the City had not made any formal moves regarding the provision of emergency accommodation, the SCA's judgment remitted the application for eviction to the South Gauteng High Court. It required the lower court to determine the date when all the residents could be evicted from the property, as well as the terms on which the City was to provide emergency accommodation to those residents facing homelessness. In addition, the SCA directed the LRC to provide a list of its clients who required emergency accommodation and their circumstances, and it ordered the City to deliver a report by no later than 31 October 2012 detailing the accommodation to be made available to the residents.<sup>47</sup>

In the South Gauteng High Court, by agreement it was ordered that the residents would vacate the building by 29 April 2013, the eviction was set for 13 May 2013, and the City was to provide emergency accommodation prior to this date. However, in the weeks leading up to the agreed date of the eviction, the LRC was unable to ascertain from the City where the residents would be housed. On 7 May 2013, the City's legal team admitted that the buildings it had lined up for this purpose were not available to the residents of Tikwelo House.<sup>48</sup> As it turned out, the City was hoping to house many of the residents in Ekuthuleni. However, by this time, the constitutionality of the house rules of Ekuthuleni was the subject of the legal challenge in *Dladla*<sup>49</sup> (outlined above), and the managing agent for Ekuthuleni was refusing to manage the building without its own rules in place or to accept any new residents.

In contrast with the City's prevarications about where to house the residents, Changing Tides indicated that it would proceed to evict the residents on the agreed eviction date. Faced with the impending crisis of homelessness, the LRC approached the South Gauteng High Court on an urgent basis to compel the City to provide the residents of Tikwelo House with temporary emergency

<sup>45</sup> See *Changing Tides v Unlawful Occupiers*, South Gauteng High Court Case No: 14225/2011 (14 June 2011).

<sup>46</sup> *Blue Moonlight* (note 8 above).

<sup>47</sup> *City of Johannesburg v Changing Tides 74 (Pty) Ltd, Unlawful Occupiers of Tikwelo House, No 48 and 50 Davies Street, Doornfontein, Johannesburg and others* [2012] ZASCA 116, 2012 (6) SA 294 (SCA) ('*Tikwelo House SCA*').

<sup>48</sup> See 'LRC welcomes High Court judgment in housing matter' Legal Resources Press Release available at: <http://www.lrc.org.za/press-releases/2724-2013-05-15-press-statement-lrc-welcomes-high-court-judgment-in-housing-matter-> (accessed on 7 March 2014).

<sup>49</sup> *Dladla* application: Part B (note 37 above).

accommodation or to prevent them from being evicted onto the streets should the application to compel not be successful. The South Gauteng High Court decided that, under the circumstances, the date of eviction should be moved to the end of May 2013 and it ordered the City to specifically facilitate the access of the residents to the buildings allocated for their accommodation (Both Ekhuthuleni and Linatex adopt the same draconian rules that are currently being challenged in *Hlophbe*.) The judgment further ordered the sheriff to ‘take the necessary steps to gain entry’ to the Ekhuthuleni and Linatex buildings should the City not have facilitated access to the residents of Tikwelo House by 29 May 2013.<sup>50</sup>

Attorney for Tikwelo House residents, Bongumusa Sibiyi, explains how, knowing that they were going to be housed at the problematic Ekhuthuleni and Linatex shelters, residents refused to leave Tikwelo House until the day of the eviction. They were forcibly removed as the building was demolished and further access blocked.<sup>51</sup> In the ensuing chaos, many of the Tikwelo House residents ended up moving into other slum buildings in the inner city. These uninhabitable buildings, including Chung Hua Mansions, highlight the desperate cycle of slum building living and the trauma of evictions that poor people must perpetually endure in the absence of decent low-cost alternatives.

### C Chung Hua Mansions

During early 2013, out of desperation to find a vaguely acceptable place to live in Johannesburg’s inner city, many of the former *Blue Moonlight*<sup>52</sup> residents – whether those originally housed in MBV Building or those sent to Ekuthuleni – (along with some residents from Tikwelo House) ended up by default in Chung Hua Mansions. The ‘Mansions’ is a multi-storey dilapidated building on Jeppe Street. At Chung Hua Mansions, these newcomers found themselves embroiled in a long-standing legal fight between some 253 residents, the owners of the building and the City.

In August 2010, the residents of Chung Hua Mansions were evicted with the assistance of a private security company and the police without a court order. Securing legal assistance from SERI, the residents applied to reverse their unlawful eviction. This application was dismissed by Maluleke J in the South Gauteng High Court.<sup>53</sup> The residents appealed the decision to a full bench of the South Gauteng High Court.

At issue in the appeal was whether (as the police, the owner and the security company alleged) the residents had consented to leave the property, whether (as Maluleke J found) the respondents were lawfully counter-spoliated by the owners or whether (as argued by the residents) the residents had been unlawfully

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<sup>50</sup> *Sibongile Goodness Mkhonza and the Unlawful Occupiers of Tikwelo House v City of Johannesburg and Changing Tides (Pty) Ltd.*, South Gauteng High Court Case No: 2011/14225 (13 May 2013) at para 4.

<sup>51</sup> Email from Bongumusa Sibiyi on 6 September 2013.

<sup>52</sup> *Blue Moonlight* (note 8 above).

<sup>53</sup> Unreported judgment of *Mthimkulu and Others v Hoosein Mohamed and Four Others*, South Gauteng High Court Case No: 2010/31260 (20 August 2010).

evicted.<sup>54</sup> The full bench of the High Court delivered a unanimous judgment that reversed the illegal eviction and held the owner, private security company and station commander of Johannesburg Central Police Station in contempt of court.<sup>55</sup> The owner subsequently applied for leave to appeal to the SCA. This application was dismissed with costs.

Possibly seeing some solace for property owners in *Blue Moonlight*,<sup>56</sup> the owner of Chung Hua Mansions then launched a fresh application in the High Court, seeking a court order evicting the residents from the property and directing the City to provide alternative accommodation to certain of the residents. The residents, represented by SERI, sought an order directing the City to provide alternative accommodation to all 250 occupiers in a location as near as possible to the property and with assurances against eviction. The case was heard in the South Gauteng High Court on 14 June 2012. Claassen J handed down judgment on the same day. He ordered the City to provide alternative accommodation to all of the Chung Hua Mansions residents as close as possible to their current location, where they may reside ‘secure against eviction’, by no later than 30 January 2013, and to provide, by 31 October 2012, a report setting out the nature and location of the temporary shelter to be provided to the residents.<sup>57</sup> The order authorised the eviction of the residents from Chung Hua Mansions by no earlier than 15 February 2013. However, due to the City’s non-compliance with the court order – the City claimed in its report submitted that it did not have the resources to comply with the order, and missed the 30 January 2013 deadline to provide shelter – further litigation was necessary to secure enforcement. SERI pursued this enforcement of the original order in *Hlophe*.

## D Hlophe

In *Hlophe*, SERI launched an enforcement application in the South Gauteng High Court to declare the Executive Mayor, the City Manager and the Director of Housing of the City of Johannesburg, in their respective capacities, constitutionally and statutorily obliged to ensure that the City complied with the *Chung Hua Mansions* order.<sup>58</sup> The matter was heard on 6 February 2013, with Lamont J suspending Claassen J’s eviction order until a further hearing on the

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<sup>54</sup> Counter-spoliation is a legal remedy that allows anyone who is in the process of being unlawfully dispossessed of property (spoliated) to ‘snatch it back’ from the spoliator without having to go to court. It is a limited exception to the principle against self-help and is aimed at restoring the status quo ante, after which the merits of the possession can be considered in court. In this case, the residents argued that they were not lawfully counter-spoliated of their homes by virtue of the fact that they had been living on the property for periods of up to five years – long before the owner, Changing Tides, had bought the property.

<sup>55</sup> *Mthimkulu and Another v Mabomed and Others* [2010] ZAGPJHC 125, 2011 (6) SA 147 (GSJ)(*Full Bench Chung Hua Mansions*).

<sup>56</sup> *Blue Moonlight* (note 8 above).

<sup>57</sup> Unreported judgment of *Changing Tides 74 (Pty) Ltd. v The Unlawful Occupiers of Chung Hua Mansions*, South Gauteng High Court case number: 2011/20127 (14 June 2012).

<sup>58</sup> *Ibid.*



matter, postponed to 9 April 2013.<sup>59</sup> In addition, Lamont J ordered the City and its officials to comply with Claassen J's order to provide temporary shelter to the residents pending the further hearing, and directed the City to deliver a report to the court by no later than 20 March 2013 setting out the nature and location of the temporary shelter to be provided.<sup>60</sup>

The City missed the 20 March 2013 deadline for reporting and, in the subsequent hearing, the City submitted that it could not comply with Claassen J's order, and would be unable to do so for another nine months. The residents again pursued their application for the court to order the City to enforce the Claassen order and failing which, for the court to hold the City executives in contempt of court. Finding for the residents, in her judgment of 3 May 2013, Satchwell J directed the Executive Mayor, City Manager and Director of Housing for the City of Johannesburg to personally explain why the City had not acted to provide shelter to the homeless, more than 18 months after the *Blue Moonlight* main judgment.<sup>61</sup> Ordering the City to provide shelter to the 201 residents of Chung Hua Mansions within two months of the date of the judgment or to have the responsible officials face being held in contempt of court with the possibility of prison sentences, Satchwell J told the City it could not simply 'throw its hands up in horror' every time it had to house people about to be evicted.<sup>62</sup> Adopting the type of supervisory role the Constitutional Court could have played in *Olivia Road*<sup>63</sup> and *Blue Moonlight*,<sup>64</sup> Satchwell J ordered the City to report to the court by 18 May 2013 regarding the steps it had taken to respond to the more generalised housing crisis and the plans that it had put in place (as well as the budget allocated) for poor people evicted by private landlords in disputes similar to those in the current matter and *Blue Moonlight*.<sup>65</sup>

Although the City applied for leave to appeal, it is apparent that the assertiveness and clear authority of Satchwell J's judgment had an impact on the City. On the eve of the leave to appeal hearing in the South Gauteng High Court, the City for the first time tendered Linatex House as available to the residents and agreed to engage meaningfully with the residents about the relocation and the accommodation. Soon after, Satchwell J handed down an interim order directing the parties to 'meaningfully engage' with each other in relation to the City's new offer of accommodation at Linatex House, and to report back to the court by no later than 26 July 2013 regarding the suitability of the accommodation. (The original eviction order was suspended during this period).<sup>66</sup>

<sup>59</sup> Unreported judgment of *Philani Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others*, South Gauteng High Court case no: 2012/48103 (consolidated with case no: 2011/20127 (*Chung Hua Mansions*)) (6 February 2013) paras 2 and 3.

<sup>60</sup> *Ibid* at paras 4 and 5.

<sup>61</sup> *Blue Moonlight* (note 8 above).

<sup>62</sup> *Hlophe and Others v City of Johannesburg Metropolitan Municipality and Others* [2013] ZAGPJHC 98, 2013 (4) SA 212 (GSJ) ('*Hlophe*') at para 26.

<sup>63</sup> *Olivia Road* (note 4 above).

<sup>64</sup> *Blue Moonlight* (note 8 above).

<sup>65</sup> *Hlophe* (note 62 above) at para 2 of the order.

<sup>66</sup> *Philani Hlophe and The Residents of Chung Hua Mansions 191 Jeppe Street, Johannesburg v The City of Johannesburg Metropolitan Municipality and Others* unreported judgment of the South Gauteng High Court, Johannesburg Case Nos: 48103/2012 and 20127/2011 (14 June 2013).

Not surprisingly, the City's response was not in lockstep with Satchwell J's order.

As a result, SERI was obliged to file an affidavit describing the engagement process to date. The affidavit adumbrated numerous problems with the engagement process. The City, once again, as in *Dladla*,<sup>67</sup> was offering gender-segregated accommodation with day-time lockout and the ability to evict without a court order after six months: this time in Linatex House rather than MES.<sup>68</sup> SERI later filed an answering affidavit in the leave to appeal application arguing that, because accommodation had now been tendered by the City and all that remained to be decided was the terms on which that accommodation will be provided. It further contended that the City's application for leave to appeal should be dismissed and, instead, the issue of the contentious rules in Linatex should be taken forward through a separate application in the High Court. Leave to appeal was dismissed by the South Gauteng High Court. However, the SCA granted leave to appeal mainly on the question of whether municipal officials can be held liable as functionaries of the city. The SCA appeal is yet to be heard.

#### IV CONCLUSION: THE NEED FOR MORE CONTENT AND OVERSIGHT AND MUCH LESS AVOIDANCE

In *Treatment Action Campaign*, the Constitutional Court stated that, 'when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation'.<sup>69</sup> This declaration is in line with the Court's pronouncement in *Fose v Minister of Safety and Security*, that courts must order such relief as required to ensure that 'the rights enshrined in the Constitution are protected and enforced'.<sup>70</sup>

Yet, as set out above, enforcing *Blue Moonlight* and related lower court decisions has been a lengthy, convoluted and expensive effort. Homeless petitioners and their lawyers have been continually frustrated by the City's non-compliance with court orders to provide appropriate alternative accommodation upon eviction by private landlords. This unfortunate situation is only aided and abetted by the Constitutional Court's disposition toward judicial avoidance in socio-economic cases. The Court's reluctance to provide adequate content to the right of access to adequate housing has allowed the City of Johannesburg to tender substandard accommodation that violates multiple rights. The Court's failure to provide longer-term oversight or structural interdicts has meant that litigants cannot rely on the Court to enforce or vary its own orders. Instead, they must rather continually return to lower courts, and then defend new appeals, in an attempt to vindicate their rights.

<sup>67</sup> *Dladla* application: Part A and Part B (note 36 above).

<sup>68</sup> Available at <[http://www.seri-sa.org/images/Hlophe\\_Affidavit\\_Jul13.pdf](http://www.seri-sa.org/images/Hlophe_Affidavit_Jul13.pdf)>.

<sup>69</sup> *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC) (*Treatment Action Campaign*) at para 113.

<sup>70</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC) at para 19. See also FC s 172(1)(b): '[W]hen deciding a constitutional matter within its power a court' ... 'may make any order that is just and equitable'.

It is instructive, at this juncture, to recall the reason provided by the *Treatment Action Campaign* Court for not ordering a structural interdict: ‘The government has always respected and executed orders of this Court’.<sup>71</sup> In light of the manifest non-compliance of the City of Johannesburg to execute court orders, is it not time for the Constitutional Court, along with other courts, to adopt a new approach to structural interdicts, and also to reconsider its stance on the content of socio-economic rights?<sup>72</sup>

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<sup>71</sup> *Treatment Action Campaign* (note 69 above) at para 129.

<sup>72</sup> The City of Johannesburg is not the only local government offender – at the time of writing, the City of Durban (eThekweni) had ignored a court order and several interdicts to stop the demolition of shacks in the Cato Crest informal settlement. This matter ended up in the Constitutional Court in *Zulu and Others v eThekweni Municipality and Others* 2014 (4) SA 590 (CC). For an analysis of the power and potential of supervisory interdicts, see for example S Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 424–438.

# Curing the Poor: State Housing Policy in Johannesburg after *Blue Moonlight*

Stuart Wilson\*

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## I INTRODUCTION

*I need a guy to share a bed: R450 [per month];*

*Space in a bedroom. R900;*

*Lady to share a bed: R550;*

*Door space to rent.*

The wall outside Shoprite Checkers, in Yeoville, Johannesburg, is covered with such advertisements. Placed by those seeking, and letting, residential accommodation,<sup>1</sup> the advertisements reveal the crisis facing poor people in need of a place to live in urban Johannesburg.

Residential accommodation in Johannesburg is scarce. Formal residential accommodation in the private sector starts at around R1 700 per month for a single room, for a maximum of two people to share.<sup>2</sup> In the non-profit or state-subsidised sector, accommodation is priced as low as R600 per month. However, demand for this accommodation far outstrips supply. The City of Johannesburg's own social housing provider, the Johannesburg Social Housing Company (Joshco), which rents rooms for between R600 and R2 700 per month,<sup>3</sup> claimed, in late 2012, that this accommodation was oversubscribed.<sup>4</sup>

Internationally, it is generally accepted that a household can spend around 25 per cent of its income on rent. (That percentage, it should be noted, excludes necessary services such as water, electricity, refuse collection and sewerage.) The United States Department of Housing and Human Services defines a family paying more than 30 per cent of its income in rent, *including* services, as being in

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<sup>1</sup> K Tissington 'Minding the Gap: An Analysis of Supply of and Demand for Low-Income Rental Accommodation in the Johannesburg Inner City' Socio-Economic Rights Institute of South Africa (SERI) Working Paper (2014) ('Minding the Gap') 64–67.

<sup>2</sup> *Minding the Gap* (note 1 above) 56–57.

<sup>3</sup> *Minding the Gap* (note 1 above) 61.

<sup>4</sup> City of Johannesburg: Accommodation Report for the Purposes of Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, dated 1 September, 2012, para 12.8.3, on file with author. Also available from the City of Johannesburg Legal and Compliance Department.

housing distress,<sup>5</sup> and provides subsidy assistance. In the Johannesburg inner city alone, 33 861 households, or 121 899 people, earn less than R3 183 per month. They must find housing for no more than R765 per month in rent, or R1 061 per month in rent and services, if they are to avoid housing distress. Some of the higher earners in this income bracket will be lucky enough to be accommodated in one of the 1 352 rooms currently provided by Joshco, and ‘Madulammoho’ (a private, non-profit social housing provider). These rooms are available at between R600 and R1 200 per month, often excluding services.<sup>6</sup> The only other major, non-profit social housing provider in central Johannesburg is the Johannesburg Housing Company. It generally cannot assist people who can only afford to pay less than R1 000 per month in rent.<sup>7</sup>

Assuming all of these rooms are full, what about the 32 000 or so households, or 115 000 people, living in central Johannesburg alone, who cannot afford formal accommodation, whether subsidised or otherwise? Those households and individuals with some income end up either paying R450 per month to share a bed with a stranger, or sleeping in a door space. One man, interviewed as part of the ‘Yeoville Studio’ project implemented by the Centre on Urbanism and Built Environment Studies (CUBES) at the University of the Witwatersrand, said that he paid R600 per month to sleep on a balcony.<sup>8</sup> These residents of urban Johannesburg and those persons with no income, or income less than about R1 800 per month (and who are unable to pay more than about R600 per month in rent including services), are the inhabitants of urban Johannesburg’s ‘bad’ buildings.

The ‘bad’ buildings sector is a loose category of buildings in and around the inner city that the Johannesburg municipality (‘the municipality’) has identified as unsafe, slum-like and potentially unfit for occupation. Bad buildings are ‘properties where little or no investment is being made in maintaining the building, either because the owner has abandoned the building or the building has been hijacked, and so there are no clear landlord/caretaker structures or arrangements in place; residents are not paying rents and so owners do not have the means to pay for building upkeep; [or] residents are paying, but the payments are not being utilised by the owner or manager to maintain the building or pay Council rates and service charges, often leading to restriction/disconnections of services, with a resultant

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<sup>5</sup> See [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/affordable\\_housing/](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordable_housing/) (last visited 14 October 2013).

<sup>6</sup> These figures do not, of course, account for ‘downward raiding’, which describes the phenomenon of people from more affluent sections of the housing market receiving accommodation meant for people with lower affordability ranges. Given that housing demand outstrips supply in almost every segment of the market catering for incomes of less than R10 000 per month, downward raiding siphons off a small but significant section of the housing supply for very poor people.

<sup>7</sup> *Minding the Gap* (note 1 above) 61–63.

<sup>8</sup> *Minding the Gap* (note 1 above) 65.

compounding of the problem'.<sup>9</sup> Depending on the source consulted, there are anywhere between 122<sup>10</sup> and 1500<sup>11</sup> 'bad' buildings in the Johannesburg inner city.

The 'bad' buildings sector is itself highly differentiated. Those 'lucky' enough to be able to afford a bed space or balcony are likely to be living in properties that have access to rudimentary services. Overcrowding one's room or flat is the chief strategy for being able to make rental and service payments to slum landlords. It also helps in paying municipal utility bills. The municipality has opened water and electricity accounts for people living in what its Debt Collection and Credit Control Policy<sup>12</sup> calls 'abandoned buildings'. Abandoned buildings have no extant owner, and residents must club together to pay the bills themselves. Those persons and households with little to no income are likely to be living in shacks constructed in abandoned warehouses, houses, workshops, or in shacks constructed in and around such properties.

The City of Johannesburg's urban regeneration policy is predicated upon the 'elimination' of these 'bad' buildings. Although the plan has gone through many iterations, at its core is a programme of state-led gentrification. 'Bad' buildings are 'closed down' by the municipality because they are considered uninhabitable, or the city provides massive financial incentives to private property developers to purchase and to renovate properties for formal residential or commercial purposes.<sup>13</sup>

What this means for those persons currently living in 'bad' buildings has now been the subject of two Constitutional Court decisions,<sup>14</sup> four decisions of the Supreme Court of Appeal<sup>15</sup> and no less than six decisions of the South Gauteng High Court, Johannesburg (since 23 August 2013 known as the 'Gauteng Local

<sup>9</sup> City of Johannesburg, Inner City Charter: Residential Housing Development, Inner City Housing Plan. Available at: [http://www.joburg.org.za/index.php?option=com\\_content&task=view&id=2131&Itemid=49](http://www.joburg.org.za/index.php?option=com_content&task=view&id=2131&Itemid=49) (last accessed on 28 February 2014).

<sup>10</sup> Nigel Fraser, 'Reconsidering "Bad" Buildings' Citichat, March 2010. Available at: [http://www.joburg.org.za/index.php?option=com\\_content&task=view&id=4939&Itemid=58](http://www.joburg.org.za/index.php?option=com_content&task=view&id=4939&Itemid=58) (last accessed on 28 February 2014).

<sup>11</sup> Felicity Kitchin 'Cities Need to Plan with the Poor, Not for the Poor' South African Civil Society Information Service Newsletter, 6 February 2013, available at: <http://sacsis.org.za/site/article/1564> (last accessed on 28 February 2014).

<sup>12</sup> Available at <[http://www.joburg.org.za/bylaws/credit\\_control\\_annexd.pdf](http://www.joburg.org.za/bylaws/credit_control_annexd.pdf)>.

<sup>13</sup> For a fuller critique of this process see S Wilson (2011) 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential of "Meaningful Engagement"' 22(3) *Urban Forum* 265–282; S Wilson (2011) 'Litigating Housing Rights in Johannesburg's Inner City: 2004–2008' (2011) 27 *South African Journal on Human Rights* 127.

<sup>14</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208 (CC); *City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33, 2012 (2) SA 104 (CC).

<sup>15</sup> *City of Johannesburg v Rand Properties* [2007] ZASCA 25, 2007 (6) SA 417 (SCA); *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28, 2010 (9) BCLR 911 (SCA); *City of Johannesburg v Blue Moonlight Properties* [2011] ZASCA 47, 2011 (4) SA 337 (SCA) and *City of Johannesburg v Changing Tides* [2012] ZASCA 116, 2012 (6) SA 294 (SCA).



Division, Johannesburg’).<sup>16</sup> All but one of these decisions<sup>17</sup> have stated that if the municipality or a private property developer wishes to evict people currently living in ‘bad’ buildings, the municipality must provide accommodation to people who would otherwise be rendered homeless. People only live in ‘bad’ buildings in the first place because they cannot afford formal residential accommodation, so the implication of these decisions is that the municipality must either leave the urban poor where they are, or provide affordable accommodation to them.

The municipality fought these decisions hard, but unsuccessfully. At first, it denied any obligation to anyone evicted from their home, even if the municipality itself was seeking the eviction. That position was rejected in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*.<sup>18</sup> After *Olivia Road*, the municipality took the stance that, while it does have obligations to people it seeks to evict, it bears no obligation to people evicted by private landowners. The municipality stopped seeking eviction orders against large numbers of people altogether and relied on its incentives to the private sector to encourage them to evict the inner city poor.

In *City of Johannesburg v Blue Moonlight Properties*,<sup>19</sup> the Constitutional Court put a stop to this strategy. Ruling that the municipality has a general constitutional duty to provide accommodation to people facing homelessness on eviction, the *Blue Moonlight* Court held that it does not matter who or what causes someone to be deprived of their home. The municipality bears the primary responsibility for addressing the housing needs of those persons who, after an eviction, are unable to find accommodation on their own.<sup>20</sup>

In response to *Blue Moonlight*, the municipality has adopted what it calls a ‘managed care’ policy. In terms of this policy, people facing homelessness as a result of eviction will be relocated to a ‘managed care’ facility and provided with therapeutic support. This article engages critically with the ‘managed care’ policy as a response to *Blue Moonlight*. It begins with an analysis of the legal requirements for the provision of alternative accommodation already implicit in existing constitutional jurisprudence. It then sets out the main features of the municipality’s ‘managed care’ policy and argues that it is constitutionally deficient in several critical respects. At its core, the ‘managed care’ policy now implemented by the municipality posits the poor as patients with a sickness that can be cured with a short programmatic intervention over a period of six to twelve months. After this intervention, the policy assumes that the poor and

<sup>16</sup> *City of Johannesburg v Rand Properties* [2006] ZAGPHC 21, 2007 (1) SA 78 (W); *Lingwood and Another v Unlawful Occupiers of R/E ERF 9 Highlands* [2007] ZAGPHC 231, 2008 (3) BCLR 325 (W); *Sailing Queen Investments v Occupants La Colleen Court* [2008] ZAGPHC 15, 2008 (6) BCLR 666 (W); *Blue Moonlight Properties 039 (Pty) Ltd v the Occupiers of Saratoga Avenue and Another* [2008] ZAGPHC 275, 2009 (1) SA 470 (W); *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] ZAGPJHC 3; *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village* [2012] ZAGPJHC 230, 2013 (1) SA 583 (GSJ).

<sup>17</sup> *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village* [2012] ZAGPJHC 230, 2013 (1) SA 583 (GSJ).

<sup>18</sup> *Olivia Road* (note 14 above).

<sup>19</sup> *Blue Moonlight* (note 14 above).

<sup>20</sup> *Blue Moonlight* (note 14 above) at para 92.

dispossessed will be able to purchase their own accommodation on the private rental housing market. The article contends that this approach ignores crucial structural imbalances in the urban housing market that effectively exclude the poor from access to affordable accommodation. These structural imbalances invariably mean that the municipality's 'managed care' policy is self-defeating. It is unlikely to resolve the problem of 'bad' buildings in central Johannesburg, or anywhere else. It will instead condemn the urban poor to an endless cycle of evictions from 'bad' buildings, to 'managed care' shelters, and then back to 'bad' buildings. This vicious cycle will recur until the broader problem of the exclusion of the urban poor from the provision of housing in urban areas is addressed.

## II LEGAL REQUIREMENTS FOR THE PROVISION OF ALTERNATIVE ACCOMMODATION

The provision of alternative accommodation to prevent homelessness on eviction is action taken to protect and promote socio-economic rights: in particular the right of access to adequate housing.<sup>21</sup> South African courts have been habitually reluctant to give substantive content to positive socio-economic rights obligations.<sup>22</sup> They prefer instead to review socio-economic policy against requirements drawn substantially from administrative law. The question is not whether the state has acted to fulfil a specified list of basic needs, but rather whether socio-economic policy formulation and implementation has been 'reasonable'.<sup>23</sup> So, for example, a failure to act to devise and implement a policy is unreasonable, because it is akin to a failure to take a decision at administrative law;<sup>24</sup> and unreasonable limitations or exclusions in socio-economic policy are generally set aside because they are comparable to the exclusion of relevant considerations, or the inclusion of irrelevant ones, in taking an administrative decision. Socio-economic policy designed under a misconception has been set aside in much the same way that a decision taken under a material mistake of fact or of law will generally be set aside.<sup>25</sup> Steps taken in breach of policies adopted by the state in a particular area of socio-economic provision will generally be set aside, as will steps taken which violate other, intersecting constitutional rights.<sup>26</sup> Socio-economic policy, including a municipal strategy to provide housing or shelter to people evicted from their homes, will be subjected to these general requirements.

<sup>21</sup> Also at stake are the rights to life and dignity: See *Olivia Road* (note 14 above) at para 16.

<sup>22</sup> For a general critique of South African socio-economic rights jurisprudence, see S Wilson and J Dugard (2011) 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' 22 *Stellenbosch Law Review* 664–682; S Wilson and J Dugard (2014) 'Constitutional Jurisprudence: The First and Second Waves' in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014).

<sup>23</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC).

<sup>24</sup> See Wilson and Dugard 'Taking Poverty Seriously' (note 22 above) at 668–669.

<sup>25</sup> See *Blue Moonlight* (note 14 above) at para 74 (Court refused to have regard to a budget drawn up under a misconception).

<sup>26</sup> See *Khosa and Others v Minister of Social Development and Others, Mablaule and Another v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC).

In addition, however, there are specific requirements which have developed in decisions taken under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'). A court will generally order that alternative accommodation, if it is to be provided, be located as near as reasonably possible to the property from which an occupier is being evicted.<sup>27</sup> Alternative accommodation must generally comply with the requirements set out in the national emergency housing policy.<sup>28</sup> An occupier provided with accommodation ought to be given an assurance that he will not be evicted from that accommodation again, unless he has somewhere else to go, or is provided with permanent housing by the state.<sup>29</sup> From these requirements, it is possible to derive a few basic standards which alternative accommodation provided in the aftermath of eviction must meet.

## A Security of Tenure

Alternative accommodation must generally provide a degree of tenure security. In *Baartman v Port Elizabeth Municipality*, the Supreme Court of Appeal set aside an eviction order on the grounds that, although alternative accommodation had been made available to the occupiers in that case, the accommodation was insufficient because it did not come with a guarantee of tenure security. Mpati DP, writing for a unanimous court, wrote as follows:

... it is certainly not in the public interest to evict the appellants from the property only for them to be evicted again ... [I]n the absence of an assurance that the appellants will have some measure of security of tenure ... I consider that the Court a quo should not have granted the order sought.<sup>30</sup>

The Constitutional Court confirmed these findings on appeal in *Port Elizabeth Municipality v Various Occupiers*. Sachs J held that:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when State action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments, rather than reduces denial of claims of the desperately poor to the basic elements of a decent existence.<sup>31</sup>

For that reason—

In general terms ... a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.<sup>32</sup>

<sup>27</sup> *Blue Moonlight* (note 14 above).

<sup>28</sup> *Ibid.* Emergency Housing Programme, Volume 4, Part 3, National Housing Code, 2009.

<sup>29</sup> *Baartman v Port Elizabeth Municipality* [2003] ZASCA 99, 2004 (1) SA 560 (SCA). See also *City of Johannesburg v Rand Properties* (note 15 above) para 78.

<sup>30</sup> *Ibid* at para 19.

<sup>31</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) at para 18.

<sup>32</sup> *Ibid* at para 28.

This suggests that ‘reasonable’ alternative accommodation is, at the very least, accommodation provided *pending* access to other formal housing, whether from the state, or through the market. This requirement is echoed in the National Housing Code, 2009, which emphasises that, where possible, the provision of emergency housing must be the first phase of a permanent housing solution.<sup>33</sup> Both of these requirements suggest that alternative accommodation must come with a degree of tenure security.

## **B Family Accommodation**

Even apartheid courts were reluctant to permit state action to interfere with family life. They interpreted influx control legislation to allow a person with a permit to live in an urban area to reside with a spouse who did not have a permit.<sup>34</sup> The post-apartheid courts have laid emphasis on the importance of the right to family life as a constituent of the rights to privacy and dignity.<sup>35</sup> They have also refused to limit the definition of ‘family’ to ‘nuclear family’, deciding that, in appropriate cases, the right to reside with one’s extended family may be protected in terms of the Constitution and subordinate legislation dealing with eviction.<sup>36</sup>

While the courts have never directly addressed the issue of the provision of family accommodation in shelters for people evicted from their homes, the assumption that family accommodation must be provided is implicit in more recent decisions. For example, in *City of Johannesburg v Changing Tides*, Wallis JA held that: –

[W]ithout greater detail as to their circumstances and their needs if evicted – the needs of a family with three children being different from those of three young men sharing living quarters – [the High Court] could not be satisfied that the order it was making was just and equitable.<sup>37</sup>

and

What the City needs to know is who requires temporary emergency accommodation and the nature of their needs, for example, whether dormitory accommodation would suffice or whether a flat of some sort is required for a family with children or whether an aged or disabled person has some special needs.<sup>38</sup>

International law, too, recognises the potential impact of an eviction on the right to family life. As a result, evictions, if carried out, must be executed in a manner that preserves and protects the right to family life.<sup>39</sup>

<sup>33</sup> Emergency Housing Policy, Volume 4, Part 3, National Housing Code, 2009, section 2.2.

<sup>34</sup> *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A).

<sup>35</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8, 2000 (3) SA 936 (CC).

<sup>36</sup> *Hattingh and Others v Juta* [2013] ZACC 5, 2013 (3) SA 275 (CC).

<sup>37</sup> *City of Johannesburg v Changing Tides* (note 15 above) at para 10.

<sup>38</sup> *Ibid* at para 48.

<sup>39</sup> General Comment 7 of the United Nations Committee on Economic, Social and Cultural Rights at paras 4 and 16.

### C Physical Structure and Access to Services

Both the courts and the National Housing Code, 2009, set out some basic requirements for the provision of alternative accommodation. In *City of Johannesburg v Rand Properties*, the Supreme Court of Appeal required ‘a structure that is waterproof and secure against the elements; and with access to basic sanitation, water and refuse services.’ It also required that the occupiers in that case be required to reside there ‘secure against eviction’.<sup>40</sup> In *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes*, the Constitutional Court set detailed and exacting requirements for the physical structure of alternative accommodation (although the order was in a form that effectively had the consent of the state), including the material from which the temporary shelters to be provided had to be constructed.<sup>41</sup>

The National Housing Code, 2009, also specifies that alternative accommodation must be provided with access to basic services, including water and sanitation, and that a floor space of at least 24 square metres must be provided per ‘household’.<sup>42</sup> The reference to a ‘household’ further underscores the assumption that families will be accommodated together where necessary.

None of these requirements is extravagant. The National Housing Code, 2009, also makes clear that the space requirements can be varied when appropriate.<sup>43</sup> What they are designed to achieve is basic, dignified living conditions – ‘a zone of intimacy and family security’<sup>44</sup> – for people who are unable to provide shelter for themselves, and have been deprived of a home through no fault of their own.

### III THE ‘MANAGED CARE’ POLICY

The requirements set out above are, on one level, directed towards ensuring that accommodation provided in the aftermath of an eviction respects critical aspects of the personhood and dignity of those facing the trauma of an eviction. Even for the privileged, moving house can be a difficult experience, full of emotional turmoil, and a sense of displacement and unease.

Poor residents who are provided with alternative accommodation in the aftermath of an eviction face all of these difficulties, together with the deep insecurity that comes with a non-consensual relocation. The provision of alternative accommodation itself often comes at the end of a long fight for recognition – that the residents are not simply ‘obnoxious social nuisances’<sup>45</sup> to be expelled from their homes and forgotten as soon as possible, but are worthy of concern and respect, and the provision of somewhere else they may stay in peace and dignity. It is accordingly important that the accommodation provided after an eviction affirms a person’s agency, responds to their reasonable needs, and affords them the basic associative privileges and freedoms that come with a home.

<sup>40</sup> *City of Johannesburg v Rand Properties* (note 15 above) at para 78.

<sup>41</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16, 2010 (3) SA 454 (CC) at para 5.

<sup>42</sup> Emergency Housing Programme, Volume 4, Part 3, National Housing Code, 2009, § 2.5.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) at para 17.

<sup>45</sup> *Ibid* at para 41.

## A The Assumptions of the ‘Managed Care’ Policy

The municipality’s ‘managed care’ policy accomplishes none of these ends. Its working assumption would appear to be that the urban poor are alienated from society and, beyond this, that they actively and pathologically reject it. This assumption produces the stereotype of people evicted from their homes as free-floating, hedonistic, anti-social trouble-makers, who have no ability to generate or adhere to rules and practices necessary to live in a community; that they do not have meaningful family relationships; that they are work-shy, and unable to seek out or obtain gainful employment unless forced to do so; and that their inability to find their own accommodation springs from their personal failings (and not from their structural exclusion from the housing market or the economy as a whole.) In other words, the ‘managed care’ policy posits poor people in need of accommodation from the state as afflicted with a sickness which causes a series of personal pathologies that need to be cured in an institutional setting.

The municipality has entered into a contract with Metropolitan Evangelical Services (MES), a religious organisation, to run one of its shelters – or ‘managed care facilities’. It has provided accommodation to 30 people evicted in the aftermath of *Blue Moonlight*. MES is also the municipality’s chosen service provider to manage a further three shelters that the City intends to open within the next year.<sup>46</sup> The municipality claims that the MES is an appropriate service provider because it has identified and has experience of a range of important characteristics in poor urban populations. It is important to understand these alleged characteristics, because they are deeply troubling.

One of MES’ Executive Managers describes ‘homeless people’ as lacking ‘capacity to control or plan for the future’.<sup>47</sup> He opines that ‘life on the streets is difficult. Many problems are perpetuated, such as physical and sexual abuse, hunger and emotional degradation’.<sup>48</sup> He continues that, in MES’ view, homeless people or potentially homeless people (MES draws no distinction) become angry, despondent and often feel powerless to change their circumstances. They often have low self-esteem. They feel rejected and demotivated. They cannot recognise their own potential. They often ‘give up’ and are defeatist. Homeless people, potentially homeless people and those living in dilapidated buildings develop defence mechanisms in order to survive. They reject rules imposed on them by society, often as a survival mechanism. They are used to making their own rules and see the submission to rules as regression and a threat to their survival. They therefore generally balk at the imposition of rules in a restorative programme.

This state of affairs, MES argues, can lead to or aggravate existing substance abuse, which prevents homeless people from reintegrating with society. Substance abuse is often used as a crutch to deal with the position in which homeless people find themselves, or as an avoidance technique in respect of some form of trauma.

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<sup>46</sup> Personal Communication with the City of Johannesburg Housing Department, 14 June 2013.

<sup>47</sup> Francois Pienaar Affidavit (24 June 2013) *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ).

<sup>48</sup> Francois Pienaar Affidavit at para 51.



MES asserts that violence is prevalent amongst homeless people. The possibility of violence is exacerbated by poverty, substance abuse and the state of being homeless. Women and children are particularly vulnerable to violence and sexual exploitation. Rape and prostitution is, according to MES, commonplace. These acts of gender violence may also have additional untoward consequences – an increase in HIV/AIDS infection. Children are often exposed to inappropriate sexual conduct between adults.

MES' ostensible solution to the problems that it identifies is to give the homeless time to 'get their affairs in order', while relieved of some of the immediate distress caused by homelessness and the financial demands of fending for oneself. MES suggests that the sooner homeless people become self-sustaining, the easier it is for them to reintegrate. However, MES warns, this reintegration requires a *desire* to become self-sustaining and to participate in a process toward that end.<sup>49</sup>

But how can *desire* be legitimately described as a causal factor in the homelessness of persons and communities born into abject poverty and without the economic or political means to radically alter their status? Whose desire, or fantasy, is MES really talking about?

MES's description of even truly vagrant populations is neither fair nor accurate. However, it is clearly an inappropriate description of people who are not homeless, but who face eviction from their homes. They already have homes, and the provision of alternative accommodation is meant to prevent them from becoming homeless (and presumably also subject to the privations that MES associates with homelessness). MES' analysis also ignores the possibility that structural defects in the housing market may have a role to play in making people homeless or driving them to occupy dilapidated buildings.

MES' analysis has no room for these complexities. People who are admitted to its shelters are anti-social, violent, sexually delinquent drug abusers. They have experienced trauma. They are sick. They need to be healed. However, the thesis that the urban poor are essentially diseased, and in need of treatment, does not extend to recognising that the urban poor may lack adequate housing for reasons beyond their control. All that is required is that they be relieved of some of the immediate distress caused by homelessness. They can become self-sustaining and reintegrate, and fend for themselves, but only if they are willing to participate MES's therapeutic process to that end.

MES' stereotypes of, and prescriptions for, the urban poor, map strikingly onto what Thomas Ross calls 'the rhetoric of poverty'. Ross identifies this rhetoric in Supreme Court decisions in the United States. The rhetoric, Ross says, tends to abstract and externalise poor people as feckless, inept and authors of their own misfortune. The poor are posited as morally weak and undeserving, and severe limits are placed on what can be done to resolve poverty, lest the undeserving poor be permitted to become perpetually dependent on the state.<sup>50</sup> In the UK, similar cultural motifs identify the poor as 'chavs' – violent, welfare-scrounging,

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<sup>49</sup> Francois Pienaar Affidavit at para 51.

<sup>50</sup> T Ross 'The Rhetoric of Poverty: Their Immorality, Our Helplessness' (1990) 79 *Georgetown Law Journal* 1499.

recidivists, living largely on an over-generous welfare state.<sup>51</sup> In South Africa, MES' therapeutic approach can be understood as an effort to prevent the evolution of a system of welfare provision which results in the undesirable 'dependent' class identified in the US and UK literature. The net effect, however, is the same: the poor are treated as something less than fully human, and therefore undeserving, or incapable of understanding or taking advantage, of anything other than the most tightly managed or restricted levels of social provision.

### **B Ekuthuleni: A Case Study in 'Managed Care'**

Once residents facing eviction have been stripped of their humanity, and reduced to the status of dysfunctional half-people, it becomes easy to justify subjecting them to rules and conditions in alternative accommodation which would normally shock the conscience. The municipality and MES have adopted an array of standard rules and conditions in the accommodation they intend to provide, and have provided, to people evicted from their homes.

It is important to consider the effect of these rules and conditions on the residents of the Ekuthuleni shelter – the first of the municipality's 'managed care' facilities. Thirty residents of Ekuthuleni were relocated to the shelter from their former homes at Saratoga Avenue, Berea. They had lived there for periods of up to 15 years before the relocation, and had engaged in a six-year legal battle with the municipality to win the right to alternative accommodation in the event that they were evicted. Finally, on 1 December 2011, the Constitutional Court directed that the residents of Saratoga Avenue be provided with accommodation on eviction from their homes. About 70 of the 100 residents, who could afford to pay R600 per month to Joshco, were relocated to a social housing project known as 'MBV Phase 2'. The remaining 30 residents, who could not afford to pay R600 per month to Joshco, were relocated to Ekuthuleni. Provision of shelter at Ekuthuleni was a hurried affair, and renovations at the shelter were not complete until a few days before the residents were to be evicted and the relocation was to take place.<sup>52</sup>

The municipality and MES kept the precise terms and conditions upon which the shelter would be run from the residents until about a week before the relocation. When they were finally revealed, the municipality and MES did not invite discussion. The residents were faced with a stark choice: move into Ekuthuleni on the municipality's terms, or be evicted and left homeless.<sup>53</sup> In the end, the residents moved into the shelter and reserved their rights to challenge aspects of the shelter regime later on. Many aspects of this regime are disturbing, and reflect a need to control the social pathologies MES imputes to the residents.

At Ekuthuleni, and in other shelters set up in terms of the 'managed care' model, residents' possessions are subject to random searches.<sup>54</sup> Residents are not given keys to their rooms. A 'disciplinary code' embraces offences such as

<sup>51</sup> O Jones *Chavs: The Demonisation of the Working Class* (2012).

<sup>52</sup> Affidavit of Nomusa Ellen Dladla (19 October 2012) *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) at paras 34 to 45.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* paras 62.12 and 62.13.

‘refusing to obey an instruction’, ‘making of and/or presenting false documents, information or evidence for personal gain’, ‘inciting other residents to commit an act detrimental to the programme’, being ‘absent from the shelter for less than four days without informing the house manager’, ‘desertion’ and ‘failing to maintain high standard (sic) of personal hygiene’.<sup>55</sup> Infractions are ultimately punishable by eviction from the shelter.<sup>56</sup>

Three further aspects of the ‘managed care’ regime have now been challenged in the South Gauteng High Court by Ekuthuleni’s residents. The first challenge takes on MES’ refusal, with the municipality’s support, to allow families to reside together. MES operates a strict gender separation regime in its shelters. So strict is this regime that MES and the municipality insist on splitting married or cohabiting couples up. If the couple have a ‘younger’ child (the ‘managed care’ policy does not say how young), that child is accommodated with his or her mother in a dormitory shared with about a dozen or more other women. ‘Older’ children (again, nobody knows how old) are accommodated with a parent of the same gender. The managed care policy does not specify what happens when an ‘older’ child has a single parent of a different gender.

Secondly, all residents of ‘managed care’ facilities are locked out of their shelters during the day. Generally, they are expected to vacate the shelter by 8am on weekdays and 9am on weekends. They are not permitted to return until 5:30pm. If they return after 8pm, then they are locked out for the night. MES maintains that it has a discretion to permit a resident with a good excuse to stay inside a shelter on a particular day to do so. However, neither MES’ shelter rules, nor the municipality’s ‘managed care’ policy specifies the conditions under which this discretion should be exercised.

Finally, both the municipality and MES maintain that alternative accommodation will be made available for a fixed period of six months. Thereafter, the municipality and MES retain the discretion to extend a resident’s stay up to a maximum period of 12 months. The managed care policy specifies no guidelines for the exercise of this discretion. When a resident’s stay comes to an end, MES and the municipality maintain the right to evict them from the accommodation, without a court order, whether or not they have anywhere else to go. ‘Disciplinary’ evictions of the type set out above will also take place without a court order.<sup>57</sup>

In the affidavits filed in support of the Ekuthuleni residents’ challenge to the daytime lock-out rules, the separation of families by gender, and eviction without a court order, a desperate picture emerges. Residents working during the night were not permitted to sleep at the shelter during the day.<sup>58</sup> One young man who returned to the shelter after 8pm at night was locked out on the streets for the

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<sup>55</sup> Schedule to the Disciplinary Code for the Linatex Managed Care Facility, annexed to the Affidavit of Thabo Maisela, filed on 11 June 2013, in the matter of *Philani Hlophbe v the City of Johannesburg*, [2013] ZAGPJHC 98, 2013 (4) SA 212 (GSJ).

<sup>56</sup> *Ibid.*

<sup>57</sup> Affidavit of Thabo Maisela (1 July 2013) *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) para 146.

<sup>58</sup> Affidavit of Nomusa Ellen Dladla (19 October 2012) in *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) at paras 80–84.

night, and stabbed.<sup>59</sup> One woman, in her fifties, had to consent to her grandchild being taken into care by the state, because she could not care for her on the streets during the day.<sup>60</sup> A married couple was split up into gender differentiated dormitories. Their children were sent to live with relatives in rural Limpopo, because they were not permitted to live with both their mother and father at the shelter.<sup>61</sup> The residents' affidavits describe feelings of humiliation, helplessness, frustration and anger caused not by their status as people evicted from their homes, but by the rules and conditions to which they are now subject.<sup>62</sup>

MES and the municipality's response to these allegations is to rely on what they say is the underlying purpose of the rules: to assist the residents to make a 'transition' from homelessness to self-sustaining urban citizenship. MES also emphasises that it provides social work assistance, including education and training and assistance in finding a job, to the residents. This is to help them 'get back on their feet', and leave the shelter. The residents say that they have not been provided with any meaningful assistance, that social workers promise help but do not provide it, and that no-one has suggested where they might find affordable accommodation other than at the shelter – except by leaving the shelter and going to live in a rural area.<sup>63</sup>

MES' programme does not engage with the fact that the residents of Ekuthuleni were neither homeless nor without work when they were admitted to the shelter. They had homes at their previous accommodation, and all were already engaged in some sort of income-generating activity. Some have low-wage jobs: as security guards, as part-time cleaners or handing out leaflets at road intersections. Others are informal traders, selling clothes, sweets and cigarettes on the inner city streets.<sup>64</sup> The problem is not that the residents are idle: it is that, despite working hard, they are unable to generate the incomes necessary to secure accommodation on the current housing market.

Even were they not able to retain low-income employment, no meaningful programme of social assistance can be deemed constructive when it separates persons from their family, locks them out on the streets during the day, and subjects them to the ever-present threat of immediate eviction without court intervention. These rules and conditions undermine rather than promote the self-esteem that MES and the municipality say is necessary to exercise the agency necessary to move on to self-supported accommodation elsewhere. Both local experts<sup>65</sup> and the available international literature on the topic,<sup>66</sup> suggest that shelter conditions premised on close discipline of residents, coupled with an outwardly 'therapeutic' approach to what is fundamentally an economic problem, are likely to retard

<sup>59</sup> Ibid at para 62.2.

<sup>60</sup> Ibid at paras 65–73.

<sup>61</sup> Ibid at paras 91–93.

<sup>62</sup> Ibid at paras 65–115.

<sup>63</sup> Ibid at para 62.9.

<sup>64</sup> Ibid at paras 65–115.

<sup>65</sup> Affidavit of Garth Stevens (30 August 2013) in *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) (Garth Stevens is a professor of psychology at the University of the Witwatersrand.)

<sup>66</sup> Stacey Murphy 'Compassionate' Strategies of Managing Homelessness: Post-Revanchist Geographies' (2009) 41 *Antipode* 305.

rather than enhance individual agency. If anything, the residents of Ekuthuleni feel as though control of their lives is being taken away from them, rather than given back.

MES' paradigm is, however, attractive to the municipality. It absolves the municipality of all responsibility to devise a *housing* programme that responds meaningfully to the massive structural imbalances which exclude the urban poor from formal accommodation. These imbalances are airbrushed out of the picture, and are replaced by a discourse of self-help and hard work. The problem, as they see it, is not that the municipality, having deliberately set out to gentrify the urban core, has not made proper provision within its housing policies to accommodate the people it must have foreseen would have been displaced as result. The problem is rather that the poor themselves are to blame for not being able to take advantage of a programme of regeneration almost tailor-made to exclude them.<sup>67</sup> As the municipality has itself said, in defending its managed care model, 'transition' (meaning the individual transformation of each person evicted from their home from an aggressive vagrant into a wage-earning paragon of the virtuous poor) is central to its policy.<sup>68</sup> The 'managed care' policy depends on ignoring the fact that the urban poor are structurally excluded from the urban housing market. Not enough accommodation in urban Johannesburg exists to cater for the poor. Such accommodation as may be accessible to the poor is either oversubscribed, or is overcrowded, squalid, unsafe and vulnerable to eviction in terms of the municipality's urban regeneration programmes.

'Transitional' shelter schemes have been tried in Johannesburg before, and have failed. Studies of their efficacy have demonstrated that people generally have nowhere else to go once their stay in transitional shelters comes to an end, and that transitional shelter schemes such as the 'managed care' policy do not work unless the state provides longer-term subsidised accommodation to people who are unable to afford their own housing at the end of the transitional period.<sup>69</sup> For so long as the municipality is allowed to blame poor people themselves for being homeless or vulnerable to eviction, it will be permitted to obscure its own role, both in encouraging evictions as part of its urban regeneration strategy and in failing or refusing to provide decent, affordable accommodation that is genuinely accessible to the poor.

Understood in this light, the managed care policy becomes much easier to explain. It is premised, not on any genuine concern to address the root causes of social exclusion, but on a need to move the residents through MES' shelters as quickly as possible. The daytime lockout rule and the separation of families, taken together with the other demeaning aspects of the disciplinary code for managed care facilities, is simply meant to make residents feel as uncomfortable as possible, so that anywhere else seems preferable to life at a shelter. If that does not work,

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<sup>67</sup> *Olivia Road* (note 14 above) at para 19.

<sup>68</sup> Affidavit of Thabo Maisela (1 July 2013) in *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) at para 54.

<sup>69</sup> L Poulsen 'A Room in the City: Strategies for Accessing Affordable Accommodation' (2010) *Urban Forum* 21.

then the municipality and MES can simply evict a resident when they decide his or her time is up.

This assessment is borne out by the experience of Ekuthuleni residents. In the 18 months since the residents were relocated to the shelter, not one has become ‘self-sustaining’. Despite their gainful employment, not one can afford accommodation on the private rental housing market in the city. Fifteen of the residents still live at the shelter. A further 12 have moved in with friends and relatives relocated from Saratoga Avenue to MBV Phase 2. Two have died. One now lives in a shack under the M1 Bridge.<sup>70</sup> No ‘transition’ has occurred, at least not of the nature to which the municipality and MES say they are committed. In April 2013, lawyers acting for the residents obtained a temporary order suspending the rules on daytime lockouts and the separation of families. MES and the municipality have also agreed not to evict the residents until the challenge to the shelter regime has been finally determined. Since then, apart from one death, the numbers of residents at the shelter have remained stable.

### C Illegality

Whatever the basis of the managed care policy, key features of the policy are likely to be held unlawful or unconstitutional. The right to evict the residents without a court order is not a right recognised by a statutory or constitutional provision. Indeed, it is dressed-up ‘self-help’ – prohibited by the common law<sup>71</sup> and the FC s 34 (read with FC s 1).<sup>72</sup> FC s 26(3) also prohibits evictions from homes without a court order. MES and the municipality say that their managed care facilities are not ‘homes’ within the meaning of FC s 26(3), but rather ‘institutions’.<sup>73</sup> This argument is unlikely to succeed. It cannot realistically be said that a shelter provided to people evicted from their homes, precisely to prevent them from becoming ‘homeless’ is not a ‘home’ for the purposes of the Constitution. In any event, subjecting residents of shelters to eviction without court orders is in breach of the guarantees of security of tenure the Supreme Court of Appeal and the Constitutional Court have consistently held ought to be supplied to people relocated to alternative accommodation.

Both spousal/partner separation and the refusal to house families – especially families with children – together, are at express odds with the constitutionally recognised right to family life, the right to dignity and the freedom of (intimate)

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<sup>70</sup> Affidavit of Paul Maobelo (30 August 2013) *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) at para 162.

<sup>71</sup> *Nino Bonino v De Lange* 1906 TS 120.

<sup>72</sup> *Chief Lesapo v North West Agricultural Bank & Another* [1999] ZACC 16, 2000 (1) SA 409 (CC). See also *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).

<sup>73</sup> Affidavit of Thabo Maisela (1 July 2013) in *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) at para 146.



association.<sup>74</sup> Moreover, they fly in the face of constitutionally well-established expectations (in eviction cases) that families must be provided alternative accommodation. As set out above, the justifications advanced for locking residents out of alternative accommodation during the day are unlikely to survive scrutiny on a plain rationality test – let alone the more exacting test for reasonableness demanded by the Court’s gloss on FC s 26(2).

However, even assuming that the worst features of its shelter regime are set aside, the municipality’s recalcitrant failure to devise and to implement a meaningful strategy to provide decent housing for those displaced by its urban regeneration programmes remains unaddressed. The local state’s wilful blindness to the needs of its poorest citizens in Johannesburg has not, as yet, been ‘cured’ by housing litigation.

#### IV CONCLUSION

*Blue Moonlight* presented the municipality with the opportunity to devise and to implement a comprehensive public housing policy which would have addressed the needs of poor people displaced by urban regeneration in a progressive, fair and sustainable manner. It could have done so in a manner reflected in the Constitutional Court’s decision in *Olivia Road*. In that matter, the Court required the municipality to provide accommodation to the residents of an inner city building through the allocation of one room per family at rent as low as R100 per room per month. No plausible reason exists for its deplorable response to *Blue Moonlight*. With a little imagination, the city could have provided the sort of accommodation demanded by *Olivia Road* at scale.

The municipality’s refusal to adopt the *Olivia Road* approach, and instead to rely on a suboptimal solution which requires people evicted from their homes to accept responsibility for their situation and engage in therapeutic programmes to address it, speaks as much to the poverty of our socio-economic rights jurisprudence as it does to the senselessness of the municipality’s approach to poverty. Our socio-economic rights jurisprudence has not, yet, achieved the depth necessary to put such a miserable regime beyond the bounds of possibility. In the years to come, the Constitutional Court will have to engage much more directly with the state’s poverty-alleviation schemes and its underlying depiction of the poor as suffering from individual psychological pathologies. Fear and apathy, not genuine regard for the well-being of the most disadvantaged, characterises the city’s response to *Blue Moonlight*.<sup>75</sup>

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<sup>74</sup> See, especially, *Dawood & Another v Minister of Home Affairs & Others* [2000] ZACC 8, 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 35 (‘The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied [through the pass laws and Bantustans that destroyed intimate relationships and family life]. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.’)

<sup>75</sup> Cf *Khosa & Others v Minister of Social Development & Others; Mablaule & Others v Minister of Social Development & Others* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) (‘The Court in *Khosa* notes that the Final Constitution commits us to an understanding of such rights as dignity, equality and social security in terms of which ‘wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.’)

One possible way of strengthening socio-economic rights jurisprudence to deal with the conditions imposed in Ekuthuleni would be to draw stronger links between socio-economic rights on the one hand, and the right to dignity and family life on the other. By insisting that policies and programmes adopted to fulfil socio-economic rights respect the dignity and the rights to family life of those to whom they apply,<sup>76</sup> the Constitutional Court might be able to develop socio-economic rights in a way that provides them with the depth and the meaning necessary to rule out repressive and demeaning measures such as the managed care policy and still operate in a manner consistent with the institutional restraint it has shown by refusing to develop socio-economic rights in terms of specific, concrete entitlements. However, whether the Court is willing to face the challenge of developing our socio-economic rights so as to ensure that we secure the dignity of the poor while they receive state housing assistance, remains to be seen.<sup>77</sup>

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<sup>76</sup> See, generally, S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *South African Journal on Human Rights* 1; S Woolman 'The Architecture of Dignity' in D Cornell, S Woolman, S Fuller, J Brickhill, M Bishop & D Dunbar (eds) *The Dignity Jurisprudence of the Constitutional Court of South Africa* (2013) 55.

<sup>77</sup> As this article was going to press, the High Court handed down judgment in *Dladla v City of Johannesburg Metropolitan Municipality and Another* [2014] 4 All SA 51 (GJ). In this case, the residents of the Ekuthuleni Shelter challenged the three aspects of the 'managed care' model discussed in section IIIC of this article. By the time of the hearing, the City of Johannesburg had abandoned its contention that a court order was not required to evict a resident from one of its shelters. Accordingly, the Court focussed on the legality of the daytime lockout rule and the separation of families by gender. Wepener J held that both are a violation of the rights to dignity, privacy and freedom and security of the person. Holding that the gender separation rule 'cuts to the very heart of the right to dignity and the right to family life' (para 38), Wepener J directed the City to permit all those residents who wish to do so to reside in a private room with their spouses or life partners. Wepener J also held that 'the lock-out [rule] also results in residents being exposed to dangers inherent in street life and inhibits their freedom in material respects and thus clearly infringes on their right to freedom, security and dignity' (para 42). He interdicted and restrained the City from applying the rule against the residents. Wepener J's judgment is notable for its emphasis on the interplay between the rights to dignity and housing.

# Avoidance Remains Avoidance: Is it Desirable in Socio-Economic Rights Cases?

David Bilchitz\*

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## I INTRODUCTION: RAY'S NUANCED THESIS

Brian Ray has produced a remarkable and sophisticated paper analysing the recent Constitutional Court decisions on evictions. Ray focuses on the adjudication techniques employed by the Constitutional Court and situates the discussion in light of the debate around the appropriate judicial role in socio-economic rights cases.<sup>1</sup> His thesis is multi-layered. In essence, he argues that the Constitutional Court's approach is one that often avoids directly providing strong substantive content to constitutional provisions. Instead, the Court uses a variety of 'avoidance techniques' which are procedural in nature yet often produce pro-poor outcomes. The Court often places emphasis on 'political enforcement' which involves essentially giving effect to social rights through existing legislation and executive action. Ray suggests that this form of enforcement can be strengthened by the Court where it substantively develops and extends the legislation in a manner that strongly reflects constitutional values and considerations. Other mechanisms such as meaningful engagement involve creative exercises of the Court's power to ensure enforcement of social rights through agreement between the political branches and the affected individuals and communities. The Court's use of fact-specific, contextual forms of adjudication allows it to achieve substantively fair outcomes for the poor in particular cases and to develop constitutional principles 'softly' over time whilst avoiding rigid rules that might create a strong conflict between the Court and the legislature and executive. All these techniques seek to utilise the power of the political branches in the enforcement of social rights and give expression to a vision of 'inter-branch' comity.<sup>2</sup> Ray's analysis of specific case law is creative and linked to this overarching framework.<sup>3</sup>

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<sup>1</sup> See, for instance, M Pieterse 'Coming to Terms with the Judicial Enforcement of Socio-Economic Rights' (2004) 20 *South African Journal on Human Rights* 383, 417; K Young *Constituting Social and Economic Rights* (2012) 133ff; and J King *Judging Social Rights* (2012).

<sup>2</sup> See, eg, S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) (Discusses shared constitutional interpretation and the manner in which institutional design under the Constitution can promote inter-branch comity.)

<sup>3</sup> B Ray 'Evictions, Aspiration and Avoidance' (2013) 5 *Constitutional Court Review* 173.

This short response cannot engage in detail Ray's complex argument. I shall focus on one central line of argument, namely the desirability of the Court's flight from a more substantive approach to the content of social rights. Procedural techniques of adjudication can only be justified by an underlying substantive rationale. The reasons provided by Ray for the Court's adjudicatory approach, rooted in democracy and inter-branch comity, do not support the Court's failure to develop the substantive content of socio-economic rights. Attention must, therefore, be paid to the impact of the Constitutional Court's avoidance approach on lower courts, the consistency of decision-making throughout the judicial system and the concomitant effects on the poor of avoiding the provision of substantive concrete content to these rights. This reply ends by advocating a form of academic resistance to the continued unwillingness of the Court to develop the content of socio-economic rights and to provide clear entitlements for those who are worst off.

## II THE (UN)DESIRABILITY OF THE CONSTITUTIONAL COURT'S AVOIDANCE TECHNIQUE

### A Descriptive and Normative

In addressing the arguments provided by Ray, one must separate the descriptive and normative components of his piece. On a descriptive level, he provides a compelling good-faith reconstruction of what the Constitutional Court is doing in its recent jurisprudence on social rights. It is no doubt a very charitable reconstruction, suggesting that the Court has intentionally adopted a coherent strategic approach to adjudication in these cases and its positioning relative to other branches of government. I am not convinced that the Constitutional Court is always explicitly seeking to adopt particular adjudication techniques that maximise the role of the legislature whilst expanding existing protections in legislation in light of the Constitution. As several authors have noted, at times, the Court seems simply to be resorting to narrow adjudicative techniques that have become the default position in a conservative legal culture.<sup>4</sup> Sadly, the new constitutional order, whilst having a very different normative foundation from the basic law under apartheid, has seen the courts struggling to rid themselves of a formalist approach that privileges procedure over substance.<sup>5</sup>

However one best *describes* the Court's approach, the focus of this brief reply will be on whether it is desirable for the Court to continue to avoid giving substance to socio-economic rights and, rather, adopting the 'avoidance' techniques Ray describes. Ray's paper, at times, appears to offer a normative defence of the Court's approach – on the aforementioned grounds of democratic

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<sup>4</sup> See K Klare & D Davis 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 403 (Authors analyse the performance of the Constitutional Court in light of a legal culture that inhibits the development of jurisprudence which could give full effect to transformative constitutionalism); and D Davis, 'Transformation: The Constitutional Promise and Reality' (2010) 26 *South African Journal on Human Rights* 85, 97.

<sup>5</sup> See, for instance, *Magidimana v President of the Republic of South Africa* [2013] ZACC 27, 2013 (11) BCLR 1251 (CC) (Constitutional Court dismissed an application asking for the state to fund the legal expenses of injured miners during the Marikana Commission of Inquiry.)

principles and inter-branch comity. In fairness, however, he also articulates concerns about this approach and worries that the Court's focus on procedure may land us up in a substantive 'dead end'. Ray suggests that one method of improving the Court's adjudication in this area is to adopt an approach of 'thick subsidiarity': this strategy effectively requires the Court to interpret existing legislation expansively in order to 'fit constitutional requirements'.<sup>6</sup> Essentially, this approach is an extension of what courts have always done when interpreting legislation. In our new constitutional order, it means that the courts now can employ this technique when asked to harmonise existing legislation with the demands of the Constitution.

Yet, what concerns me is the Court's lack of willingness to expand upon the standards required by the Constitution itself. This role is the fundamental reason for the Constitutional Court's existence. As I have argued elsewhere, the full embrace of this function is necessary to ensure that constitutional provisions have teeth.<sup>7</sup> Moreover, the foundational provision of constitutional supremacy in FC s 1(c) demands that the Constitution be used to provide the foundation for all other legal instruments and policy rather than the other way round.<sup>8</sup> If the Court further elucidates the standards required by the Constitution, then it may do so, of course, through a variety of techniques. Direct constitutional interpretation is only one possibility. The interpretation of a statute in light of the Constitution is another technique expressly mandated by FC s 39(2).<sup>9</sup> It would be overly prescriptive to suggest that a Court is constrained to adopt one particular adjudicatory approach in every given case. The 'avoidance' that is of concern here reflects a consistent refusal to provide meaning to constitutional provisions that are directly implicated in a host of cases.

## **B The Grounding of Procedural Reasoning**

Yet, as Ray points out in his article, the Court demonstrates great discomfort with the creation of substantive content in social rights matters. Many of the 'avoidance' techniques the Court uses are strongly procedural in nature. By requiring parties to resort to meaningful engagement, for instance, the Court can avoid direct constitutional adjudication on a particular issue.<sup>10</sup> Courts also prefer reasoning that involves fact-specific, ad-hoc adjudicatory

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<sup>6</sup> Ray (note 3 above) at 180, 193.

<sup>7</sup> D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2001) 119 *South African Law Journal* 484; D Bilchitz *Poverty and Fundamental Rights* (2006).

<sup>8</sup> On the centrality of constitutional supremacy for the South African project, see J Fowkes 'Founding Provisions' in J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13. See also F Michelman 'The Rule of Law, Legality and Constitutional Supremacy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2006) Chapter 11.

<sup>9</sup> On the disadvantages of courts' consistent resort to FC s 39(2), see S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762. The urtext on 'avoidance' as a legitimate, normative approach to South African constitutional law was written 15 years ago by Iain Currie. See I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138.

<sup>10</sup> See, eg, *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208 (CC).

techniques.<sup>11</sup> Where direct engagement with socio-economic rights cannot be avoided, courts focus on whether a government programme has been adopted to address the right and whether that programme is ‘reasonable’.<sup>12</sup> Part of the strategy of the Constitutional Court appears to reflect the belief that such a proceduralist approach can often be used in a manner to achieve strong substantive outcomes without necessarily having to adopt a strong (and possibly controversial) position on the substance of the right itself. Part III of this reply questions whether in fact such ‘weak’, ‘procedural’ approaches can be relied on to achieve<sup>13</sup> strong substantive outcomes for the poor. This section considers the normative basis for the claim that we should focus on ‘procedural’ techniques rather than the substance of such rights. Why should we retreat into a proceduralist approach where we have a clear, substantively transformative document to interpret?

As a matter of abstract philosophical reasoning, we might ask a foundational question about the very value of procedure (and proceduralist reasoning described above) in law.<sup>14</sup> Clearly, it is often very difficult to provide a justification for why a particular procedure, in a given case, has some form of intrinsic value. Rather, procedures are most often justified instrumentally – because they enable the achievement of a particular goal or end. Of course, abiding by extant procedures is a critical component of the rule of law and its commitment to equal treatment of the governed and the governors, as well as all parties who bring a dispute to court. However, when we employ specific procedures, we must not fetishise them, but utilise them only insofar as they achieve the *legitimate* purposes for which they are designed.

The above considerations suggest careful reflection upon the value of the procedures we use. (This critical reflection drives much of Ray’s analysis of the techniques employed by the Court.) Meaningful engagement orders, for instance, often force a dialogue to occur between two parties involved in an eviction. They therefore uphold important principles and values around democratic participation and the dignity and autonomy of all affected individuals. Yet, it is crucial to be clear what such orders are meant to achieve: meaningful engagement is not about people trading their rights for other benefits or allowing stronger parties to browbeat weaker ones into submission. An understanding of the substantive

<sup>11</sup> See, eg, *Occupiers of Skuurweplaas 353* JR v PPC Aggregate Quarries (Pty) Ltd [2011] ZACC 36, 2012 (4) BCLR 382 (CC) (‘*Skuurweplaas*’) & *Occupiers of Portion R25 of the Farm Mooiplaats 355*; JR v Golden Thread Ltd [2011] ZACC 35, 2012 (2) SA 337 (CC) (‘*Golden Thread*’ case).

<sup>12</sup> *Mazibuko v City of Johannesburg* [2009] ZACC 28, 2010 (4) SA 1 (CC) at para 67; and *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19 2001 (1) SA 46 (CC), para 44. D Brand ‘The Proceduralisation of South African Socio-Economic Jurisprudence or “What are Socio-Economic Rights for?”’ in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003).

<sup>13</sup> For the sake of brevity, I use the epithets ‘weak’ and ‘procedural’ to capture the approach often adopted by the Constitutional Court that Ray describes.

<sup>14</sup> J Fowkes ‘Managerial Adjudication, Constitutional Civil Procedure and *Maphango v Aengus Lifestyle Properties*’ (2013) 5 *Constitutional Court Review* 309 – (Correctly recognises that civil procedure is both an instrumental good and an intrinsic good as by the text of the Constitution, especially FC ss 1(c) and 34.) See also M Dafele ‘On the Flexible Procedure of Housing Eviction Applications’ (2013) 5 *Constitutional Court Review* 331.



goals of a procedure allows for the construction and careful calibration of the procedure itself.

‘Procedural’ techniques of adjudication are only justifiable on the basis that they have a strong substantive justification rooted in the values and principles underlying the Constitution. We can thus expect judges to be reflective about the substantive normative bases for their adjudicatory techniques. Constant reminders about the co-dependent relationship between procedure and substance are vitally important: procedural reasoning often takes on a life of its own if it is detached from its substantive underpinnings. Procedure must not block just outcomes.<sup>15</sup>

### **C Procedural Reasons, Democracy and Inter-Branch Comity**

I cannot, within the scope of this brief reply, exhaustively examine the reasons Ray provides for why the Court’s procedural approach may be attractive. I will, however, focus on two important underpinnings for this approach. The first argument is that the Court should try and use legislative provisions and executive policy as far as possible in its adjudication for reasons of democracy. These branches of government derive their legitimacy through popular elections. Courts should thus seek to give effect to the legislation and policies of the representatives of the people.

Such reasoning, however, only takes one so far in a constitutional democracy with an entrenched and justiciable bill of rights. Unlike some countries where this power has implicitly been recognised by courts, the South African Constitution explicitly provides for the power of a court to strike down any law that is inconsistent with the Constitution and to make any order that is just and equitable in this regard.<sup>16</sup> As such, the polity has itself granted this power to judges and the substantive interpretation of the Constitution and concomitant exercise of remedial powers cannot therefore be regarded as illegitimate.<sup>17</sup>

The supremacy of the Constitution also requires that legislative and executive action be evaluated against constitutional standards: the Court must give these standards discernable content. Without discernable content, the Constitution provides no meaningful constraint upon the legislature or the executive (or the rest

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<sup>15</sup> See, for example, the use of ‘subsidiarity’ techniques in *Nokotyana v Ekurhuleni Metropolitan Municipality* [2009] ZACC 33, 2010 (4) BCLR 312 (CC) (Subsidiarity used to avoid addressing the substantive questions of the right to sanitation.)

<sup>16</sup> FC s 172(1)(a) and (b).

<sup>17</sup> See, especially, *Minister of Home Affairs v Fourie* [2005] ZACC 19, 2006 (1) SA 524 (CC) at para 171. O’Regan J responds to claims that the legislature is by default the best institution to correct unconstitutional laws as follows: ‘It would have been desirable if the unconstitutional situation identified in this matter had been resolved by Parliament without litigation. The corollary of this proposition, however, is not that this Court should not come to the relief of successful litigants, simply because an Act of Parliament conferring the right to marry on gays and lesbians might be thought to carry greater democratic legitimacy than an order of this Court. The power and duty to protect constitutional rights is conferred upon the courts and courts should not shrink from that duty. The legitimacy of an order made by the Court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.’ *Ibid.*

of the judiciary for that matter).<sup>18</sup> Thick subsidiarity, which Ray advocates, may be a method of doing so: legislation of course can be entirely congruent with the demands of the Constitution. However, the Court must not avoid making clear in such cases the respects in which the legislation reflects the standards demanded by the Constitution and which cannot therefore, for instance, be the subject of legislative amendment.<sup>19</sup> This consideration – a demand for constitutional justification – will help ensure that the distinction between legislation and constitutional standards is not entirely conflated.

A further substantive justification for the ‘avoidance’ techniques described by Ray lies in the demands of inter-branch comity and the separation of powers. By utilising legislative provisions and executive policies, courts signal their respect for the work of the other branches. By encouraging engagement, courts allow individuals and the government to work out a viable solution and enhance the citizen-government relationship. Whilst none of this is objectionable, what is problematic is to conceive of the Court’s exercise of its interpretive power to provide substantive content to socio-economic rights as being in some sense in conflict with inter-branch comity and the separation of powers.

Constitutional supremacy itself requires the articulation of constitutional standards against which the exercise of legislative and executive power can be measured. The development of these standards is precisely the role of courts where they are granted the powers of judicial review. Socio-economic rights are often not explicitly recognised in older constitutional systems. Yet, where they do exist (largely now in countries in the Global South), the role of courts must be conceptualised in a manner that can give concrete effect to these constitutional provisions. When courts perform this role, they therefore actively achieve what they are required to do in terms of the division of powers within these modern constitutions. That does not mean, however, that the court must not actively engage other branches in the important task of optimally realising these rights. Those branches, however, exercise their power to realise these rights within the substantive framework set by the courts.

The Colombian Constitutional Court has been prepared to develop such constitutional standards whilst still articulating an important role for other branches in giving effect to these standards.<sup>20</sup> For instance, in a case dealing with internally displaced persons (IDPs) in Colombia, the court recognised that there had been a systematic violation of the rights of these persons. It specified a minimum level of realisation of these rights that had to be implemented as a matter

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<sup>18</sup> A vociferous debate in legal philosophy exists as to the justifiability of powers of judicial review. See, for instance, J Waldron *Law and Disagreement* (1999) and R Dworkin *Freedom’s Law: The Moral Reading of the American Constitution* (1996).

<sup>19</sup> The Court has slowly been developing this line of thinking in eviction cases. For its initial attempt, see *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) (‘*Port Elizabeth Municipality*’).

<sup>20</sup> See MJ Cepeda Espinosa ‘The Constitutional Protection of IDPs in Colombia’ in *Judicial Protection of Internally Displaced Persons: The Colombian Experience* (2009) 1. The following description and discussion of that case is drawn from D Bilchitz ‘Constitutions and Distributive Justice: Complementary or Contradictory?’ in D Bonilla Maldonado (ed) *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Colombia* (2013) 41.

of urgency. To this end, it ordered government entities in charge of assisting IDPs to co-ordinate their activities effectively; to quantify and make available adequate resources necessary to realise the minimum levels of these rights; to develop a programme of action to correct institutional capacity problems that hampered the realisation of IDP rights; and to report to the court on progress in this within set time-periods. Whilst seeking to address the systemic problems involved in this case, the court did not determine exactly the manner in which these duties should be carried out nor even exactly when other government agencies had to adopt specific measures. ‘What it did require of them is to report on what they are doing, to establish their own goals and their timetables that they are to follow when complying with their constitutional and legal obligations and to explain to the Court – and the public – how the activities that they have chosen are going to lead to the results that they are expecting’.<sup>21</sup> The court thus set the *standards* other branches of government must meet without ordering the exact *means* by which these standards must be realised. By retaining jurisdiction and handing down follow-up orders, the court ensures continued government accountability for meeting these standards, supervises the implementation of its orders and encourages continued ‘inter-institutional dialogue among different branches of government’.<sup>22</sup>

The Colombian Constitutional Court carves out its own role as both a standard-setting entity and an entity focused on monitoring the implementation of its orders relating to fundamental rights. It does so without usurping the functions of other branches of government and seeks to encourage a creative collaboration rather than rigid division between these different spheres. Such an approach can thus give strong content to socio-economic rights and still reflect inter-branch comity.<sup>23</sup> Importantly, the court here also begins to re-envision what an account of separation of powers requires in the context of a Constitution. Far from undermining the democratic system in Colombia, such an approach takes seriously the court’s role in realising social rights and vouchsafing the Constitution’s legitimacy.

### III PROCEDURAL REASONING, CONSISTENCY AND THE RULE OF LAW

Ray’s piece, as we have seen, focuses on the ‘avoidance’ techniques of the Court in the context of the relationship between different branches of government. I would suggest that we also need to consider their effect within the judiciary and, ultimately, upon the resolution of cases throughout the judicial system in achieving a jurisprudence on socio-economic rights that gives them concrete effect in the lives of the poor. In particular, it seems to me germane to consider the manner in which evictions are being dealt with by the lower courts and how the Constitutional Court’s balancing, fact-specific approach influences lower

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<sup>21</sup> Ibid at 26–27.

<sup>22</sup> Ibid at 35.

<sup>23</sup> See further, D Landau ‘Aggressive Weak-Form Remedies’ (2013) 5 *Constitutional Court Review* 244 (Engages the Colombian experience at greater length). For further analysis of the Colombian experience to be found in this volume, see S Issacharoff ‘The Democratic Risk to Democratic Transitions’ (2013) 5 *Constitutional Court Review* 1.

court decisions. Lower courts are where most cases are adjudicated and only very few reach the Constitutional Court on appeal.

How has the Constitutional Court's 'avoidance' approach translated into High Court practice? Unfortunately, many of the outcomes in recent High Court cases have appeared to contradict the approach of the Constitutional Court towards evictions and cannot be described as pro-poor socio-economic rights decisions.

Ray himself engages *Golden Thread*.<sup>24</sup> The case dealt with the unlawful occupation of land in Tshwane Municipality and an application in the North Gauteng High Court for the eviction of the occupiers. The High Court ordered an eviction without the provision of alternative accommodation. The High Court held that the shortness of the period the occupiers had been on the property, the quick action of the land-owners and the failure of the occupiers to put down strong roots in the area were dispositive of the matter. The Constitutional Court criticised the High Court for not taking account of the local authority's obligation to provide reasonable alternative accommodation to the occupiers (even where the occupation had been less than six months as part of the 'all relevant circumstances enquiry' as required by FC s 26(3)) and working with a conception of ownership rights as 'virtually unlimited'.<sup>25</sup>

In *Occupiers of Skurweplaas 353 v PPC Aggregate Quarries*, an eviction was granted by the North Gauteng High Court.<sup>26</sup> Whilst the High Court did consider alternative accommodation, the judge held in favour of the land-owner. The decision allowed the occupiers to be rendered homeless *pending* the provision of alternative accommodation by the City. Once again, the Constitutional Court ruled that this was 'neither just nor equitable'.<sup>27</sup>

The South Gauteng High Court has recently heard even more troubling eviction cases. In November 2012, the Constitutional Court approved a settlement in terms of which the City of Johannesburg was required to provide emergency housing to the occupiers of various properties in Marlboro and engage meaningfully with them pending their eviction. Many factual matters were in dispute. At the heart of the matter lay competing claims about the length of time during which the occupiers were on the property. The unlawful occupiers were removed twice in June and August 2012. Their possessions were destroyed during the latter eviction. The city claimed that the Metro (JMPD) police acted pursuant to their law enforcement functions to prevent trespassing and that their response was not part of an ordinary eviction. In the High Court judgment<sup>28</sup>, Kgomo J held that the actions of the JMPD constituted law-enforcement measures and did not constitute an eviction. He also held that the resistance to the occupiers meant they could not succeed in their *mandament van spolie* – the action to restore 'peaceful and undisturbed possession'.<sup>29</sup> The judge made it clear that in his view,

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<sup>24</sup> *Golden Thread* case (note 11 above).

<sup>25</sup> *Ibid* at para 17.

<sup>26</sup> *Skurweplaas* (note 11 above).

<sup>27</sup> *Ibid* at para 13.

<sup>28</sup> *Marlboro Crisis Committee v City of Johannesburg* [2012] ZAGPJHC 187 (South Gauteng High Court, Case 29978/12, 7 September 2012).

<sup>29</sup> *Ibid* at paras 73–83.

‘it must be instilled in the minds and consciences of potential land-grabbers and unlawful or illegal occupiers, that landowners and contractors of space too are bearers of constitutional rights and that conduct violating those rights tramples, not only on them, but on all’.<sup>30</sup> The framework developed by the Constitutional Court surrounding evictions offers a distinctly different view of unlawful occupiers: furthermore, the Court has held that they are not to be treated as criminals.<sup>31</sup> What’s worse is that the court in this matter also incorrectly used pre-constitutional common law to avoid the application of the constitutional and statutory framework governing evictions. (FC s 26 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act<sup>32</sup> (PIE) constitute that framework’s central pillars.) The balancing framework adumbrated in PIE, the need to consider the engagement between the municipality and the occupiers, and the constitutional requirement that provision of temporary alternative accommodation be supplied prior to eviction were not properly considered or applied.<sup>33</sup>

In *Johannesburg Housing Corporation v Unlawful Occupiers of Newtown Village*, Willis J was also concerned with an eviction application against the unlawful occupiers of a property in Newtown, Johannesburg.<sup>34</sup> The High Court raised an understandable concern regarding the need for ‘clear, certain, and implementable guidelines’ as to how the court should go about making its order.<sup>35</sup> The High Court then raised a number of questions about how any state authority – including a court – ought to interpret the term ‘just and equitable’ as used in PIE. Willis J shows his preference for a very strong understanding of property rights. He reads the Constitutional Court’s judgment in *Blue Moonlight* as precedent supporting his views.<sup>36</sup> (The *Blue Moonlight* Court though clearly recognises that such rights can, at least temporarily, be limited: Willis J’s gloss seems substantially more.) The judge then quotes the National Development Plan and effectively argues that the only way to secure socio-economic rights for individuals in the long term is through strong protection for private property and economic growth: ‘If we want more people to have access to housing, it must be made easier to own property and not more difficult.’<sup>37</sup> Willis J here provides some insight into his own legal-philosophical world-view. Whatever the merits of his view might be, he articulates an approach to socio-economic rights that appears strikingly at odds with the normative thrust of Constitutional Court decisions: an oeuvre that requires that the property rights of land-owners and the housing rights of occupiers be balanced in a nuanced fashion.

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<sup>30</sup> Ibid at para 100.

<sup>31</sup> *Port Elizabeth Municipality* (note 19 above) at para 12.

<sup>32</sup> Act 19 of 1998.

<sup>33</sup> For a detailed engagement with the flaws in this judgment, see D Bilchitz and D Mackintosh ‘P.I.E. in the Sky: Where’s the Constitutional Framework in High Court Eviction Proceedings?’ (2014) *South African Law Journal* 521ff.

<sup>34</sup> [2012] ZAGPJHC 230, 2013 (1) SA 583 (GSJ).

<sup>35</sup> Ibid at para 28.

<sup>36</sup> Ibid at para 75.

<sup>37</sup> Ibid at para 103.

Why this disjunction between the Constitutional Court's housing and eviction jurisprudence and several High Court judgments?

I do not wish to create the impression that High Court judges are all ignoring or bypassing the constitutional framework on evictions. Instead, we might turn our attention to the responsibility borne by the Constitutional Court to make its normative framework for evictions transparent, and in so doing, rather easy for lower courts to follow. As Ray points out, the Court has, in eviction applications, created a strong fact-specific and contextual jurisprudence. In general, it has been unwilling to provide general principles as to how to render decisions. That lack of clarity has had untoward substantive results: judges in the High Courts have significant discretion as to whether to grant an eviction order or not. Those judges who do not share the Constitutional Court's sensitivity to vulnerable groups and who prefer to work within a more traditional common-law conception of property rights render judgments that tend to over-emphasise the rights of land-owners. This set of dispositions results in eviction orders that create unnecessary misery and hardship. The Constitutional Court's failure to develop clear guidelines and a more substantive normative framework creates a lacuna in the law which is filled by judges whose views are not in conformity with the new constitutional order's pro-poor commitment in eviction disputes.<sup>38</sup>

Whilst Willis' judgment is, in many respects, clearly at odds with the new constitutional ethos, the question arises as to whether he is not at least correct in asking for clearer guidelines for rendering 'just and equitable' decisions. The Constitutional Court is beginning to respond to these concerns. It has held that alternative accommodation must be considered even in cases of short occupation, and that it is not acceptable to allow for temporary homelessness pending the provision of alternative accommodation. Those of us pressing for a more substantive view of adjudication have not been asking for that much more than this: for the court clearly to articulate standards which can be relied on in a manner that can help address the plight of the poor. This request for clearer guidelines is also a requirement of the rule of law in the context of evictions.<sup>39</sup> The employment in all cases of fact-specific, contextual reasoning may thus have the unintended consequence of strongly reducing the usefulness of these rights for unlawful occupiers or the homeless.

#### IV CONCLUSION: THE ROLE OF ACADEMICS IN THE FACE OF 'AVOIDANCE'

We have seen thus far the need for the Court to offer a clear understanding of the substantive justification for its approach to the adjudication of socio-economic rights. I have also argued that some of the reasons provided by Ray do not support a flight from giving substantive content to socio-economic rights, though such content may be developed in several ways.

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<sup>38</sup> See *Port Elizabeth Municipality* (note 19 above). See M Dafele 'On the Flexible Procedure of Housing Eviction Applications' (2013) 5 *Constitutional Court Review* 331.

<sup>39</sup> For a similar point, see T Roux 'The Langa Court: Its Leitmotifs and Legacy' (2015) *Acta Juridica* (forthcoming).



The Constitutional Court appears, at least for the time being, to be set on a course that increasingly utilises these procedural ‘avoidance’ techniques despite their apparent drawbacks. One interesting question, with which I would like to conclude, is to consider how academics should respond to this approach of the Constitutional Court.

One option is to do what Ray does in his lead essay: identify the techniques, accept the approach of the Court and identify ways in which its current approach can be exploited to produce further pro-poor results. Ray justifies this strategy as follows:

The signs of avoidance in these more recent cases show that it is unlikely the Court will begin to develop the reasonableness test in strong substantive ways. But the pro-poor results and doctrinal advances in this set of cases also point towards approaches that allow the Court to mitigate the institutional and practical concerns that pervade its socio-economic rights decisions and still exercise greater institutional authority for interpreting and enforcing these rights.<sup>40</sup>

This approach has its benefits: it works with the modes of thought current in the Constitutional Court and tries to show ways in which they can lead to better results. While Ray does point to several weaknesses in the Court’s approach, his strategy might have the unintended consequence of strengthening and legitimating its ‘avoidance’ techniques.

An alternative strategy for academics is to adopt a stance of resistance. Resistance jurisprudence highlights the manner in which the Court fails fully to grasp the nettle of the new constitutional order.<sup>41</sup> It would mean continuing to point out the Court’s failure to provide minimum core content to socio-economic rights. It would involve challenging the Court’s refusal to articulate a general principle that evictions cannot take place without the provision of a minimum standard of alternative accommodation. It would mean standing up for the basic principle that courts are bound by the Constitution, have a duty to make meaning, and should do so in an open and unapologetic manner that affords citizens the most basic of socio-economic goods. The benefits of such a strong push by academics would be to give other members of civil society well-developed grounds for pressing all organs of state to deliver in concrete and specific terms on our Constitution.<sup>42</sup>

Ray’s approach in the lead essay and resistance jurisprudence are not mutually exclusive. Academics could seek, as Ray does, to exploit the possibilities of the existing approach whilst highlighting its inadequacies. However, continued and sustained pressure from the academic community and civil society to ‘harden’ the socio-economic rights into firm principles and commitments should, over time, lead to a changed judicial mind-set as well as a different legislative and executive attitude toward meeting their constitutional obligations. We have already moved far, far down the road from Etienne Mureinik’s still stirring victory in the cause

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<sup>40</sup> Ray (note 3 above) 175.

<sup>41</sup> Even an ardent proponent of interpretive charity, finds ‘resistance jurisprudence’ appropriate when the Court appears to fall back on well-entrenched common-law rules that ought to be disentranced by new constitutional norms. See F Michelman ‘Expropriation, Eviction and the Gravity of the Common Law’ (2013) 24 *Stellenbosch Law Review* 245.

<sup>42</sup> T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013) 392–397.

of making pro-poor socio-economic rights justiciable.<sup>43</sup> The challenge now is to consolidate and build on these gains in a manner that ensures that someday our Constitution's aspirations are fully realised.

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<sup>43</sup> See E Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464; E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

## Comments and Replies



# Managerial Adjudication, Constitutional Civil Procedure and *Maphango v Aengus Lifestyle Properties*

James Fowkes\*

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## I INTRODUCTION

From a day-to-day perspective, civil procedure can be some of the driest and most technical law there is. It may therefore seem a less fertile area for study than more obviously substantive topics, and it can be easy to marginalise its importance under the slogan that form should give way to substance.

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\* Senior Researcher, Institute for International and Comparative Law in Africa, University of Pretoria. My thanks to the editors for the invitation to be part of this volume; to Okyerebea Ampofo-Anti, Michael Bishop, Jason Brickhill, Michael Dafel, Jackie Dugard, Brian Ray, Theunis Roux, Ben Winks, Stu Woolman and the other participants at the CCR conference for their valuable comments and questions; to three of the counsel who appeared in *Maphango*, Nobuntu Mbelle, Warren Pye and Stuart Wilson, for their very helpful responses to my queries; and to two anonymous referees for the CCR. Their input has substantially improved this note (although, as always, the responsibility for any errors remains mine alone). Such collegiality will continue to assist my own engagement with this issue in the future papers that will be necessary to do justice to their comments. I am particularly grateful to Michael Dafel for agreeing to reply to this paper, and for his reply's valuable engagement with the issue of procedural flexibility particularly in the context of eviction cases. Michael sees this flexibility as confined to that specialised context, and in this he and I disagree: I see the trend as a general one borne of considerations that arise in many areas of the Court's work. I therefore see the eviction cases only as a (very) important site of this development, alongside decisions in other areas in which the Justices have reframed cases *mero motu*, like *Joseph v City of Johannesburg* [2009] ZACC 30, 2010 (4) SA 55 (CC) and *President of the Republic of South Africa v Me&G Media Ltd* [2011] ZACC 32, 2012 (2) SA 50 (CC) (see note 40 below). I also see it as part of a much broader trend in which the nature of the work the Constitution requires the Court to perform leads judges to push up against traditional procedural limits, as we see, for example, by the comments in *Mazibuko v City of Johannesburg* [2009] ZACC 28, 2010 (4) SA 1 (CC) on the reception of new evidence on appeal (a finding that the Court, in its turn, treats as confined to the specialised socio-economic rights context, again incorrectly in my view). For more on this emerging trend of reflexive meaningful engagement (across the entire Bill of Rights) between a multiplicity of private and/or public parties with an interest both in a pareto-optimal resolution of a dispute and a settlement that enhances the normative legitimacy of any outcome, see B Ray 'Engagement's Possibilities and Limits as a Socio-Economic Remedy' (2010) 9 *Washington University Global Studies Law Review* 399; S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013). Michael is undoubtedly correct, however, to note that the Court has long been cautious of procedural flexibility, and that these novel procedures must be described, at most, as an emerging trend. A full examination of the trend and these claims, however is a paper in itself, and for that reason and in order to preserve the paper-reply format, I have not extended this note to address them. I look forward to engaging with them, and Michael's important arguments, in future work.

Scholars of South African constitutionalism have not always paid much attention to civil procedure. When they have, it has often been simply to argue that the Court needs to break free of it and be more flexible, informal and collaborative.

If we take the synoptic view, however, alterations in procedure often reveal the dramatic changes in the work that legal institutions are called upon to do. Procedure is the way that courts do things: so when courts are called upon to do new things, or to do old things in new ways in response to broader social changes, we will often find the story written in the development of the rules of procedure. If we are in the midst of such changes, then we should be able to trace them in the way judges find themselves pushing against traditional procedures and developing them in light of new functions and needs. Conversely, it's important to assist the judges by thinking about what procedural forms best fit the new ways in which they find themselves (more or less consciously) being led to operate. Procedure is, after all, part of the law that judges must interpret and develop in line with constitutional values.<sup>1</sup>

*Maphango v Aengus Lifestyle Properties (Pty) Ltd* is a case in point.<sup>2</sup> The case is nominally (and notionally) about rental law, but the real split within the *Maphango* Court is over issues of procedure and the Court's institutional role. This comment engages that debate. However, while the *Maphango* Court raises numerous issues of constitutional civil procedure, I confine myself here to articulating the constitutional significance of the debate in *Maphango* and to working out answers to some of the issues presented but not fully considered (or perhaps even entirely apprehended) by the decision.

## II A PROBLEM IN CIVIL PROCEDURE

*Maphango* concerned rental contracts that placed limits on the landlord's ability to increase rent, but also permitted their own cancellation. The landlord sought to increase rent by substantially more than the contractual limits by cancelling the old contracts and offering to sign new ones at much higher rents. The majority, per Cameron J, concluded that the issue was best dealt with in terms of a statute, the Rental Housing Act 50 of 1999. It held that this route offered the best way to resolve the dispute as between the parties. The ruling is also in line with the Court's emerging principle of subsidiarity, which prefers statutory routes where available.<sup>3</sup> The majority also concluded, in turn, that it would be best if the

<sup>1</sup> See *Giddey NO v JC Barnard and Partners* [2006] ZACC 13, 2007 (5) SA 525 (CC) at para 16.

<sup>2</sup> *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2, 2012 (3) SA 531 (CC).

<sup>3</sup> On subsidiarity in South African constitutional law, see L du Plessis 'Subsidiarity: What's in a Name for Constitutional Interpretation and Adjudication' (2006) 17 *Stellenbosch Law Review* 209; L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 32; AJ van der Walt 'Normative Pluralism and Anarchy: Reflections on the 2007 Term' (2008) 1 *Constitutional Court Review* 77; K Klare 'Legal Subsidiarity & Constitutional Rights: A Reply to AJ van der Walt' (2008) 1 *Constitutional Court Review* 129; Jaap de Visser 'Institutional Subsidiarity in the South African Constitution' (2010) 21 *Stellenbosch Law Review* 90; B Ray 'Evictions, Aspirations and Avoidance' (2013) 5 *Constitutional Court Review* 173. I defend several kinds of subsidiarity: see J Fowkes *Building the Constitution: Constitutional Interpretation in South Africa since 1994* (Dissertation 2014; Book in Progress, forthcoming 2015). For discussion in specific relation to the decision in *Maphango*, see F Michelman 'Expropriation, Eviction, and the Gravity of the Common Law' (2013) 24 *Stellenbosch Law*



statutory questions were considered in the first instance by the Gauteng Rental Housing Tribunal, created by the Gauteng provincial government in terms of the Act. Whatever one's view of these conclusions – for which I think there is much to be said as a general matter but which I will not be defending in this note<sup>4</sup> – they represent at least plausible responses by the Court to its institutional position as one actor among others charged with giving effect to the Constitution, amidst a growing array of statutes and alternative forums.

The difficulty that caused the Court to split, however, was the fact that this way of resolving the case did not correspond to the way that it had been pleaded or the way that it had been framed on appeal. The tenants had only pleaded the Act in a rather peripheral way, framing their case instead mainly in terms of the Constitution and the common law, and it had been decided that way by the High Court and the Supreme Court of Appeal (SCA). They had at no point sought the remedy the Court eventually issued, which was to stay the court proceedings and redirect the dispute to the Tribunal.<sup>5</sup> Indeed, the tenants had initially approached the Tribunal and pursued their case there through a mediation step, but had withdrawn it before the matter was referred to arbitration in order to focus on bringing matters in the High Court.

The Constitutional Court, then, was faced with an appeal that did not frame the case the way the Court believed the issue should constitutionally be framed. What should it do in response? The dissent in *Maphango*, written by Zondo AJ and joined by Mogoeng CJ and Jafta J, held that the Court should play the traditional role of the court of appeal. 'A court', it argued, 'is required to adjudicate only the issues between the parties'.<sup>6</sup> Even if a case might be more advantageously considered in another way, '[t]he Court must respect the choice that the applicants made in circumstances in which they had professional legal advice available to them'.<sup>7</sup> The dissent would have resolved the legal points identified in the appeal from the SCA, upheld the decision in favour of the landlord, and terminated proceedings.<sup>8</sup>

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*Review* 245, 254–263.

<sup>4</sup> Sue-Mari Maass defends *Maphango* as a way to provide flexible tenure protection to vulnerable classes of tenants, at least in the absence of specific statutory provision for it. See S Maass 'Rent Control: A Comparative Analysis' [2012] *Potchefstroom Electronic Law Journal* 41. On the need for flexibility and for statutory reform, see also SM Maass & AJ van der Walt 'The Case in Favour of Substantive Tenure Reform in the Landlord-tenant Framework: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele; City of Johannesburg Metropolitan Municipality v Blue Moonlight*' (2011) 128 *South African Law Journal* 436. The ability of the Tribunal to provide this protection, in the absence of specific statutory guidance, remains to be seen.

<sup>5</sup> As the dissent points out; see *Maphango* (note 2 above) at paras 91–93, 103 and 136. Email communication with counsel confirms that the specific remedy ordered was not proposed by the parties, and also that the issue of the Tribunal's jurisdiction mainly came out only in the applicants' reply in oral argument in the Constitutional Court. On the oral recording of the hearing, see note 40 below.

<sup>6</sup> *Ibid* at para 145.

<sup>7</sup> *Ibid* at para 138.

<sup>8</sup> For critical discussion of the approach of the SCA and by the minority in the Constitutional Court to the substantive rental-law questions, see M Dafeel 'Curbing the Constitutional Development of Contract Law: A critical response to *Maphango v Aengus Properties*' (2014) 131 *South African Law Journal* 271.

The majority, written by Cameron J, and supported by a brief concurrence written by Froneman J, instead decided to reframe the issue in line with its view of the best constitutional understanding of the case. The concurrence, in particular, emphasised that the Court should take the extant legislative route ‘no matter how the case was pleaded’ and that the Court’s powers to make any just and equitable order ‘are not confined by the pleadings’.<sup>9</sup> The majority ruled that the case should be resolved in terms of the Act, not the common law, and then postponed the appeal in order to give the tenants an opportunity to refer the dispute to the Tribunal.<sup>10</sup> If the matter was referred, then the parties would be entitled to return to the Constitutional Court, on papers amended as necessary; if not, the appeal would stand dismissed.

Frank Michelman has suggested that *Maphango* is something of a disappointment because it forgoes an opportunity for ‘careful, pointed public ventilation’ of important issues.<sup>11</sup> He is thinking primarily about habits of deference and a hide-bound common-law mentality, as well as the issues of subsidiarity that he (rightly) acknowledges may be more important in *Maphango* than common-law deference. In suggesting that issues of pleadings and the appellate role lie at the heart of the matter, I identify an additional subject for his disappointment: Neither the majority nor the minority of the *Maphango* Court convincingly engages with the other on issues of procedure or the role of an appellate court.

The majority judgment does pay attention to the procedural implications of the order and its impact on the parties, as we will see. But it does not say very much about the weight of these considerations. After all, if the rule of law and the supremacy of the Constitution require judges to consider statutes and relevant constitutional points regardless of whether the parties raise them, does this mean that the way a case is pleaded and framed has no weight?<sup>12</sup> If it has some weight, how much? Similarly, if the procedural rules preserving fairness can be overridden in these circumstances, can they be generally broken? Or are there again some limits to this process of reframing: if so, what are they? The majority does not say, and yet there is reason to think we need answers to these questions. If the Court is exercising discretion about the constitutionally best way to resolve the case – as it was in referring the case to a tribunal whose jurisdiction was not compulsory – then it needs to factor in the constitutional weight of any procedural prejudice that would follow from a decision to reframe the case in that way. And, in fact, this proposition holds true even where the effect of a statute *is* compulsory. In a situation where the parties (and the courts below) have neglected a statute, then the appeal court clearly has no discretion and must apply the statute. But there

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<sup>9</sup> *Maphango* (note 2 above) at paras 152–153. See also *ibid* (Cameron J) at para 48.

<sup>10</sup> The order permits ‘[a]ny of the parties’ to lodge a complaint with the Tribunal, but this is surely aimed at the applicants, since the respondents, armed with a presumptive appeal victory, have little incentive to do so if the tenants do not.

<sup>11</sup> Michelman (note 3 above) 263.

<sup>12</sup> On the meaning of ‘objective unconstitutionality’, and the relative importance of the parties before the Court for determining the denotation of a right and its role in resolving a constitutional matter, see S Woolman ‘Application’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) Chapter 31; and, in reply, F Michelman ‘On the Uses of Interpretive Charity’ (2008) 1 *Constitutional Court Review* 1.

may still be procedural costs to doing so for the first time on appeal, and even if a court does not have discretion in applying a statute, it *does* have discretion about how to go about doing so, including whether to take additional procedural steps. So the constitutional weight of any procedural prejudice should still be part of what informs the court's decision.

The *Maphango* dissent, on the other hand, simply treats as decisive the traditional procedural considerations in favour of fairness, especially in relation to the respondent. It therefore does not even seek to weigh these considerations against the constitutional arguments in favour of the majority's approach. Given the importance of the majority's arguments, the dissent can only truly claim to have the better constitutional argument, all things considered, if it can show that the majority's arguments are outweighed by the dissent's procedural concerns.

*Maphango*, therefore, shows the need for an understanding of the constitutional weight of these procedural issues that the judgment itself mostly does not offer. If we are sympathetic to the flexible approach of the majority and wish to show that it can meet the procedural objections of the dissent, or if we simply wish to be useful to a Court that will certainly have to keep confronting these issues, then we should seek to fill this gap. In particular, we need to pay more attention to the most obvious way to reconcile the opinions. If traditional procedures ensure fairness, but traditional procedures do not fit other aspects of the Court's work, then first prize would obviously be to find new procedures that can do *both*. This drive to procedural innovation is one larger theme of this paper.<sup>13</sup> If we appreciate the more flexible role being played by the Court in *Maphango* and elsewhere, then we (and the Court) should spend more time thinking about new procedures to fit its new constitutional activities.<sup>14</sup> The tradition-bound minority does not even consider the possibility of *different* fair procedures – and *that*, and not the mere fact that the dissenters are worried about procedure, is why they can be accused of being reactionary.

Where this first prize proves to be unattainable, as it sometimes will, then we will need a procedural debit-credit ledger. These problems with realising our first prize raises the other, broader question that animates this paper: what

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<sup>13</sup> See, further, J Fowkes 'Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge' (2012) 1 *Cambridge Journal of International and Comparative Law* 235, 235–237.

<sup>14</sup> For one view on the relationship between novel constitutional procedures (as well as institutional design) and substantive constitutional outcomes, see S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013). I (and the *Maphanga* majority) share Woolman's belief that creative, non-traditional ways of acting can help courts tackle complex problems where their traditional institutional limitations might otherwise seem insuperable. See Fowkes 'Managerial Judge' (note 13 above); Fowkes *Building the Constitution* (note 3 above) Chapter 10. Woolman's argument, however, is also like the *Maphanga* majority's, in not being very concerned with new *formal* procedures. Part of his aim is to move past the 'largely process-driven theorizing' of experimental constitutionalism to a 'more substantive view of justice' – Woolman *Selfless Constitution* at 382–86 – and he is sometimes similarly impatient with traditional procedures (ibid at 443) or inclined to replace them with ad hoc arrangements (ibid at 473) without considering the procedural costs of breaking them. His arguments, in many respects ground-breaking, nevertheless also share the existing literature's focus on direct access and remedies (ibid at 283–85, 426–27). The aim of this paper, conversely, is to argue that such welcome creative efforts should be accompanied by careful attention to formal rules and in particular formalities in the context of pleading. Insofar as Woolman calls on judges using novel approaches to articulate 'frameworks' which can include 'fairly strict procedural requirements' (ibid at 426, 461, 465) I take him to be gesturing in the same direction, and look forward to engaging with and building on his arguments in future work.

are the limits of public interest considerations when judges hear cases between private parties? It is increasingly settled law that public interest cases are simply to be run in the way that best serves the public interest. This public interest does not disappear in cases between private parties, especially if they engage in constitutional interpretation. But we need to decide how to reconcile the broader public interest with the interests of the parties to the dispute, where the two are in tension – as they can be when a court reframes an issue in a way that threatens to cause procedural unfairness. Both themes require us to examine the constitutional significance of pleadings, formal procedures, and party autonomy.

### III CONSTITUTIONAL ARGUMENTS FOR CIVIL PROCEDURE AS AN INSTRUMENTAL GOOD

One thing the substance over form slogan misses, when used to attack traditional procedures, is that traditional procedures are there in the first place because they serve substantive goals.<sup>15</sup> Let us start by considering this *instrumental* constitutional value that procedure can have – a key concern of the dissent’s opinion.

Most obviously, adherence to formal procedures serves the goal of fairness as between the parties. If the case is confined to what is in the pleadings, then the respondents know what case they have to meet, and both sides are clear about what evidence to lead. Judges disrupt this formal equality if they can reframe the case on appeal.

There are, however, fairly obvious ways to respond to this difficulty if one is willing to be innovative. Multi-stage proceedings on appeal can give parties an opportunity to present argument on new points. Courts may wish to refer the hearing of new issues to another forum if need be. However, the fact that one feels the need for some sort of procedural response – and that it seems important to worry, as the dissent does, about whether the *Maphango* respondent in particular had a proper opportunity to contest the Court’s reframing – suggests that the issue of fairness between the parties has constitutional weight.<sup>16</sup>

We might express this proposition in terms of the FC s 34 right of access to courts.<sup>17</sup> If traditional procedure, based on pleadings, protects a certain level of fairness in dispute resolution, then a change to adopt a more free-wheeling procedure that protects fairness less would constitute a retrogressive step, or a limitation of FC s 34. It would, accordingly, require constitutional justification in terms of FC s 36. *Van der Walt v Metcash* suggests a further argument in terms of

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<sup>15</sup> Fowkes ‘Managerial Judge’ (note 13 above) 235–236. See also, in the context of criminal procedure, *S v Shaik* [2007] ZACC 19, 2008 (1) SACR 1 (CC), 2008 (2) SA 208 (CC) at para 41 (‘[W]hile it is true that the Constitution does not envisage a legal system that places form above substance, procedural rules are there to ensure the fair conduct of a trial by all the parties.’)

<sup>16</sup> See *Maphango* (note 2 above) at para 143.

<sup>17</sup> I call this conscious effort to try and express arguments as constitutional arguments an application of the interpretative premise. Since the arguments considered here are traditionally legal, the application of the premise in this context does not require the normative justification it can require elsewhere. See further Fowkes *Building the Constitution* (note 3 above) especially Chapter 2.

equality, FC s 9, and the FC s 1(c) founding value of the rule of law.<sup>18</sup> According to *Metcash*, parties have a general right to the normal procedure used by courts.<sup>19</sup> Departing from the normal rules of civil procedure would therefore require constitutional justification.

Adherence to procedures also serves the goal of fairness in relation to other actors. Following the normal pleading process permits others to learn about the litigation and join it, especially if it involves constitutional issues. This issue might be especially relevant in a case like *Maphango* where a court reframes a largely common-law dispute as an entirely statutory one in which government actors might be thought to have a more direct interest. As with fairness between the parties, one can readily imagine procedural innovations to respond to these problems; once again, that we feel the need to do so is suggestive of their constitutional weight.

One might read this idea, too, into FC s 34. That argument would run as follows: a plaintiff has the right to have a dispute *resolved*, which is potentially undermined if less care is taken to ensure that relevant actors are part of the process. If so, then the same *Van der Walt* argument would apply. It would mean that a person whose case is reframed receives a potentially less efficacious form of dispute resolution than the standard arrangement. However, both arguments have a more limited bite here. The parties' FC s 34 rights would not be significantly affected unless the absence of other actors prevents the court from being able to resolve the parties' dispute. (It is also unlikely that an outside actor could be that central to the case without it also being true that the parties would have been under an obligation to join that party initially, however they had framed the dispute). The more complete argument here acknowledges the importance of institutional comity. Institutional comity requires notification of interested state actors. Why? The judicial duty to uphold the Constitution requires courts to do so in the constitutionally best manner, and thus to involve all parties whose participation is relevant to the optimal resolution of the issue.<sup>20</sup> In addition, the importance of *perceived* fairness, both in relation to the litigants and in relation to other interested and affected parties, means that there is a further constitutional reason for judges to take steps to maintain the appearance of fairness when they

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<sup>18</sup> *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4, 2002 (4) SA 317 (CC). On the rule of law, generally, see F Michelman 'The Rule of Law, Legality and Constitutional Supremacy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 11. On the place of the rule of law in terms of FC s 1, see J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13.

<sup>19</sup> *Van der Walt* (note 18 above) at para 24.

<sup>20</sup> *Mabaso v Law Society of the Northern Provinces* [2004] ZACC 8, 2005 (2) SA 117 (CC) at paras 13–14. Note that in *Mabaso* the applicant failed to comply with the procedures for notifying the relevant Ministers of a statutory challenge, and the Court cured the defect by notifying the Minister, who indicated her willingness to abide the Court's decision. The Court did, however, indicate that it was only taking this step to cure the applicant's non-compliance because the Rules were new at that stage and that it would 'not ordinarily take steps to remedy the failure by an applicant to comply' with the rule.



depart from the established procedures usually considered ‘fair’ in a particular system.<sup>21</sup>

Finally, one ought to consider the costs in time, legal fees, and the delay in resolving a dispute imposed on litigants by a judicial reframing of the sort conducted in *Maphango*. This issue might be addressed in terms of the same FC s 34 argument. To the extent that traditional procedures are there to narrow, clarify and expeditiously resolve disputes, it would be a retrogressive step or a limitation of FC s 34 to abrogate those procedures in a way that frustrates that effect.

More creatively, we might also express this point in terms of the right to property. If private parties are effectively being compelled to use the litigation that they are funding to serve some broader public, constitutional interest they did not raise, that might be understood to be a deprivation for the purposes of the property right test. Even if such a proposition seems highly speculative, it remains an interesting way to express the limits of the public interest in private litigation.

#### IV CONSTITUTIONAL ARGUMENTS FOR PLEADING AUTONOMY AS A GOOD IN ITSELF

In addition to these instrumental considerations, it is also important to consider the constitutional significance of party autonomy as a good in itself. If civil litigation is an exercise in dispute resolution, preventing self-help, then we might think that its most important function is to give each party a day in court and an opportunity to state their case. Given this understanding, it would be logical to let the pleadings shape the trial: the parties should stand or fall by whatever arguments they chose to advance, just as two boxers are judged by the punches that they actually throw and two students by the exams that they actually write. It would also, by implication, be a mistake to interfere too much in the combat.

But in South Africa today (as elsewhere), we understand the dispute resolution function to have a broader public significance. We will be less willing to accept that a private injustice should go un-remedied just because of a pleading error. We believe the whole society has an interest in avoiding injustice.<sup>22</sup> We also understand civil proceedings to have a law-making function, and we will be unwilling to let this law-making function be distorted by the pleading choices of two private parties. Both concerns are, of course, ultimately constitutional, and

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<sup>21</sup> Woolman puts this two-fold proposition as follows: enhanced inclusion overcomes informational deficits that courts often experience and simultaneously increases the normative legitimacy of the outcome for all parties to a matter. See Woolman *The Selfless Constitution* (note 14 above) eg at 199–202. He thus raises the possibility that novel procedures can maintain or enhance perceived fairness if parties feel that they are being included and listened to. The ‘if’, however, is important, and if a judge begins by departing from the normal procedures that the litigants expect, then she may start off on the back foot in this regard – and must take special care to compensate procedurally as a result, as I argue below.

<sup>22</sup> See S Woolman ‘Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on *Barkhuizen*’ (2008) 125 *South African Law Journal* 10 (Woolman’s argument against unilateral waiver of fundamental rights includes a similar premise that our entire society has an interest in the Court’s construction of any given person’s rights).



we would not accept that the force of the Constitution should depend on how private individuals choose to plead.

Pursued to its logical end, this line of thinking might lead us to treat the pleadings as having no independent force whatsoever. That is, once the litigation is launched, the effect of the parties' pleadings in shaping it would become entirely contingent on the court's view of what would be the best constitutional step to take next.

This logical conclusion is not a merely hypothetical possibility. Public interest litigation in India (PIL), for example, effectively treats pleading in this way at least some of the time. Judges override the wishes of the parties, raise issues *mero motu*, and define the case in terms of the problem to be solved rather than in terms of the legal issues pleaded by the parties. While South African public interest litigation has not reached this stage, judges in this context have shown the same tendency to treat parties' pleading choices as subordinate to the public interest. Decisions such as *Campus Law Clinic* make it clear that the right to bring cases in the public interest is contingent on the court's agreement that it is in the public interest for the case to be framed that way.<sup>23</sup> Indian law goes further. Where the *Campus Law Clinic* Court rejects a public interest application that fails to meet this test, Indian judges are willing to restructure the litigation in line with their view about how the case should, instead, be heard.<sup>24</sup> Some modest signs of this sort of restructuring in the South African case law exist, and the *Maphango* majority offers further support for a court-driven understanding of public interest in the conduct of litigation.<sup>25</sup>

However, since *Maphango* is not a public interest case, can party autonomy be overruled quite so readily? *Carmichele* tells us that judges should consider constitutional points whether the parties raise them or not, in the context of the development of the common law.<sup>26</sup> *Carmichele* is based ultimately on arguments about constitutional supremacy and the judicial duty to give effect to it, which apply generally. *Shilubana* echoed these arguments in the context of developing customary law. The duty to interpret statutes in light of the spirit, purport and objects of the Bill of Rights, specifically, and in terms of the Constitution generally, exists whether or not such arguments feature in the parties' pleadings.<sup>27</sup> So pleadings are not decisive in private cases. But are they *irrelevant*? In other

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<sup>23</sup> *Campus Law Clinic, University of KwaZulu-Natal Durban v Standard Bank of Africa Ltd* [2006] ZACC 5, 2006 (6) SA 103 (CC).

<sup>24</sup> For this argument about *Campus Law Clinic*, as well as a broader survey of the issues in Indian PIL, see J Fowkes 'How to Open the Doors of the Court – Lesson on Access to Justice from Indian PIL' (2011) 27 *South African Journal on Human Rights* 434; Fowkes 'Managerial Judge' (note 13 above) at 237–39, and further sources there discussed. *Maphango's* reframing of the case offers some encouragement to the argument of the former paper.

<sup>25</sup> For example, the Court sometimes calls for argument on points it raises (*Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11, 2006 (6) SA 416 (CC)) and sometimes invites parties to appear as amici (*Shilubana v Nwamita* [2008] ZACC 9, 2009 (2) SA 66 (CC)). There are also, however, decisions showing that the Court remains content to dismiss an application as a non-ideal vehicle for hearing an issue (*Minister of Safety and Security v Van Niekerk* [2007] ZACC 15, 2008 (1) SACR 56 (CC)).

<sup>26</sup> *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) at paras 34–36.

<sup>27</sup> *Shilubana* (note 25 above) at para 48; Michelman 'Rule of Law' (note 18 above); Michelman 'Interpretive Charity' (note 12 above); FC s 39(2).

words, we accept that the parties' powers to frame the case will ultimately always give way to the need to uphold the Constitution. The question is how quick judges should be to supplant the original pleadings with reframed issues. The answer depends in part on how constitutionally important party autonomy is understood to be.

To understand why the way the parties have pleaded might have some constitutional significance, it is again instructive to look at Indian PIL. Sometimes the parties in Indian PIL can seem mere playthings, with the case they wanted to bring reshaped, sometimes against their wishes, by judges. We may be willing to accept this approach as a way to ensure that the broader public interest is served, but we can also readily see why it might be a bad experience for the litigant. We can also see how, to the extent that the original parties did have a real dispute, this kind of free-wheeling approach might not always conduce to its settlement, as distinct from the settlement of issues of broader public significance that it might implicate. I suspect that even those who are willing to accept this result in the public interest context would feel that something has gone wrong if the traditional dispute-resolving aims of litigation were undermined in this way in private disputes.

If so, then we should be receptive to attempts to articulate this interest in constitutional terms. One could conceivably frame this concern in terms of dignity, or freedom of speech. One might also, more creatively, invoke ideas from public law about the importance of process. For example, given that a dispute resolution is an exercise of public power, one might make an *Albutt*-style argument that it is irrational to carry it out according to a procedure that does not serve the purpose for which the power is granted.<sup>28</sup> A procedure that did not settle the parties' dispute, in some rich sense of 'settle', might therefore be considered irrational and unlawful.<sup>29</sup>

However, the most useful and natural way to express this point is again in terms of FC s 34. FC s 34 is the place where we structurally resolve questions about the litigant's possible dispute resolution options. The section asks us to compare standard adversarialism to other forums that might offer different dispute resolution experiences that may be cheaper, more informal, elicit better information, enjoy greater legitimacy, and so on. Arguments about litigation experiences therefore lie at the core of FC s 34 questions about whether given mechanisms are 'appropriate' and the circumstances under which they may not

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<sup>28</sup> *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4, 2010 (3) SA 293 (CC). For a survey of the procedural understandings emerging in *Albutt* and in a range of other contexts, see S Rose-Ackerman, S Egidy & J Fowkes *Due Process of Lawmaking: United States, South Africa, Germany and the European Union* (forthcoming 2014) Chapter 3.

<sup>29</sup> I acknowledge that this suggestion is in some tension with the decision in *Van der Walt* (note 18 above): it arguably resembles the relatively expansive understanding of the minority judgment in that case more closely than it does the majority's view. *Albutt*, however, seems to signal a more expansive approach to procedural fairness in the context of rationality analysis. *Albutt* (note 28 above). See also *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC) at paras 76–77; *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24, 2013 (1) SA 248 (CC) at paras 33–37, 39, 41–45; Rose-Ackerman et al (note 28 above) at Chapter 3; M Murcott 'Procedural Fairness as a Component of Legality: Is a Reconciliation Between *Albutt* and *Masetlha* Possible?' (2013) 130 *South African Law Journal* 260.

be so. It is also a natural place to read in the content suggested by the arguments from dignity, free speech and fair procedure just considered.<sup>30</sup> So imbued, we might understand FC s 34 as a right to meaningful, dignified, objectively satisfying dispute resolution. The upshot is that if we worry about the litigant's experience of the litigation when we are choosing whether to replace traditional adversarialism with resolution in other forums, we should also worry about it when we are replacing traditional adversarial procedures in the ordinary courts with something rather less traditional.

## V CUSTODIAL RESPONSIBILITY

The constitutional arguments for the instrumental and intrinsic value of procedure have important application in a range of circumstances (including, in several respects, in public interest cases as well). But I want first to consider in more detail a particular implication of these arguments in *Maphango*, where the Court decides that it is constitutionally best to override the framing of a case by private litigants.

The traditional model is that parties bear responsibility for their own arguments in private litigation. I suggest that where a court overrides parties' pleadings, and takes over from them the task of shaping the case, it acquires a special custodial responsibility. To the extent that it wishes to arrogate to itself this power, a court must take special account of the parties' interests in its subsequent exercise of that power.

This type of argument should be familiar enough from other contexts. For example, if a party is unrepresented in court, then we relax the normal rule of party responsibility to some degree and expect the judge to take special care to ensure that the unrepresented party gets a fair hearing. The effect of a judicial override of a party's pleadings is analogous because it, too, means that the case is being run in a manner not selected for the party by her own legal professional. A similar judicial obligation to take special care of the party's interests should therefore be understood to arise.

This custodial responsibility might also be understood as the corollary of the court's responsibilities in the context of class actions and public interest cases. In those contexts, the judge is understood to have a responsibility to ensure that the would-be representatives of the class or the public interest act in the best interests of the wider group. This responsibility takes a somewhat different form when a judge in a private litigation reshapes that litigation in order to pursue broader public, constitutional aims. The judge should be seen to have an equivalent responsibility to ensure that the interests which form the underlying

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<sup>30</sup> *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (FC s 1's commitment to the rule of law – and legality – is read together with FC s 34 to ensure that the state carries out its obligations to all parties in the underlying dispute about evictions, property rights, housing, forced removals and a failure by state officials to execute court orders.) See, further, *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16, 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC).

basis for the court hearing the case – the interests of the parties – are served by the proceedings.<sup>31</sup>

There are several signs that the *Maphango* Court feels a degree of such custodial responsibility. The dissent obviously feels the obligation; it just understands no way to discharge it except by adherence to traditional procedures. The majority argues at some length that the Tribunal, with its broad terms of reference, offers a remedy that would serve the interests of both parties.<sup>32</sup> More speculatively, we can also detect in the majority a concern that the tenants may have an important grievance, but not one that the judges feel can be addressed via the common law.<sup>33</sup> That suggests that in reframing the case the *Maphango* Court has the interests of the parties firmly in mind, along with the broader constitutional points about subsidiarity, institutional comity and so forth. This set of concerns can be pleasingly understood in terms of a FC s 34 argument: the majority is overriding the parties' pleading choices in circumstances in which it believes this will, inter alia, best serve their FC s 34 rights.

Finally, the majority acknowledges that the tenants made a decision to withdraw from the Tribunal. It emphasises, however, that they only did so on the grounds that they wanted to focus their limited resources and energy on one forum at a time.<sup>34</sup> The dissent attaches little significance to this detail – formally, a withdrawal's a withdrawal.<sup>35</sup> The idea of custodial responsibility, however, offers an explanation for its significance: it matters that the tenants did not make a decision *against* the Tribunal. The tenants' withdrawal did not reflect a belief that the Tribunal offered an inadequate remedy or was for some other reason unacceptable to them. Sending them back to the Tribunal, is therefore not a particularly serious overriding of their pleading choices.

In this light, the custodial responsibility, rather agreeably, can be seen to grow weaker the less the Court actually contradicts the parties' preferences. Thus it seems weaker where the *Maphango* Court acts in a manner designed to harmonise the parties' interests with the broader constitutional considerations. It also seems weaker the more the Court subsequently complies with their preferences about later steps. Conversely, the responsibility gets stronger the more the situation is one in which private parties are being compelled to litigate a case and take step after step on the public's behalf. Of course, the parties always have the option to

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<sup>31</sup> This argument means that the question of precisely what type of standing a litigant is understood to rely upon might have weighty consequences in a *Maphango*-type scenario.

<sup>32</sup> Indeed, one gets the sense that the Court would have liked to require the parties to undertake the functional equivalent of the engagement remedy it uses in the context of eviction. That it does not simply order engagement is no doubt due to the Tribunal's jurisdiction, which covers rental disputes but (since 2007) explicitly does not include eviction cases – Rental Housing Act s 13(14).

<sup>33</sup> The majority prefaces its discussion of the statutory regulation of rental disputes by stating that 'At common law, there can be no doubt that a lessor was entitled with no let or hindrance to terminate a lease on notice', suggesting a view that the applicants might not find relief in the common law alone. *Maphango* (note 2 above) at para 29. The majority also argues that the statutory remedy is much broader, more nuanced, and better takes account of the interests of both parties, suggesting a belief that the limited provisions of the common law might not encompass the applicants' objections, or, conceivably, adequately embody important interests of the respondent either. *Ibid* at paras 49–53.

<sup>34</sup> *Ibid* at para 45.

<sup>35</sup> *Ibid* at paras 140–143.

withdraw their case. But it would hardly be fair if a private party were prevented from getting her dispute resolved because she decided she could not afford the cumbersome steps foisted upon her on behalf of the public by a judicial reframing of the case. This potential outcome implies that cost considerations should have increasing weight in the Court's mind, and perhaps that the Court will have an escalating obligation to appoint *amici curiae* the more dramatically its reframing serves to complicate or lengthen a case.<sup>36</sup> It also implies that the Court should be more reluctant to reframe issues the longer the case persists, and require a progressively stronger constitutional reason for doing so. We could, as in the criminal law of *autrefois acquit* and *convict*, impose some absolute rule – such as a maximum of one reframing and redirection per cause of action – which would serve to limit the extent to which private individuals can have their cases reshaped in the public interest. But this rule looks too blunt, and also out of step with the flexible 'interests of justice' standard the Court usually invokes. The escalating and context-sensitive idea of custodial responsibility offers a better way to express this concern.<sup>37</sup>

## VI PROCEDURE LEADING UP TO THE *MAPHANGO* DECISION

Armed with these constitutional arguments, and the idea of the custodial responsibility in particular, I turn to consider some of the more specific questions that *Maphango* raises. Let's begin with the procedure followed by the judges in reaching the decision itself. The Court's approach to its own procedures in general has been criticised as insufficiently flexible and creative.<sup>38</sup> The sort of reframing conducted in *Maphango* makes for a fairly straightforward argument for more flexibility: if the Court wishes to reframe cases in constitutionally optimal ways, it must compensate for this choice procedurally.

The most obvious concern is the dissent's argument that the respondent did not get an adequate opportunity to present argument on the remedy ultimately ordered by the Court, because at no point was a stay pleaded. As the dissent points out, if the applicants had asked for a stay in the Constitutional Court, they (and the Court) would have been firmly required to confront issues of delay and prejudice to the respondent.<sup>39</sup> The respondent would have had an opportunity for dignified protest (or, alternatively, for helpful acquiescence). The fact that the initiative for a stay came from the Court should not rob the respondents of this opportunity, and it does not seem that they had one. The Court did not call for

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<sup>36</sup> On these amici 'in the traditional sense', see G Budlender 'Amicus Curiae' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition 2005, OS) at 8–1, 8–4.

<sup>37</sup> This flexible approach also better accommodates the fact that the *timing* of reframing, too, is a matter of degree: it can occur (or start to) at various stages of litigation after the close of pleadings, including in earlier courts. Potential prejudice to the parties is presumably reduced the earlier this occurs, and thus the custodial responsibility of the relevant judges will be proportionally weaker.

<sup>38</sup> See sources cited above in Fowkes 'Managerial Judge' (note 13 above) at 240; and Fowkes 'Indian PIL' (note 24 above) at 462–463.

<sup>39</sup> *Maphango* (note 2 above) at paras 104, 110–111, 136.



further argument on the question of the stay, and it appears that the issue was not extensively canvassed at the hearing.<sup>40</sup>

The most overt defense of this approach appears in the concurrence of Froneman J. He argues that the matter had to be recast as a statutory matter, asserts in so many words that this caused the respondents no prejudice, and also notes that the course taken was the least prejudicial to the respondent (compared to a referral back to the High Court or dismissal of the relief ordered by the SCA).<sup>41</sup>

That these arguments are made shows some awareness on the part of the Court of the procedural stakes of its reframing, but they are at best a partial answer to the constitutional arguments I have articulated. It shows, at most, that the Court was concerned with the impact of its decision on the parties, and anxious that the procedure followed not be perceived as objectively unfair. The custodial responsibility demands more, however. Hearing from the respondent regarding the reframing represents a constitutional good in itself. The Court's approach also neglects subjective perceptions of fairness, which are naturally implicated when a court takes a novel procedural step without fully hearing both parties on it.<sup>42</sup>

Perhaps the *Maphango* majority simply thought it unnecessary to call for further argument on the issue of the stay. Perhaps the judges saw referral to the Tribunal as tantamount to an appeal court's referral of a matter back to the court of first instance for re-hearing in light of the legal findings made on appeal. The parties would not usually be entitled to be heard in relation to that routine step (and it

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<sup>40</sup> I have not yet, at time of writing, had an opportunity to review the recording of the public hearing itself, having somewhat surprisingly been informed by the Registrar's Office of the Constitutional Court that these recordings may only be accessed by the public on written application placed before the Justices. However, email communication with counsel confirms that the issue was not extensively canvassed at the hearing, particularly since most of the discussion on the Tribunal's jurisdiction appears to have occurred only in the applicant's reply (see note 5 above). The simple fact of the dissent's concerns bears this out. The impression of worrying procedural uncertainty is further confirmed by the fact that this type of situation is not confined to *Maphango*. In *President of the Republic of South Africa v M&G Media Ltd* [2011] ZACC 32, 2012 (2) SA 50 (CC), for example, the Court conducted a similar constitutional reframing of a case and referred it back to the High Court, while hearing from the respondents only on some aspects of this decision. See O Ampofo-Anti & B Winks 'There and Back Again: The Long Road to Access to Information in *M&G Media v President of the Republic of South Africa*' (2013) 5 *Constitutional Court Review* 465.

<sup>41</sup> *Maphango* (note 2 above) at paras 153–157.

<sup>42</sup> The process in *Maphango* can be interestingly contrasted with the approach in *De Beer v Raad vir Gesondheidsberoepe* 2004 (3) BCLR 284 (T), where Bertelsmann J raised the constitutionality of a statute *mero motu* and, in the fullest discussion of the issue in existing case law, set out careful procedural guidelines for such cases. These included consultation with the parties over the framing of the constitutional issue and affording counsel an opportunity to research the issue. On this decision, see M Chaskalson, G Marcus & M Bishop 'Constitutional Litigation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 3, at 3–6 to 3–7. The Supreme Court of Appeal's subsequent judgment in the case concerns the application of the statutory provision (which Bertelsmann J ultimately concluded was not unconstitutional) and does not discuss this procedural question. See *De Beer v Raad vir Gesondheidsberoepe van Suid-Afrika* [2005] ZASCA 115, 2007 (2) SA 502 (SCA). See also *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* [2009] ZACC 8, 2009 (4) SA 222 (CC) (discussing the principles for when a court may raise a constitutional issue *mero motu*).



might be practically problematic if they were), and the majority may have viewed referral to the Tribunal as a multi-institutional version of the same idea.

That reading is not unappealing. But if the majority indeed held this view, then it underestimated the stakes of the decision. The procedure adopted in *Maphango* is also not nearly as routine as a referral for rehearing is. Its implication is that hereafter rental disputes (in Gauteng at least) should go first to the Tribunal. *Maphango* is thus the disruptive decision that calls for a different procedure to be routine, not the decision that itself embodies that new procedure. And even if its procedure were intended to become routine, it certainly was not routine at the time of decision. It is when courts do novel things that the most care needs to be taken to preserve fairness and the perception of it. The custodial responsibility demanded more of the *Maphango* majority here.

## VII PROCEDURE AFTER THE MAPHANGO DECISION

The procedural details of the steps that were to follow the Court's ruling also take a little working out. The order postponed the appeal to give the tenants an opportunity to approach the Tribunal. It held that if no approach were made to the Tribunal, the appeal would fail. It did not decide what should happen if the tenants did approach the Tribunal and they or the landlord wished to protest the result. However, it did state that they would be able to return directly to the Constitutional Court.

As it turned out, the applicants did approach the Tribunal, and thereafter the case was settled. But given that the *Maphango* Court crafted its order without knowing the subsequent outcome, it is important to consider the procedural implications of the approach it chose.

Let us start with the first possibility: that the applicants do not approach the Tribunal and the appeal fails. The majority made no ruling that the SCA was right about the common-law questions, so on what basis does the appeal fail? One could argue that the majority is wrong and that the appeal should not be thought to fail in these circumstances. If that were the position, then any party could nullify a decision by the Court to redirect a case to another forum by simply declining to go and then arguing that this revives the original appeal questions. The better answer, therefore, is that *Maphango* is a *procedural* ruling. A failure by the applicants to take the next procedural step articulated by the Court is like any other serious procedural breach: ultimately, grounds for resolving the case against the offending party.<sup>43</sup>

What then of the second possibility, that the tenants do approach the Tribunal and it issues a decision, but one of the parties is dissatisfied with it? *Maphango* says that the parties are entitled to return to the Constitutional Court. This anticipated scenario looks sensible. All the judges agree that it would be cumbersome and unduly burdensome to require the applicants to begin again in the High Court, when the Court's decision had already imposed additional costs and delays on them. It is

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<sup>43</sup> *Giddey* (note 1 above) at para 16 ('[F]or courts to function fairly, they must have rules that regulate their proceedings. Those rules will often require parties to take certain steps on pain of being prevented from proceeding with a claim or defence.')

also sensible for the further reason, not noted by the judges, that some rather tangled questions of jurisdiction and *functus officio* arise if the High Court were to be asked to consider a different legal framing of the same cause of action on a matter it and a superior court had already pronounced upon in judgments still the subject of an unresolved appeal.

That said, however, the right to return to the Constitutional Court has its own complexities. The *Maphango* ruling holds that the case should be resolved in terms of the statutory mechanism. So if the matter were to return to the Court, it would be resolved within the framework of those statutory terms, and it would be those substantive questions that the Court would have to resolve – in light of the Constitution – in order to finally dispose of the appeal. But these questions are not the questions the High Court and the SCA decided. So the Court would be deciding the new questions without the benefit of decisions by other courts, something it usually considers undesirable.<sup>44</sup> How is *Maphango* to be reconciled with this standard rule?

The implication might be that the Court should only reframe a case on appeal and redirect it outside the ordinary courts if it would be willing to hear the issue directly, in terms of the usual direct access test, and should the parties be dissatisfied with the outcome in the alternative forum. But *Maphango* offers no hint of this line of thinking. In any case, this route seems to curb unduly the subsidiarity considerations that favour reframing. Those considerations do not go away just because a case does not meet the Court's stringent direct access test. Conversely, the implication might be that the Court should grant direct access much more generally than usual when it reframes cases. But again, why exactly should this be so? The Court has principled reasons for its direct access test, and whatever their merits, those reasons also do not go away just because subsidiarity considerations in favour of reframing and redirecting a case are present. We might then draw the conclusion that the two constitutional arguments, against direct access and for subsidiarity, are to be balanced against each other. However, the *Maphango* majority gives no sign that it engaged in such a balancing act either.

I suggest that the idea of custodial responsibility provides an answer here. In terms of that argument, the Court acquires special duties to safeguard the interests of the parties when it reframes cases. A decision by the Court to refer a case on appeal outside the ordinary court system imposes burdens on parties, in time and costs and potential new legal complexities, and those burdens will usually be increased if parties are not permitted to return directly to the Constitutional Court. Thus, the custodial responsibility gives the Court a principled constitutional reason to grant direct access more readily in cases it redirects outside the ordinary courts.

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<sup>44</sup> For an overview of the leading cases, see K Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007) Chapter 5 at 5–18 to 5–19.

VIII THE ROLE OF AN APPEAL COURT

Next, what should we make of the dissent's argument that an appeal court should confine itself to resolving the legal questions it has been asked to resolve? The argument has some appeal at first glance. Upon closer scrutiny, it is actually rather weak.

It would, of course, be a worrisome trend if appeal courts began to leave legal points hanging or failed to resolve the legal dispute between the parties. This outcome would *prima facie* be bad for legal certainty and contrary to the constitutional right to dispute resolution. But *Maphango* would only have that result if the matter is not ultimately resolved, whether by the Tribunal or on the Court's further direction if the parties return to it.<sup>45</sup> Assuming the dispute is resolved, it is hard to see why it is very important to the parties that it be resolved in the particular legal terms in which they pleaded it or framed it on appeal. They, presumably, care about the outcome, not the legal details.

One might object that some private parties do care about the particular legal terms used to resolve to a dispute. One might think of repeat players, for example, who may face a recurrent kind of legal dispute in their line of work and want it resolved in a particular way.<sup>46</sup> They might well prefer a legal ruling in terms of common law, for example, to one that required each case to be referred to a new and unfamiliar tribunal with broad and equitable jurisdiction.

This objection looks to have merit – but in *that* case, it seems much more reasonable to override that party's wishes. Consistent with the condition that the resolution of the underlying dispute is itself not being compromised, the party still enjoys the adequate dispute resolution she is entitled to in terms of FC s 34. What she is not entitled to, is the right to set the terms of law reform: she may seek to have a legal point resolved in her favour, but she cannot expect her interests in a particular legal resolution of the case to trump the general imperative to develop the law in a constitutionally optimal manner. A party who prefers a common-law rule to a statutory tribunal may argue for this, but she does not get to trump legislative and judicial determinations to the contrary. A private litigant more concerned with strategic litigation is behaving very much like a public interest litigant, and it is, analogously, more acceptable to make her right to run her case conditional on it being in the public interest for it to be run that way.

For these reasons, Zondo AJ's argument that an appeal court should decide the questions put in front of it does not follow from premises about the parties' legitimate expectations. The argument also does not follow from the decisions he cites in which the Court was reluctant to depart from the pleadings. For one thing, all but one of these decisions involves *one of the parties* attempting to

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<sup>45</sup> The fact that we do not have finality about the legal questions decided by the SCA does not matter, of course, because we *do* have finality that they were constitutionally not the proper questions.

<sup>46</sup> For 'repeat players', see M Galanter 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.

reframe a case on appeal in some way.<sup>47</sup> These can be distinguished from cases like *Maphango*, where *the Court itself* raises the new issues, and in these cases it has shown itself willing to take compensatory procedural steps such as calling for argument and notifying new parties.<sup>48</sup> It is, in principle, perfectly consistent for the Court to have resisted attempts by parties to reframe cases as not serving the interests of justice while deciding that in *Maphango* a reframing would best serve those interests.

This argument would be a good deal weaker if the Court, in response to those earlier attempts by parties to reframe cases, had ruled that it could never consider an improperly pleaded issue. In fact all the decisions the dissent cites recognise exceptions to the rules that they announce. They hold that while constitutional issues should be properly pleaded, the Court has discretion to hear improperly pleaded issues or evidence, exceptionally, where this is in the interests of justice.<sup>49</sup> Indeed, in no less than four of the six decisions that the dissent cites, the Court did not ultimately treat the procedural irregularities in those cases as a bar to considering the new issue or evidence.<sup>50</sup> The strongest support for the dissent is *Bel Porto*, the only case the minority cites in which the impulse to alter the case as pleaded did not come from the parties: there, the majority firmly rejected Ngcobo J's lone suggestion to award relief that the relevant party had not sought at any stage. However, *Bel Porto*, too, accepted that the Court could depart from this rule in exceptional cases, as it had in *Prince*; the majority simply did not think *Bel Porto's* facts warranted such a departure.<sup>51</sup>

Deciding on the precise scope of this sort of exception, and the extent to which it represents an extension of existing common-law procedural exceptions, is an important question that exceeds the scope of this note. The significance of these decisions for *Maphango* is that they show a consistent concern with ensuring that issues are heard properly: with proper argument and factual foundation, and

<sup>47</sup> *Maphango* (note 2 above) at paras 111–114. See *Prince v President of the Law Society of the Cape of Good Hope* [2000] ZACC 28, 2001 (2) SA 388 (CC); *Carmichele* (note 26 above); *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18, 2004 (5) SA 460 (CC); *Phillips v National Director of Public Prosecutions* [2005] ZACC 15, 2006 (1) SA 505 (CC); and *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC). For the exception see note 51 below.

<sup>48</sup> See citations to aforementioned cases (note 25 above).

<sup>49</sup> The cases cover different situations, including attempts to raise new evidence, new constitutional challenges to statutes, and new constitutional points, and so the details of tests set out by the Court differ somewhat as a result, but in all cases it is recognised that the rule admits some flexibility. See *Prince* (note 47 above) at paras 21–23; *Carmichele* (note 26 above) at para 31; *Bel Porto School Governing Body v Premier of the Western Cape Province* [2002] ZACC 2, 2002 (3) SA 265 (CC) at paras 117–119; *Alexkor* (note 47 above) at para 44; *Barkhuizen* (note 47 above) at para 41; *Phillips* (note 47 above) at paras 37–44. In *Phillips*, it might appear to find that failure to plead an issue properly is an absolute bar to the Court's considering it. *Phillips* (note 47 above) at paras 37–39. However, the *Phillips* Court explicitly states that this result is only 'ordinarily' the rule. *Ibid* at para 43 (Court cites passages from *Shaik v Minister for Justice and Constitutional Development* [2003] ZACC 24, 2004 (3) SA 599 (CC) at para 40 which recognise that the rule is flexible.)

<sup>50</sup> See *Prince* (note 47 above) at paras 24–30; *Carmichele* (note 26 above) at paras 50–60; *Alexkor* (note 47 above) at paras 45–46; and *Barkhuizen* (note 47 above) at para 41.

<sup>51</sup> *Bel Porto* (note 49 above) at paras 115–119. Ngcobo J agreed with the majority that the rule to apply was that stated in *Prince* and simply disagreed on its application to the facts of the case. *Ibid* at paras 250–252.

without procedural unfairness or other prejudice to the parties involved. The implication is that *if* the Court decides to address a new issue, notwithstanding that it was not pleaded in the normal way, it must satisfy itself that it can do so without violating these conditions and it must take those steps necessary to ensure that no violation occurs. That implication coheres with the argument made in this note. If *Maphango* is inconsistent with these earlier decisions, then it is because it may not have taken sufficient steps to ensure these conditions were met, as argued earlier. It is not inconsistent with them merely because it is considering issues not raised in the pleadings in the ordinary way.

In light of this, perhaps the dissent's concern is better understood as an argument about judicial accountability rather than one about what procedures parties are entitled to follow and to expect. It might simply be thought better if judges stick to their appeal court jobs and do not go off reframing cases to suit their personal law-reform agendas.

If this account offers the strongest interpretation of the minority's argument it does not ground nearly as strong a conclusion as the one Zondo AJ seeks to draw. Historically, to be sure, common-law systems have considered it vital for judges to stay detached from proceedings until the verdict, but this is hardly a necessity for maintaining judicial accountability. That rule was a product of particular circumstances, including the presence and role of the jury, that have changed. Common-law systems around the world today accept far more active judicial involvement in shaping cases, as the procedures in continental systems have long done.<sup>52</sup> In addition, settled and convincing precedents in South Africa exist for some judicial power to raise constitutional issues *mero motu*.<sup>53</sup>

It is true that this changing judicial role can pose novel problems for judicial accountability. A glance at the Indian jurisprudence, for example, will again show that this possibility is far from hypothetical.<sup>54</sup> But as with its objections about procedural fairness, the dissent offers no reason to think that the constitutionally best way to respond is by sticking to party-controlled tradition. Indeed, it is doubtful that it could. Instead, all it shows is that we have some reason to worry about the implications for judicial accountability of the power to reframe, just as we have some reason to worry about its implications for procedural fairness. This worry should prompt the question: if we are willing to permit judges to reframe cases, what sorts of constitutional limits should they observe when they do? Once again, a theory of custodial responsibility offers a useful answer to this question.

## IX CUSTODIAL RESPONSIBILITY AND SUBSIDIARITY

How should we understand the constraints on the judicial power to reframe private cases? Naturally, one constraint is imposed by the subsidiarity arguments themselves. If they are weak or absent, no constitutional reason exists to reframe

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<sup>52</sup> For further argument on this point, and additional sources to support this proposition, see Fowkes 'Managerial Judge' (note 13 above) and (note 60 below).

<sup>53</sup> See aforementioned sources (notes 22 and 43 above).

<sup>54</sup> See Fowkes 'Indian PIL' (note 24 above) at 453–454, 463 (For further argument on this point, and for additional supporting sources.)

a case and make the parties argue accordingly, and still less to send their case to another forum. However, while this is a crucial constraint, an argument for the importance of reframing cases does not speak to the countervailing need to ensure that the interests of private parties are not lost in the process.

The custodial responsibility has important implications for what a court must consider before it decides to reframe and redirect a case. I hope to have demonstrated that the *Maphango* Court majority has begun to think along these very lines.

A decision to reframe and redirect can impose a variety of potentially prejudicial consequences on parties, over and above the obvious costs in time and money. The decision in *Maphango*, for example, means that what the parties would be entitled to from ordinary courts, after having gone to the Tribunal, would ordinarily only be a review. It also means that if the case had been decided by the Tribunal and one of the parties had been dissatisfied with the result there, but did not wish to incur the further delay of working back up through the courts, they would have had to accept what the Court itself considers an inferior resolution of their dispute: the ultimately decisive legal issues would have been settled by the Court without the benefit of prior decisions by other judges. In both ways, the parties would potentially be getting less than they signed up for.

The custodial responsibility implies that the Court needs to think about all these consequences before it reframes and redirects a case, since they follow necessarily from the choice to do so. It is not enough, in other words, to consider only the issue usually raised as a necessary constitutional constraint on subsidiarity arguments, which is whether the alternative forum itself offers a constitutionally acceptable remedy.<sup>55</sup> The judge must also consider the surrounding consequences, procedural and otherwise, for the whole dispute resolution process that will result from its decision to reframe and redirect the case. Only if the Court makes these sorts of determinations can it pretend to have enquired as to whether its alternative resolution of the dispute will resolve the parties' dispute better, or, if not, that any disadvantages to the parties can be creatively remedied or seen to be outweighed by other constitutional goals. Absent these determinations, it cannot claim that its decision to reframe the case is compatible with the Constitution, especially the parties' FC s 34 rights. The idea of custodial responsibility represents (and calls attention to) this particular element in the constitutional equation in such a case.

## X CONCLUSION

Until the early eighteenth century, English law considered defence counsel in criminal trials an evil to be avoided.<sup>56</sup> Civil jury trial was once considered imperative in England. Over the course of the nineteenth century, it declined and

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<sup>55</sup> This line of argument extends Karl Klare's earlier case for keeping the constitutional adequacy of the alternative forum firmly in view in subsidiarity discussions. See Klare (note 3 above) at 147–152.

<sup>56</sup> J Langbein 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors' (1999) 58 *Cambridge Law Journal* 314.



is now only vestigial.<sup>57</sup> Jury trial in the United States was once thought so essential that it was treated as a constitutional right that could not be limited. Today, the jury trial is considered so cumbersome that the right is circumvented in virtually all cases.<sup>58</sup> At times, common-law judges have been abjured to keep silent until they hand down judgments; at others, to intervene as they deem necessary.<sup>59</sup>

The examples could be multiplied, but the lesson is clear: procedure evolves in response to novel circumstances or different normative conceptions of due process. It would be ahistorical simply to cling to tradition, just as it would also be ahistorical to suggest that the proper response to new pressures is necessarily to remove procedure or reduce it to flexible indeterminacy.<sup>60</sup> Civil procedure is a part of the common law that needs to be constitutionally developed, and a part of the statutory law that needs to be interpreted and applied in accordance with the Constitution. The need to consider the manner of its evolution is a constitutional imperative. *Maphango* contributes significantly to that debate, while also illustrating why we need to have it. The decision primarily shows us that the discussion about the development of constitutional procedure remains in its incipient stages.

What is certain, however, is that *Maphango* reflects the weakening of traditional strong party control of the shape of private cases. Given the majority's decision to act in the face of Zondo AJ's argument, *Maphango* is precedent for the proposition that the traditional conception of the role of an appeal court should not prevent courts from departing from parties' pleading choices when judges decide that it is constitutionally better to frame the case another way.<sup>61</sup> This more flexible approach is to be welcomed. Indeed, where adherence to tradition would imply judges deferring to a private party's constitutionally inferior framing of a case, reframing will come to be seen as nothing less than a judicial duty. But this approach is based, ultimately, on an argument about what best promotes the Constitution. Because issues of procedure and party autonomy have constitutional weight, both instrumentally and intrinsically, they must be part of this determination. The *Maphango* majority, and those who follow it, will not be able to fully justify their decision to take (aspects of) a private case out of the hands of its litigants unless they can conclude that these procedural considerations are outweighed, or unless

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<sup>57</sup> C Hanly 'The Decline of Civil Jury Trial in Nineteenth-Century England' (2005) 26 *Journal of Legal History* 235.

<sup>58</sup> See, eg, J Langbein 'On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial' (1992) 15 *Harvard Journal of Law and Public Policy* 119.

<sup>59</sup> See, eg, J Langbein, R Lerner & B Smith *History of the Common Law: The Development of Anglo-American Legal Institutions* (2009); J Resnik 'Managerial Judges' (1982) 96 *Harvard Law Review* 374. The evolution of these expectations is quite complex. See, eg, R Lerner 'The Transformation of the American Civil Trial: The Silent Judge' (2000–2001) 42 *William and Mary Law Review* 195.

<sup>60</sup> It would also, of course, be foolish to depart from traditional procedures unless we have some reason to think that the proposed alternatives would work better. See, eg, E Hurter 'Seeking Truth or Seeking Justice: Reflections on the Changing Face of the Adversarial Process in Civil Litigation' (2007) *Tydskrif vir die Suid-Afrikaanse Reg* 240; Fowkes 'Managerial Judge' (note 13 above).

<sup>61</sup> It should be noted, however, that the three *Maphango* dissenters continue to take a more restrictive view of the question than their colleagues. See, eg, *Mazibuko v Sisulu* [2013] ZACC 28, 2013 (6) SA 249 (CC) at paras 138–39 (joined in dissent by Mhlantla AJ); *MM v MN and Another* [2013] ZACC 14, 2013 (4) SA 415 (CC) (joined by Nkabinde J).

they can compensate for any prejudice by procedural flexibility and creativity. If judges in this position do not recognise their custodial responsibility and act upon it, their claim to be adopting the constitutionally best course of action will remain in doubt.

# On the Flexible Procedure of Housing Eviction Applications

Michael Dafel\*

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## I INTRODUCTION

I read James Fowkes' article as a call for more judicial honesty when courts elect to venture beyond the confines of the parties' chosen pleadings.<sup>1</sup> He is, of course, in good company. Writing in *Chirwa*, Langa CJ expressed concern with the majority's 'mischaracterisation' of the issues.<sup>2</sup> In that matter, the majority of the Constitutional Court opted to reframe the applicant's dismissal by a state employer as one which should be dealt with in terms of labour law despite the applicant pleading her case in terms of administrative law. The Chief Justice held that '[w]hatever we think of the wisdom of her election to avoid the specialised provisions of the [Labour Relations Act], we must evaluate the claim as it was presented to us.'<sup>3</sup> This line of reasoning keeps faith with South Africa's adversarial system and the need for judicial accountability. Typically, parties are solely responsible for the manner in which they present their case to a judge who in turn is required to limit his or her findings to the evidence and legal arguments presented. This system seeks to safeguard fairness to the parties, and places a check on judicial activism. It constrains judges from unduly arrogating power to themselves by raising issues, *mero motu*, in order to forward their own law reforms.<sup>4</sup>

Fowkes raises this concern of judicial reframing in the context of private party litigation.<sup>5</sup> In essence, he argues for a more principled approach for determining the justifiable extent to which judges may vary the dispute presented by the parties. In this regard, his paper is most useful. He has succinctly set out the possible advantages and disadvantages of bestowing a discretion on judges to

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<sup>1</sup> J Fowkes 'Managerial Adjudication, Constitutional Civil Procedure and *Maphanga v Aengus Lifestyle Properties*' (2013) 5 *Constitutional Court Review* 309.

<sup>2</sup> *Chirwa v Transnet Limited* [2007] ZACC 23, 2008 (4) SA 367 (CC) at para 158.

<sup>3</sup> *Ibid.*

<sup>4</sup> See E Hurter 'Seeking Truth or Seeking Justice: Reflections on the Changing Face of the Adversarial Process in Civil Litigation' (2007) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 240, 242–4; W de Vos 'Developments in South African Civil Procedural Law over the Last Fifty Years' (2002) 11 *Stellenbosch Law Review* 343, 345–6; and W de Vos and DE van Loggerenberg 'The Activism of the Judge in South Africa' (1991) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 592, 594.

<sup>5</sup> The term 'private party litigation' or 'private party dispute' in this article denotes civil dispute litigation where the state is not a litigant.

reframe a case as presented. His article however goes further. Fowkes provides a solution (or at least a framework) for assessing the justifiable parameters of judicial reframing. He argues for the recognition of a theory he has termed the courts' 'special custodial responsibility'. This theory, if it finds application, seeks to reconcile the possible advantages and disadvantages of judicial reframing, and, in doing so, seeks both to inform and limit the powers of judges to recharacterise and redirect the case so that is presented in a more suitable manner.

The central feature of the theory is that judicial reframing is permitted provided that the court procedurally compensates for doing so. For instance, if a court considers that the matter had not been presented in the way it ought to have, then it can opt, if it is justifiable to do so, to reframe the factual and legal questions for answering and solicit new evidence and arguments by means of further hearings, the appointment of *amici curiae*, the joinder of interested parties, or the remittance of the matter to another forum. If I am correct in my understanding, the custodial responsibility theory can be viewed as a balancing exercise where the importance of reframing the case in a more appealing manner is weighed against the costs and inconveniences of requiring additional procedural steps. It is therefore a value-driven and context-specific enquiry.

Fowkes finds traction for his theory in the decision of *Maphango v Aengus Lifestyle Properties (Pty) Ltd.*<sup>6</sup> In this matter, the Court was called upon to assess if a landlord is entitled to an eviction order where it had cancelled residential lease agreements for the sole purpose of securing higher rentals. I will return to the facts and holdings of *Maphango* later. At this stage, however, it requires mentioning that the ground on which the *Maphango* Court decided the matter was not explicitly pleaded as a defence in the initial High Court application. Fowkes believes that the *Maphango* Court, in reframing the case, was acting in terms of what he describes as their custodial responsibility.

I do not share the view that the Court reframed the dispute requiring adjudication in this matter, and I therefore do not consider it necessary to explain the case in terms of a theory or doctrine of custodial responsibility that justifies and details the parameters of judicial reframing. Rather, the procedure adopted and the remedy ordered by the majority of the *Maphango* Court is best explained by the Court's previous housing eviction jurisprudence.

Part 2 focuses on the Court's housing jurisprudence. I conclude that the Court has embraced a generally flexible approach for entertaining housing eviction cases, which is primarily due to the inquisitorial and value-driven legal framework mandated by FC s 26(3) and housing security legislation. This approach not only requires judicial officers to assume a managerial, inquisitorial and fact-finding role. It also requires parties to a housing eviction dispute to engage with one another in a meaningful and honest manner in an attempt to reach mutually acceptable solutions. Both of these innovations which have come to define housing eviction case law depart from the more orthodox civil procedure typically witnessed in private disputes. In Part 3, I offer an alternative reading of *Maphango*. My reading of *Maphango*, and the seeming departure from the initial pleadings, suggests that

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<sup>6</sup> [2012] ZACC 2, 2012 (3) SA 531 (CC).

the Court's approach reflects the flexibility and the inquisitorial nature that is required in housing eviction applications as opposed to a more systematic belief that the Court has the inherent power to reframe cases. Nevertheless, I concede, in Part 4, that some of the features of the custodial responsibility theory proposed by Fowkes may be detected in other decisions handed down by the Constitutional Court.

## II THE FLEXIBLE PROCEDURE OF HOUSING EVICTION DISPUTES

The Final Constitution ('FC') has fundamentally altered the law of evictions in South Africa. Whereas in our pre-democratic society a landowner was entitled to an eviction order at the sight of an unlawful occupier (because it was accepted that landowners had exclusive right to use their land unless consent had otherwise been given), the Final Constitution now places significant limitations on the ability of a landowner to secure an eviction order.<sup>7</sup> In particular, FC s 26(3), which reads '[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances', now entrenches procedural and substantive safeguards to occupiers who, without consent, reside on another's land. Although this provision still permits the eviction of unlawful occupiers, it is clear that eviction may not occur until a court has made such an order having considered all the relevant circumstances. FC s 26(3) therefore bestows a discretion on the courts: it allows a judge to refuse an application for an eviction order if the circumstances of the case militate against the granting of the application.

In addition, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE),<sup>8</sup> which was enacted pursuant to FC s 26(3), provides further procedural and substantive safeguards to persons facing evictions. Like FC s 26(3), PIE not only prohibits evictions without judicial authorisation but also necessitates an enquiry into the relevant circumstances of the case to determine if it is 'just and equitable' to order an eviction. For present purposes, it is not necessary to fully elaborate on the provisions of PIE. However, a few salient features are worthy of mention. PIE requires that an eviction order against unlawful occupiers may only be granted where the court is 'of the opinion that it is *just and equitable* to do so, after considering *all the relevant circumstances*.'<sup>9</sup> PIE prescribes a non-exhaustive list of factors the court should consider during the enquiry. Such factors embrace the rights and needs of the elderly, children, disabled persons and households headed by women.<sup>10</sup> If the unlawful occupiers have occupied the land for more than six months, then the court must also consider the availability of alternative land.<sup>11</sup>

<sup>7</sup> AJ van der Walt *Constitutional Property Law* (2005) 412. See, for example, the Prevention of Illegal Squatting Act 52 of 1951.

<sup>8</sup> Act 19 of 1998.

<sup>9</sup> PIE ss 4(6), 4(7) & 6(1) (emphasis added).

<sup>10</sup> PIE s 4(6) & s 4(7). See also s 6(3).

<sup>11</sup> PIE ss 4(7) and 6(3)(c). In private party disputes, this ordinarily requires the joinder of the state to determine if the state is in a position to provide alternative housing. See, for example, *The Occupiers of Short's Retreat, Pietermaritzburg v Daisy Dear Investments Pty Ltd* [2009] ZASCA 80, 2010 (4) BLCR 354 (SCA) at paras 12–14.

The courts are also free to assess any other relevant circumstance as well as the weight to be accorded to that circumstance. In addition, if a court determines that it is just and equitable to grant an eviction order, then the court also has a broad discretion to determine a just and equitable date for the execution of the eviction order.<sup>12</sup>

*Port Elizabeth Municipality v Various Occupiers*<sup>13</sup> is widely regarded as the leading case on the interpretation of PIE.<sup>14</sup> This matter concerned an eviction application by the state in terms of s 6 of PIE for the removal of approximately 68 people who were residing on privately owned land. The *Port Elizabeth Municipality* Court refused to grant the eviction order because it was not satisfied that it was just and equitable to do so. In evaluating the relevant circumstances of the case, the Court gave particular regard to the following facts: (a) that the residents had occupied the land for a lengthy period; (b) there was no intent to put the land to productive usage; (c) the municipality had not attempted to engage with the occupiers; and (d) the group of occupiers was small, homeless and in need.<sup>15</sup> In addition, the *Port Elizabeth Municipality* Court laid down two procedural elements designed to guide the manner in which housing evictions applications are handled by courts. I discuss these next.

## A 'Active Judicial Management' and the Relaxation of Civil Procedure Rules

One of the most definitive and innovative features introduced in *Port Elizabeth Municipality* is the Court's emphasis that judges should not confine themselves to the traditional umpire role when entertaining housing eviction applications. Sachs J, writing for a unanimous court, held that courts are under a constitutional obligation to consider all circumstances when judging what is just and equitable, and this requires the court to be fully appraised of all the circumstances of the case.<sup>16</sup> The requirement that all circumstances should be in the knowledge of the court leads to the relaxation of civil procedure rules in two material ways.

<sup>12</sup> PIE s 4(8). A similar framework was created in the Extension of Security of Tenure Act 62 of 1997.

<sup>13</sup> [2004] ZACC 7, 2005 (1) SA 217 (CC).

<sup>14</sup> S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 273. *Port Elizabeth Municipality* is concerned with evictions at the instance of an organ of state. I have argued elsewhere that *Port Elizabeth Municipality* also, to a large extent, finds application to evictions sought against non-state actors. See M Dafele 'The Negative Obligation of the Housing Right: An Analysis of the Duties to Respect and Protect' (2013) 3 *South African Journal on Human Rights* 591, 609.

<sup>15</sup> *Port Elizabeth Municipality* (note 13 above) at para 59. See L Chenwi 'Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions' (2008) 8 *Human Rights Law Review* 105, 127–8 (The author summarises the relevant considerations courts should take into account when determining whether to grant an eviction order. Chenwi lists them as follows: manner in which the occupation was affected; duration of the occupation; availability of suitable alternative accommodation or land; reasonableness of offers made in connection with suitable alternative accommodation; timescales proposed; willingness of occupiers to respond to the alternatives offered; extent to which serious negotiations have been attempted; and the gender, age, occupation and health of occupiers.)

<sup>16</sup> *Port Elizabeth Municipality* (note 13 above) at para 32. The Court made this holding in respect to defining the term 'must have regard to' as mentioned in s 6.



First, ‘technical questions relating to onus of proof should not play an unduly significant role in its enquiry’.<sup>17</sup> Eviction applications, the Court reasoned, are not ‘resolving a civil dispute as to who has rights under land law’ but are rather a constitutionally value-driven enquiry as to whether ‘in upholding and enforcing land rights it is appropriate to issue an order which has the effect of depriving people of their homes’.<sup>18</sup> Second, in order to secure the ‘necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it’.<sup>19</sup> In this regard, the *Port Elizabeth Municipality* Court concluded that ‘when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to “have regard” to relevant circumstances’.<sup>20</sup>

In addition to the relaxation of these civil procedure rules, the *Port Elizabeth Municipality* Court continued to state that housing eviction applications may require the courts to assume a more managerial role when justice and equity require:

The court is thus called upon to go beyond its normal functions, and engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its power and the order it might make.<sup>21</sup>

*Port Elizabeth Municipality* therefore stands for the proposition that courts are expected to assume a more inquisitorial, managerial, responsive and fact-finding role to ensure that eviction orders are granted only when it is just and equitable to do so. If judges confine themselves to the more traditional role observed in other adversarial civil proceedings, so the Court held, then courts run the risk

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid. This approach was recently endorsed by the SCA in *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28, 2010 (9) BCLR 911 (SCA) (The SCA rescinded a High Court eviction order on the basis that the High Court did not have regard to all ‘relevant circumstances’ as required by PIE. The applicants, who stood to be evicted, did not appear to defend the eviction application in the High Court application, but the SCA reasoned that the High Court still ought to have enquired about the rights and needs of the elderly, children, disabled persons and households headed by the women as required by PIE.)

<sup>21</sup> Sachs J described the new role of judicial officers as ‘complex, and constitutionally ordained’ in *Port Elizabeth Municipality* (note 13 above) at para 13. The Court’s complex, supervisory role is on display in *Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) (*Joe Slovo I*). However, the procedural remedy the Court introduced necessitated a second round of negotiations and a novel resolution. See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2011] ZACC 8, 2011 (7) BCLR 723 (CC) (*Joe Slovo II*). For further discussion of these two cases, see S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (2013) 326–327, 460–466.

of not fulfilling the ‘delicate task’ entrusted to them by the legislature.<sup>22</sup> The SCA reiterated these words in *Occupiers of Short Retreat*. Jafta JA held that ‘PIE obliges the courts to be innovative and if it becomes necessary, to depart from the conventional approach.’<sup>23</sup>

In conclusion, courts entertaining housing eviction applications are mandated in terms of FC s 26(3) and PIE to consider all relevant circumstances before granting an eviction order. To the extent that this information is obscured or not forthcoming from the parties, courts are required to ascertain this information through other means. Typically, this entails the postponement of the eviction application either to allow for the collection of further information, for further engagement amongst parties, or to order the joinder of other interested parties.

## **B The Duty to Engage**

The second procedural innovation of *Port Elizabeth Municipality* is the Court’s articulation of the state’s duty to engage with unlawful occupiers; and the Court’s holding that the extent and outcomes of the engagement are relevant circumstances in terms of PIE. Following its holding that courts must assume a managerial role, the Court held that ‘one potentially dignified and effective mode of achieving sustainable reconciliation of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions.’<sup>24</sup> The Court reasoned that engagement, like informal discussions and mediation, has the potential to narrow the areas of dispute and facilitate mutual give-and-take. Moreover, engagement processes ‘enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful and good neighbourliness for the future.’<sup>25</sup> The Court concluded:

Given the *special* nature of the competing interests involved in eviction proceedings launched under ... PIE, absent special circumstances it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.<sup>26</sup>

The *Port Elizabeth Municipality* Court also noted that in appropriate circumstances the courts should order that mediation be attempted between the parties before the court itself determines the merits of the eviction application.<sup>27</sup>

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<sup>22</sup> See also Liebenberg (note 14 above) at 278–9 (She argues that *Port Elizabeth Municipality* suggests a ‘fluid, dialogic relationship between property rights and housing rights as opposed to an implacable confrontation between two static, fixed rights’, and that ‘[t]his relational, context-sensitive adjudication of conflicts between rights is one of the features of a transformative approach to the adjudication of constitutional rights.’)

<sup>23</sup> *The Occupiers of Short Retreat* (note 11 above) at para 14 and note 7. It is perhaps worthy to note that Jafta J (having been promoted to the Constitutional Court) seems to depart from this view in *Maphango*, where he signs onto the minority judgment.

<sup>24</sup> *Port Elizabeth Municipality* (note 13 above) at para 39.

<sup>25</sup> *Ibid* at para 43.

<sup>26</sup> *Ibid* (emphasis added).

<sup>27</sup> *Ibid* at para 45.

In *Port Elizabeth Municipality*, the Court ultimately found that an order requiring the parties to engage with one another was not appropriate as ‘much water has flowed under the bridge’.<sup>28</sup> The duty to engage was first ordered in *Olivia Road*.<sup>29</sup> In this matter, the Constitutional Court refused an eviction order on the ground that the City of Johannesburg had failed to enter into meaningful engagement with the unlawful occupiers before initiating the eviction application in the High Court. As a result, the Court issued an interim order that was aimed at ensuring the City and occupiers engaged with each other meaningfully in an attempt to resolve certain of the issues that were raised in the pleadings.<sup>30</sup> This order culminated in an agreement between the City and the occupiers that obliged the City to render the ‘properties “safer and more habitable” in the interim’ and ‘provide all occupiers with alternative accommodation in certain identifiable buildings’.<sup>31</sup>

The *Olivia Road* Court relied on its earlier decision in *Port Elizabeth Municipality* to justify the engagement order. Yacoob J, writing for the Court, summarised the position as follows:

[A]s I have already pointed out, it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. ... The absence of any engagement process would ordinarily be a weighty consideration against the grant of an ejection order.<sup>32</sup>

*Olivia Road* has had a natural ripple effect. In *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands*, the High Court applied the duty to engage to non-state actors seeking to have unlawful occupiers located on private land evicted.<sup>33</sup>

Given that disputing parties are not ordinarily required to enter a dialogically engaging process in a meaningful and honest manner aimed at securing consensus amongst the parties before approaching a court, the *Olivia Road* Court’s articulation of the duty to engage meaningfully in housing evictions cases is a departure from the orthodox rules of civil dispute resolution. Moreover, engagement orders are also a way for courts to manage highly emotionally disputes that have no clear solution. The *Port Elizabeth Municipality* and *Olivia Road* decisions make it clear

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<sup>28</sup> Ibid at para 47.

<sup>29</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC).

<sup>30</sup> Ibid at para 5.

<sup>31</sup> Ibid at paras 24–25.

<sup>32</sup> Ibid at para 21. The *Joe Slovo I* and *II* Courts adopted a similar approach. See *Joe Slovo I* and *Joe Slovo II* (note 21 above).

<sup>33</sup> *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 (3) BCLR 325 (W) at para 33. See also S Wilson ‘Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality’ (2009) 126 *South African Law Journal* 270, 290; Dafel (note 14 above) at 610–611; Woolman (note 21 above) at 323–331, 440–442.

that the duty to engage arises as a result of the ‘just and equitable’ value-driven enquiry required by PIE and FC s 26(3).<sup>34</sup>

### III *MAPHANGO V AENGUS LIFESTYLE PROPERTIES*<sup>35</sup>

It is against this backdrop that the majority’s decision in *Maphango* is best understood. In this section, I first briefly canvass the case’s relevant facts and procedural history. Thereafter, I caution against over-reading *Maphango*, and suggest that the majority’s approach was well in line with the Court’s prior eviction case law. Before commencing with the discussion, it is however important to note that *Maphango* is a procedurally complex matter. The complexity of the case arises primarily from the fact that both the tenants and the landlord initiated different cases in different forums and raised different causes of action. It therefore must be borne in mind that the case concerned two procedural trajectories, but, as the majority of the *Maphango* Court held, the two cases could not be separated as they both dealt with the same factual dispute and legal interest.

#### A The Facts and the Decisions<sup>36</sup>

*Maphango* was primarily concerned with a decision of a landlord to cancel residential lease agreements for the sole aim of securing higher rentals. Following renovations to the apartment building, the landlord believed it necessary to increase the rent. The increases fell somewhere between 100–150 per cent over the existing rentals. This escalation was necessary to cover the overhead costs and secure a reasonable rate of return. However, the lease agreements contained rent escalation clauses that only permitted increases of rentals at a rate of between 10–15 per cent per annum. In order to evade the clauses, the landlord elected to terminate the lease agreements and offer the tenants new lease agreements that were similar to the original agreement save for significantly higher rentals. Some of the tenants, who could not afford the higher rentals, believed they were at risk of being rendered homeless.

The tenants, aggrieved by the actions of their landlord, lodged a complaint with the Gauteng Housing Tribunal. They alleged that they were threatened with eviction without a court order and subject to unfair and exploitive rental and service charges. The Tribunal has jurisdiction to entertain disputes, which may be lodged by either the landlord or the tenant, involving conduct that constitutes an ‘unfair practice’. The term ‘unfair practice’ is defined broadly to include ‘any

<sup>34</sup> Cf Woolman (note 21 above) at 260–292, 318–357, 422–480 (Contends that the trend toward meaningful engagement reaches across a broad swath of substantive provisions in the Bill Rights – including political participation rights, the right to equality, the freedom of cultural and linguistic practices and the right to education.)

<sup>35</sup> *Maphango* (note 6 above).

<sup>36</sup> For a more extensive analysis of the facts, arguments and decisions in *Maphango* see SM Maass ‘Conceptualising an Unfair Practice Regime in Landlord-Tenant Law’ (2012) 27 *South African Public Law* 652; MR Phooko ‘A Critical Analysis of the Decision of the Constitutional Court: *Maphango v Aengus Lifestyle Properties*’ (2012) *Obiter* 702; and M Dafele ‘Curbing the Constitutional Development of Contract Law: A Critical Response to *Maphango v Aengus Lifestyle*’ (2014) *South African Law Journal* 271.

act or omission by a landlord or tenant in contravention of the [Rental Housing] Act' or 'a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord'.<sup>37</sup> With respect to the latter part of the definition, the Gauteng regulations of the Tribunal prescribe unfair practice to include, among other things, 'oppressive or unreasonable conduct'.<sup>38</sup>

A finding of an 'unfair practice' by the Tribunal leads to several significant consequences. Two effects are relevant for the case at hand. First, landlords are precluded from cancelling lease agreements in situations which are classified as constituting an 'unfair practice'. Section 4(5)(c) of the RHA stipulates that a landlord may only terminate a lease if the grounds of termination are stipulated in the agreement and furthermore 'do not constitute an unfair practice'. Second, in terms of s 13(4) of the RHA, the Tribunal, upon finding the existence of an 'unfair practice', has the power to order a wide array of remedies. These solutions encompass the power to order compliance with the RHA, refer the matter for investigation to a competent body if it appears there is a contravention of the law, or to make any other order that is just and fair with the aim to terminate the unfair practice. This last-mentioned remedial power includes the power to make any just and fair order, which includes, but is not limited to, ordering the discontinuation of overcrowding, unacceptable living conditions, exploitive rentals, or the lack of maintenance. In addition, the powers of the Tribunal, upon finding that the conduct of either the landlord or the tenant is an 'unfair practice' within in the meaning of the RHA and its regulations, extend to determining the new rental payable. The RHA states that new rental amount should be determined taking into account the prevailing economic conditions of supply and demand, and the need for a realistic return on investment for investors in rental housing.<sup>39</sup>

Before the matter was heard by the Tribunal, however, the landlord instituted eviction proceedings in the High Court. Citing the need to focus on the eviction application in the High Court, the tenants elected to withdraw their claim before the Tribunal. The Tribunal was therefore deprived not only of an opportunity to make a ruling on whether the landlord's actions constituted an 'unfair practice' but also of issuing an appropriate remedy if it reached such a finding.

In the High Court eviction application, the landlord contended that since the lease agreements were lawfully terminated, the tenants were now unlawful occupiers and therefore stood to be evicted. In response, the tenants' principle defence was that the lease agreements were in fact not lawfully terminated and they were therefore not unlawful occupiers. They argued that the landlord acted against public policy as it was unfair to cancel a lease merely to secure higher rentals.<sup>40</sup> In the alternative, the tenants argued that if it was found that the lease agreements were lawfully terminated, it would not be just and equitable in terms

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<sup>37</sup> Section 1 of the Rental Housing Act 50 of 1999 (RHA).

<sup>38</sup> Reg 14(1)(d) and reg 14(2)(e) of the Gauteng Unfair Practice Regulations Notice 4004 of 2001, *Provincial Government Gazette Extraordinary* 124 of 4 July 2001.

<sup>39</sup> RHA s 13(5).

<sup>40</sup> The standard for setting aside an agreed upon contractual provision is a high threshold. See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9B–G. ('[T]he doctrine should only be invoked in the clearest of cases in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds').

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of PIE to order their eviction on the grounds that some tenants would be rendered homeless and other tenants would be forced into lower standards of living. The High Court found that the lease agreements were lawfully terminated, and the tenants stood to be evicted. The High Court did, however, postpone the eviction application of some of the tenants to ascertain if alternative accommodation could be made available by the state. It appears that the High Court did not consider potential findings by the Rental Housing Tribunal to be a relevant circumstance in terms of the ‘just and equitable’ enquiry required by PIE.

On appeal to the Supreme Court of Appeal (‘SCA’), the tenants for the first time raised the ‘unfair practice’ argument in terms of the RHA. Disputing the High Court’s finding that the lease agreements were lawfully terminated, the tenants argued that the landlord was precluded from cancelling the agreement because its decision to cancel the lease agreements for the sole purpose of securing higher rentals constituted an ‘unfair practice’ in terms of the RHA because it amounted to ‘oppressive or unreasonable conduct’. Brand JA, writing for the court, dismissed the argument on two grounds. First, a singular act of cancelling a residential lease cannot constitute a ‘practice’ as the term rather ‘envisages incessant and systemic conduct by the landlord which is oppressive or unfair’.<sup>41</sup> Second, the landlord’s conduct could not in the circumstances be ‘denounced as unreasonable or unfair, let alone oppressive’ because the landlord was running a business venture and was not expected to run at a loss.<sup>42</sup> The tenants did not pursue arguments based on PIE in the SCA.

The tenants appealed the matter to the Constitutional Court. The tenants once again contended that the termination of the lease agreements given the circumstances amounted to an ‘unfair practice’ as it constituted ‘oppressive and unreasonable’ conduct. The lease agreements were therefore never lawfully terminated, and, as a result, the eviction order should be set aside. This contention split the *Maphango* Court.

The majority opinion, authored by Cameron J, emphasised that despite neither the landlord nor the tenant fully appreciating the force of the RHA in litigating their dispute, ‘it would be wrong for this Court to take a narrow view of the matter that ignores the importance and impact of the statute’.<sup>43</sup> The majority therefore proceeded to determine if the applicants’ grievance is in principle capable of resolution by the Tribunal. First, the majority disagreed with the SCA’s interpretation that ‘practice’ cannot denote a singular event because ‘it has long been established in our law that a “practice” may consist in a singular act’ as it accords ‘with the ordinary meanings of the word’.<sup>44</sup> The majority of the court, however, elected not to pronounce on the second ground of the SCA’s dismissal: namely that it was not ‘oppressive or unreasonable’. The *Maphango* majority

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<sup>41</sup> *Maphango v Aengus Lifestyle Properties* [2011] ZASCA 100, 2011 (5) SA 19 (SCA) at para 34.

<sup>42</sup> *Ibid* at paras 25 and 34. This finding was, however, disputed by the applicants. They claimed that the landlord had to prove this contention and had not done so. See Applicants’ Heads of Argument in the Constitutional Court at para 14.

<sup>43</sup> *Maphango* (note 6 above) at para 48.

<sup>44</sup> *Ibid* at para 57.



believed that the Tribunal should make such a determination.<sup>45</sup> The Tribunal should also be afforded an opportunity to make an appropriate order should it find that the landlord's conduct did amount to an unfair practice. At the same time, Cameron J noted that the Tribunal could also determine new rental rates if it finds in favour of the landlord's claim that the current rentals were 'uneconomic and unsustainable'.<sup>46</sup>

As a result, the majority ordered that the tenants (and the landlord) be provided with an opportunity to raise the 'unfair practice' argument before the Housing Tribunal and to allow the Tribunal to determine whether or not the landlord's conduct in cancelling the leases for the sole purpose of securing higher rentals constituted an unfair practice. The basis on which the majority justified the remittal order is important. The majority held that the High Court entertaining the eviction application in terms of PIE, given the underlying nature of the dispute, should have raised the applicability of the RHA itself. Cameron J reasoned that the Tribunal's determination as to whether the landlord's termination of the tenants' leases solely in order to secure higher rates of return constituted an unfair practice would be material to any subsequent decision on whether to grant an eviction order. FC s 26(3) requires that an eviction order be granted 'after considering all relevant circumstances'. A Tribunal's determination that the landlord's termination of the tenants' leases was an unfair practice would certainly qualify as a relevant circumstance.<sup>47</sup>

Despite the procedural complexity of the case, the ratio of the *Maphango* Court was simply that the High Court, instead of granting the eviction orders, ought to have rather 'postponed the eviction application to enable proceedings before the Tribunal to determine whether the termination of the leases was an unfair practice'.<sup>48</sup> It should have done so because such a determination is a 'relevant circumstance' that the High Court was required to consider in order to determine whether the eviction application ought to succeed.<sup>49</sup> This line of reasoning remains true regardless of the fact that the tenants did not themselves raise the relevance of the RHA and the possible findings by the Tribunal.

The minority disagreed with the majority's view on this last point. It concluded that the tenants' failure to raise the 'unfair practice' argument in the High Court precluded them from doing so now. The rationale – alluded to at the outset of

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<sup>45</sup> Ibid at para 58.

<sup>46</sup> Ibid at paras 59–60.

<sup>47</sup> Ibid at para 61.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid at para 62. The majority did also, however, justify the order on another broader ground. Cameron J held that the rule of law requires courts to apply legislation that applies to a dispute and litigants cannot ignore relevant legislation. Ibid at para 48. Furthermore, Froneman J, in his concurring judgment, held that it would be a 'denial of constitutional responsibility for any court to decide a matter without considering legislation where it was aware of applicable legislation. This would be so no matter how the case was pleaded.' Ibid at para 152. Froneman J further held that '[c]ourts deciding constitutional matters may, and in some circumstances are obliged to, make any order that is just and equitable [in terms of section 172(1)(b) of the Constitution]. These powers are not confined by the pleadings.' Ibid at para 153. These holdings seem, however, to be more a response to the minority's decision to exclude consideration of the RHA on appeal on the ground that the applicants did not raise it from the outset.

this reply – is that a time-honoured commitment to procedural fairness demands that defendants should not be required to answer new allegations in appeal proceedings.<sup>50</sup> In keeping with this first line of argument, the minority judgment found it inappropriate to remit the matter back to the Housing Tribunal. Neither party had requested such an order. ‘The Court’, Zondo AJ held, ‘must respect the choices that the applicants made in circumstances in which they had professional legal advice’.<sup>51</sup>

### **B An Alternative Reading of Maphango**

Having outlined the procedural and factual matrix of *Maphango* above, I suggest that, although it is not completely clear from the judgment, the majority’s incorporation of the ‘unfair practice’ argument in the appeal proceedings and issuing of an order which neither party requested is in conformity with the generally flexible approach that is observed in housing eviction cases. The ratio of the majority makes this clear. I do not believe that the majority’s approach is a radical innovation or departure requiring new doctrinal justifications. *Maphango* conforms to the Court’s previous position in such cases as *Port Elizabeth Municipality*. In fact, it is squarely in line with it. It is rather the minority’s failure to recognise the flexible approach that is observed in housing eviction applications to identify and to evaluate all relevant circumstances that fails to keep faith with the Court’s existing housing law jurisprudence.

I would, again, caution against a reading of *Maphango* that suggests that courts are entitled, outside the context of evictions, to raise arguments absent from the parties’ elected pleadings. As a general principle, the court’s flexibility in housing eviction jurisprudence is a result of the express wording of FC s 26(3), their mandate to ensure a ‘just and equitable’ order in terms of PIE, and the severe socio-economic consequences often associated with the loss of housing.

## **IV ‘INTERESTS OF JUSTICE’ AND THE COURT’S BROAD DISCRETION TO DETERMINE ITS OWN PROCESSES**

I now return to Fowkes’ notion of the courts’ ‘custodial responsibility’. I have been unable to identify a purely private party dispute before the Constitutional Court where the Court entertained a wholly new issue on appeal, whether litigant- or court-raised, or where the Court radically departed from traditional adversarial civil procedure. I am therefore reluctant to conclude that there is evidence to support the existence of a custodial responsibility theory at this stage. However, this is not to suggest that the proposed theory has no basis whatsoever. It is rather that the Court elects to justify procedural variation in different terms and on a different basis.

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<sup>50</sup> Ibid at paras 103–14.

<sup>51</sup> Ibid at para 138.

The Court has on several occasions indicated that it possesses a discretionary power to regulate its own processes.<sup>52</sup> Such power may, of course, involve a departure from traditional rules of procedure either on an ad hoc basis, or to create new processes. Deviation from established procedure is, however, a power that must be ‘exercised sparingly’.<sup>53</sup> The Court relies on its power to act in the ‘interests of justice’ – drawn from FC s 173. Section 173 of the Constitution states: ‘The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the *interests of justice*.’<sup>54</sup>

In this regard, Fowkes’ proposed theory may find some support. Given that the custodial responsibility theory seeks to explain procedural variation in private party disputes, I highlight two judgments below, both of which were private party disputes, which discussed the power of the court to alter procedure.

In *Betlane*, Mogoeng J (as he then was) noted that ‘[a]n abandonment of orders does not automatically deprive this Court of its inherent jurisdiction to hear matters which raise constitutional issues of importance, when it is in the interests of justice to do so’.<sup>55</sup> In this matter, the respondent landlord abandoned orders that restrained the applicant tenant from appealing an eviction order. The abandonment, which took place prior to the Constitutional Court hearing oral arguments, resulted in the issue being rendered moot. Despite this, however, the *Betlane* Court suggests that in some instances ‘when it is in the interests of justice to do so’, it may proceed with a matter despite the absence of live case or controversy. This position reflects the Court’s existing jurisprudence on mootness.<sup>56</sup> However, one must read this statement with caution. Not only was this dictum made *obiter*, the Court seems to contradict itself in the exact same paragraph. After stating that the ‘interest of justice’ may well require an issue to proceed after abandonment, the *Betlane* Court in the same breath found that since the issue has ‘now been rendered moot ... it is therefore not in the interests of justice for this matter to be heard’.<sup>57</sup>

The Court also discussed its discretion to determine its own processes in *Pioneer Foods*.<sup>58</sup> Although this matter was concerned with the procedural requirements for certifying a class action, the Court did enunciate certain rules regarding its own regulation of civil procedure. The Court noted that although FC s 34 guarantees the right of individuals to have their dispute entertained by a court of law, the right ‘does not include the choice of procedure or forum in which access

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<sup>52</sup> See *S v Thunzi* [2010] ZACC 12, 2011 (3) BCLR 281 (CC) at paras 49–51; *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* [2006] ZACC 15, 2007 (1) SA 523 (CC) at paras 35–36; *S v Pennington* [1997] ZACC 10, 1997 (4) SA 1076 (CC) at paras 22–23.

<sup>53</sup> *Ibid*.

<sup>54</sup> FC s 173 (Emphasis added).

<sup>55</sup> *Betlane v Shelly Court CC* [2010] ZACC 23, 2011 (1) SA 388 (CC) at para 23.

<sup>56</sup> See, for example, *MEC for Education: KwaZulu-Natal and Others v Pillay* [2007] ZACC 21, 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC) at para 32; *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23, 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC) at para 11.

<sup>57</sup> *Betlane* (note 54 above) at para 23.

<sup>58</sup> *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23, 2013 (5) SA 89 (CC).

to courts is to be exercised'.<sup>59</sup> Jafta J reasoned that the non-inclusion of choice of procedure in the access to court right stems from the fact that FC s 173 bestows on the Constitutional Court, the Supreme Court of Appeal and the High Court 'the inherent power to protect and regulate *their own process* ... taking into account the interests of justice'.<sup>60</sup>

The power of courts to regulate their own procedures does not grant them unfettered discretion to set out whatever procedures they wish. These powers are cabined by the important rider – 'in the interests of justice'. In this regard, two holdings of the Court are important. First, the primary function of any rule of court is to ensure the 'attainment of justice'.<sup>61</sup> Accordingly, the rules must be designed to 'facilitate access to courts rather than hindering it'.<sup>62</sup> Second, rules must allow for flexibility: '[r]igidity has no place in the operation of court procedures'.<sup>63</sup> The *Pioneer Foods* Court reiterated, verbatim, its position in *PFE International*:

Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.<sup>64</sup>

These two cases suggest that the Court is in principle willing to alter traditionally observed civil procedures, and, where they elect to do so, the yardstick for the departure from existing rules is the 'interests of justice'. The Court has indicated that this determination is dictated by the factual predicate of a given case. There may well therefore be instances where the Court deems it necessary to entertain new arguments on appeal or reframe the case so that it is presented in a more appropriate manner. However, when viewed alongside the Court's consistent reluctance to entertain new issues on appeal or to grant direct access, it remains clear that the 'interests of justice' will not readily be invoked to justify a departure from existing rules of civil procedure. As the Court frequently notes in the context of direct access applications, 'exceptional reasons' must exist before it is willing to hear a matter as the court of first and last instance.<sup>65</sup> At this stage, as a general

<sup>59</sup> Ibid at para 28.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid at para 32.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid at para 39.

<sup>64</sup> Ibid quoting *PFE International v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21, 2013 (1) SA 1 (CC) at para 30.

<sup>65</sup> See, for example, *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9, 2005 (1) SA 530 (CC) at para 11. See further *Dormehl v Minister of Justice* [2000] ZACC 4, 2000 (2) SA 987 (CC) at para 4 ('The court states '[s]ince a high court has jurisdiction in constitutional matters and is the court which ought ordinarily to be approached to deal with constitutional matters at first instance, compelling reasons are required to justify a different procedure. An applicant for direct access must establish that there are such reasons, and that the circumstances of the case justify a departure from the ordinary rule, and the granting of direct access.');

and *Bruce and Another v Fleecytex Johannesburg CC* [1998] ZACC 3, 1998 (2) SA 1143 (CC) at para 9 ('The court held that 'compelling reasons are required to justify a different procedure and to persuade this Court that it should exercise its discretion to grant direct access and sit as a court of first instance').

rule, the interests of justice require parties to raise all issues from the outset, and courts should themselves not reframe the case.

## V CONCLUSION

The Constitution Seventeenth Amendment Act of 2012 came into force recently, and the Constitutional Court's jurisdiction now extends to non-constitutional matters.<sup>66</sup> The Court has the jurisdictional competence to entertain an appeal 'on the ground that the matter raises an arguable point of law of general public importance which ought to be considered by' the Constitutional Court.<sup>67</sup> Since the exercise of governmental power invariably raises a constitutional issue – our rule of law and legality jurisprudence tells us so – the Court's jurisdictional extension ostensibly means that it will entertain more common-law disputes between private parties where no particular substantive provision of the Constitution is in play. (Good reasons, as Frank Michelman pointed out long ago, exist to assume that the Court always possessed such plenary powers.) James Fowkes' timing for questioning the role of appeal courts in private disputes is therefore apt. Going forward, his description and analysis of the advantages and disadvantages of allowing and disallowing new matters on appeal, whether raised by the court or a party, is extremely useful.

But let us return to the matter at hand: what to make of *Maphango*? I have read the case far more narrowly than James. FC s 26(3) and the 'justice and equity' enquiry mandated by PIE dictate that courts should have regard to all relevant circumstances before they grant an eviction order. To ensure that all relevant circumstances are placed before the court and that the order is just and equitable, the Constitutional Court has endorsed a flexible, responsive, inquisitorial and managerial process in disputes concerning housing evictions. However, this relaxation of general civil procedure rules, while fitting comfortably with the Court's prior housing eviction jurisprudence, should also, as a general matter, be viewed as limited to eviction cases.

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<sup>66</sup> The constitutional amendment came into force on 23 August 2013.

<sup>67</sup> Constitution s 167(3)(b)(ii).

# The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and E-Tolling in *National Treasury v Opposition to Urban Tolling*

Mia Swart\*  
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‘It is necessary from the very nature of things that power arrests power.’<sup>1</sup>

## I INTRODUCTION

The place of the doctrine of separation of powers in South African constitutional jurisprudence, in particular, and in modern constitutional theory, generally, remains a hotly contested topic. Its application and relevance in particular cases is often unclear.

The issue most recently arose in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (OUTA)*.<sup>2</sup> The case involved the legality of a controversial government decision to fund an upgrade to freeways in Gauteng through the collection of tolls from road-users. The Respondents sought, and were granted, an interim interdict from the North Gauteng High Court. The interdict prohibited the levying and collection of tolls pending further proceedings for final relief as to whether the government possessed the power to declare certain roads as toll roads.<sup>3</sup>

Before the proceedings for final relief could be heard in the High Court, the National Treasury and the South African National Roads Agency (SANRAL) instead sought leave to appeal to the Constitutional Court against the interim relief granted by the High Court. The Constitutional Court took the unusual step

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<sup>1</sup> Montesquieu *The Spirit of the Law* (1748) (trans A M Cohler, BC Miller & HS Stone, 1989) Book XI Chapter 4 155 cited in S Seedorf & S Sibanda ‘Separation of Powers’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition 2005, OS) Chapter 12, 12–7.

<sup>2</sup> *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Road Freight Association Intervening)* [2012] ZACC 18, 2012 (6) SA 223 (CC), 2012 (11) BCLR 1148 (CC) (‘OUTA’).

<sup>3</sup> The final relief would also require a review of the environmental authorisation for the project to upgrade the freeways on the grounds that the decision-maker had not considered the social impact of tolling on various communities upon which it was imposed. Cf *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* [2007] ZACC 13, 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC) at para 82. This aspect did not, however, feature in the Court’s analysis.



of granting leave in these circumstances.<sup>4</sup> It set aside the interim relief granted by the High Court. In so doing, the Court permitted the implementation of e-tolling to continue pending the finalisation of proceedings in which the courts would determine the lawfulness of the underlying decision to allow tolling.

In dealing with the traditional requirements for interim relief, the *OUTA* Court held that the consideration of the so-called ‘balance of convenience’ (which is one of four inter-related requirements for interim relief, dealt with further below) must now consider the extent to which interdictory relief ‘will probably intrude into the exclusive terrain of another branch of government’.<sup>5</sup> Interim relief suspending an exercise of statutory power is ‘competent’, the Court noted, but is only ‘appropriate’ in the ‘clearest of all cases’ and ‘after careful consideration of separation of powers harm’.<sup>6</sup> The Court found that the case before it did not meet this entirely novel, rigorous threshold.

The Court’s cautious approach might be explained by procedural concerns. In interim proceedings, a court will invariably *not* make any definitive finding on whether an exercise of a public power is lawful or not. Interim relief can pose problems. The Court noted that the same sensitivity – to issues of institutional comity – will not necessarily be present when a court ultimately considers final relief reviewing the decision to toll the roads. If those decisions are then found to be unlawful and void, then the Court will grant relief.<sup>7</sup>

*OUTA* is significant for other reasons. The Court, not surprisingly, portrays the body of law regarding the doctrine of separation of powers as being more settled than it is. The *OUTA* Court, in doing so, indicates that, as a general principle, courts should adopt a ‘hands off’ approach when a matter involves policy making and large-scale resource allocation. While that may make sense when a project is in its very incipient stages, the Court, with powers of judicial review under a basic law committed to constitutional supremacy, cannot *simply* defer to the executive because a dispute is complicated. Virtually all private party versus the state disputes that reach the Constitutional Court are public and polycentric – even if the dispute appears binary on its face. A case brought by the *Mail and Guardian* that seeks the release of documents from the state has an effect on the entire body politic. It is, furthermore, trite jurisprudence by now to note that the resolution of virtually every piece of litigation that involves enacted law and government policy will have an effect on the public purse. Need one roll out the tired comparison of the changes to government practice made as a result of FC s 35 – criminal procedure – as to the Court’s hyper-minimalist but still genuine engagement with socio-economic rights – and the attendant costs of each.

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<sup>4</sup> See *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4, 2010 (3) SA 293 (CC), 2010 (5) BCLR 391 (CC) at para 23 (Court held that ‘it will not generally be in the interests of justice for this court to entertain appeals against interlocutory rulings which have no final effect on the dispute between the parties’).

<sup>5</sup> *OUTA* (note 2 above) at para 47.

<sup>6</sup> *Ibid* at paras 47 and 64–66.

<sup>7</sup> *Ibid* at para 64.

That the *OUTA* Court appears to need reminding of the basic contours of the separation of powers doctrine as generally understood in South Africa is apparent from the following remarks by Moseneke DCJ:

Thus the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of executive function and domain. What is more, absent of any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to the budgetary appropriations by Parliament.<sup>8</sup>

The Court's actual practice – over the past 20 years – indicates the truth of Alexander Bickel's observation in relation to the US Supreme Court: the separation of powers doctrine is best understood as a prudential doctrine invoked on an *ad hoc* basis as a way of managing the court's relationship with the political branches.

In matters such as *OUTA*, the budgetary implications and the will of the executive cannot be definitive. A court must, even at the stage of considering interim relief, take serious cognisance of the wide-ranging implications that such a programme has for a panoply of human rights and other constitutional principles. At the same time, we take cognisance of the fact that the Court did not pronounce on the *constitutionality* of the e-tolling scheme, or the lawfulness of declaring certain freeways as toll roads.<sup>9</sup> Nonetheless, in light of the wide-ranging impact of the case on the lives of South African commuters, it is unfortunate that the Court could not seize the initial opportunity to offer a more expansive and sensitive judgment.

Some readers may respond and argue that the nature of interim relief is, in fact, that a court should not pronounce on the substantive merits of an application. However, given the harm the plaintiffs would suffer in the immediate term, a court *is* obliged to view a matter from a rights-based perspective, and not solely on purely procedural grounds. That any harms could be recovered via an enrichment action in the future, as the *OUTA* Court held, fails to take seriously the (*prima facie*) rights violations that made the interim interdict necessary.<sup>10</sup>

## II E-TOLLING CASE: BACKGROUND AND FACTS

E-tolling emerged as a result of a decision taken by the South African Cabinet to improve certain national motorways through the Gauteng Freeway Improvement Project (GFIP). The first phase of the GFIP saw an upgrade of 185 kilometres of the existing freeway network. The second phase will see a further 376 kilometres upgraded and created.<sup>11</sup>

In order to pay for these upgrades, SANRAL saw fit to toll these routes via gantries situated approximately 10km apart along the freeway network. Vehicles

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<sup>8</sup> *Ibid* at para 67.

<sup>9</sup> P de Vos 'E-tolling Judgement: Sorry for Gauteng, but it's Perfectly Lawful' *Daily Maverick* (20 September 2012) available at <<http://www.dailymaverick.co.za/opinionista/2012-09-20-e-tolling-judgement-sorry-for-gauteng-but-its-perfectly-lawful/#.UcbjZTswfKY>>.

<sup>10</sup> *OUTA* (note 2 above) at para 54.

<sup>11</sup> See website of the South African National Roads Agency <<http://www.nra.co.za>>.

would pass underneath these gantries, and transponders fitted to each vehicle would pick up transponders attached to the gantries. The user's account would thereafter be debited with the amount to be paid. Vehicles belonging to non-Gauteng residents, rental vehicles, and those without transponders would be photographed, and presented with an account. Failure to pay would result in hefty traffic fines levied against the owner of the vehicle. Government published draft regulations on 27 May 2013 which would exempt public transport and emergency vehicles from the e-toll system. Owners of minibus taxis, for example, will not have to pay for tolls if they are operating the vehicle for the purposes of public transport.<sup>12</sup> The cost of the entire project is enormous. SANRAL financed the first phase of the project to the tune of R21 billion rand. The Government guaranteed R19 billion of debt.<sup>13</sup>

SANRAL's answering affidavit<sup>14</sup> before the High Court<sup>15</sup> details an extensive public consultation process. This process began in 2003. The MEC for Transport and Public Works introduced the Gauteng Toll Roads Bill (Notice 1880 of 2003)<sup>16</sup> to give effect to a proposed toll road network policy produced in April 1998.<sup>17</sup> In October 2007, the then Minister of Transport officially announced the launch of the GFIP,<sup>18</sup> and on 12 October 2007, the Minister published his notice of intent to toll the proposed sections of the freeway network.<sup>19</sup> In terms of s 27(4)(a) of the South African National Roads Agency Limited and National Roads Act (SANRAL Act),<sup>20</sup> this notice gave an indication of the approximate position of the toll plazas, and invited interested persons to comment and make representations on the declaration and position of the plazas. The public were given 30 days to make these comments, and public authorities were given a further 30 days to comment.<sup>21</sup>

It is most curious that the affidavit makes no mention of the Gauteng Legislature's Bill to build new roads in a collaborative manner with the national and municipal authorities. The Gauteng Roads Plan was specifically designed to cross-subsidise public transport for the poor and to create new arterial roads to better serve the commercial demands of business in the province.

On 4 February 2011, the Director-General of the Department of Transport published the tariffs for the proposed network<sup>22</sup> in terms of s 27(3)(c) of the

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<sup>12</sup> Draft Regulations on Exemptions for the Payment of Tolls on the GFIP Toll Roads, *Government Gazette*, Notice 537 of 2013.

<sup>13</sup> See *OUTA* (note 2 above) at para 3.

<sup>14</sup> Available at <<http://www.oua.co.za/site/wp-content/uploads/2012/05/SANRAL-Answering-Affidavit-final.pdf>> ('Ali Answering Affidavit').

<sup>15</sup> *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd & Others* [2012] ZAGPPHC 63, 2012 JDR 0808 (GNP) ('*OUTA HC*').

<sup>16</sup> Ali Answering Affidavit (note 14 above) at para 11.10.2.

<sup>17</sup> *Ibid* at para 11.10.1.

<sup>18</sup> *Ibid* at para 11.10.6.

<sup>19</sup> *Ibid* at para 11.10.7.

<sup>20</sup> South African National Roads Agency Limited and National Roads Act 7 of 1998.

<sup>21</sup> Ali Answering Affidavit (note 14 above) at para 11.10.9.

<sup>22</sup> Ali Answering Affidavit (note 14 above) at para 11.10.17.

SANRAL Act. Public hearings of a steering committee to address concerns surrounding e-tolling were held on 24 March, 4 April, 5 April and 6 April 2011.<sup>23</sup>

The public outcry against the e-tolling system began in October 2011 when the Minister of Transport instructed SANRAL to halt the tolling process.<sup>24</sup> SANRAL ignored the instruction and announced that tolling would go live in February 2012.<sup>25</sup> On 22 February 2012, the Minister of Finance announced that the e-tolling system would be implemented by 30 April 2012, but with reductions in the toll tariff.<sup>26</sup> On 13 April 2012, a notice was published stipulating the tariffs to be paid. Five days later, a notice entitled ‘Conditions of Toll’ was published – the draft regulations exempted public transport operators.

## A The High Court Decision

By this stage, an NGO, the Opposition to Urban Tolling Alliance (OUTA), had approached the North Gauteng High Court for an interim interdict to restrain SANRAL from implementing the GFIP. The High Court granted the interim interdict.

The High Court began by remarking upon three distinct characteristics of e-tolling. Firstly, e-tolling involves a system of tolling entirely different from long-distance tolling. The former exists within a city-region, and thus the ‘sections of road that have been earmarked for tolling, constitute the main arteries for the movement of motor vehicles in and around the two major cities of South Africa [Johannesburg and Pretoria]... the economic and administrative heartland of the country.’<sup>27</sup> Secondly, due to the lack of adequate alternative public transport, a large number of citizens make use of the proposed toll roads, or at least would be affected by the toll roads. Thirdly, due to the lack of viable alternative forms of transport – including alternative non-tolled roads expressly provided for in the Gauteng Legislature Roads Bill – users of roads would effectively be held captive by the new road toll network. The High Court’s nuanced understanding of the impact of e-tolling tracked the four requirements for an interim interdict set out in *Setlogelo v Setlogelo*.<sup>28</sup>

First. The applicant must establish a *prima facie* right on the part of the applicant to the relief sought. While Prinsloo J expressly refrained from expressing a firm view on the merits of the grounds of review, he acknowledged a reasonable prospect of success on any one of the grounds of review upon which OUTA relied.<sup>29</sup>

Second. The applicant must establish a well-grounded apprehension of irreparable harm if the interim relief is not granted. Prinsloo J referred to affidavits of a wide range of deleteriously effected individuals – from a pensioner who would have to cough up an extra R6 600.00 per annum if e-tolling were to

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<sup>23</sup> Ibid at para 11.10.20.

<sup>24</sup> Ibid at para 11.10.25.

<sup>25</sup> Ibid at para 11.10.26.

<sup>26</sup> Ibid at para 11.10.28.

<sup>27</sup> *OUTA HC* (note 15 above) 17–18.

<sup>28</sup> 1914 AD 221.

<sup>29</sup> Ibid at 26.

be implemented, to a plumber who would be forced to retrench an employee due to the increased costs of travel associated with e-tolling.<sup>30</sup> Prinsloo J found SANRAL's argument unpersuasive that, should the final review application be successful, the tolls collected could simply be refunded to aggrieved motorists.<sup>31</sup>

Third. The balance of convenience must favour the granting of interim relief. The High Court focused on the harm that would be suffered by SANRAL were the interim interdict to be granted. Although that harm would be substantial, the harm that would be suffered by users of e-tolls was, for Prinsloo J, far more burdensome. In addition, the High Court noted that the implementation of the system had *already* been delayed four times. The latest delay occurred a mere two days before judgment was handed down.<sup>32</sup>

Fourth. No other remedy must be available to the litigant. The High Court held that this factor was satisfied because the e-tolling process was not only substantially underway, but veritably complete.<sup>33</sup>

SANRAL and the National Treasury appealed to the Constitutional Court.<sup>34</sup>

### III SEPARATION OF POWERS: THE DISTINCTIVE SOUTH AFRICAN MODEL

The justification for the doctrine of separation of powers is well established. The separation of powers should prevent the over-concentration of power in any one branch of government.

Constitutional Principle VI<sup>35</sup> in the Constitutional Principles in the Interim Constitution,<sup>36</sup> provided as follows: 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' Constitutional Principle VI was, however, silent as to the exact model of separation of powers to be established by the Constitutional Assembly. The doctrine acquired distinctly more substantial character in the *First Certification Judgment*:

<sup>30</sup> Ibid at 12–14.

<sup>31</sup> Ibid at 26.

<sup>32</sup> *OUTA HC* (note 15 above) at 28.

<sup>33</sup> *OUTA HC* (note 15 above) at 29.

<sup>34</sup> Separate litigation was launched to review the *actual* decision to launch e-tolling. It is not necessary to consider this decision; suffice to say that the review application by OUTA was dismissed by the High Court in December 2012. *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* [2012] ZAGPPHC 323. OUTA appealed the decision to the Supreme Court of Appeal. The SCA noted that the 'main focus of the debate on the papers was directed at SANRAL's election of e-tolling as a method of funding the GFIP. More particularly, the main thrust of the applicant's case was that SANRAL should have adopted a method of funding other than toll.' *Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited* [2013] ZASCA 148 ('*OUTA SCA*') at para 17. The SCA concluded, primarily, that the challenge to e-tolling was brought too late: The SCA noted that five years had elapsed since the impugned decisions were taken and that, during those five years, 'things have happened that cannot be undone... the clock cannot be turned back to when the toll roads were declared, and I think it would be contrary to the interests of justice to attempt to do so.' Ibid. While the judgment focused primarily on issues of procedure, the judges were aware that its judgment would inevitably have a 'deleterious effect on funding so desperately needed by health care, educators, pensioners, those dependant on social grants, and so forth.' Ibid at para 33.

<sup>35</sup> The Constitutional Principles were contained in the Interim Constitution Schedule 4, incorporated by a reference under the Interim Constitution s 71(1)(a).

<sup>36</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

Within the broad requirement of separation of powers and appropriate checks and balances, the Constitutional Assembly was afforded a large degree of latitude in shaping the independence and interdependence of government branches. The model adopted reflects the historical circumstances of our constitutional development.<sup>37</sup>

The negotiators of the Final Constitution insisted on the clear *existence* of separation of powers in the final text. It is, therefore, somewhat surprising that the phrase ‘separation of powers’ is nowhere to be found. However, the very structure of a state predicated upon the doctrine can be found throughout the Final Constitution.<sup>38</sup>

What then is our South African form of separation of powers? The *First Certification Judgment* offers an initial response when it notes that although no universal model of separation of powers exists,<sup>39</sup> an absolute separation of powers is not desirable and that the provisions outlining the functions and structures of various organs of state and their respective independence and interdependence are explicitly laid out in the text.<sup>40</sup> The *Dodo* Court later cited with approval the remark by Laurence Tribe: ‘What counts is not any abstract theory of separation of powers but the actual separation of powers “operationally defined by the Constitution.”’<sup>41</sup>

In the view of *Seedorf* and *Sibanda*, the Court has, when necessary, used the ‘distinctiveness’ of the South African model to deviate from the review standard used in other countries.<sup>42</sup> They are of the view that the Court has followed a ‘pick and choose’ approach.<sup>43</sup> This approach essentially forms part and parcel of a greater ‘constitutional project’, in which it is believed that a fuller realisation of rights can and should be achieved over time – not only by the judiciary, but also by the executive and the legislature. The approach also recognises the seemingly

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<sup>37</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (‘*First Certification Judgment*’) at para 112.

<sup>38</sup> See, for example, FC s 92(2), which indicates that members of the Cabinet are ‘accountable collectively and individually to Parliament for the performance of their functions’. In terms of FC s 92(3)(b), Cabinet members are compelled to provide Parliament with full and regular reports concerning matters under their control. In addition the legislature has the power to remove the President and indirectly the Cabinet (which is presidentially appointed) under FC s 89.

<sup>39</sup> *First Certification Judgment* (note 37 above) at para 108 (‘There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government over another, there is no separation that is absolute.’)

<sup>40</sup> *Ibid* at paras 110–11.

<sup>41</sup> L Tribe *Constitutional Law* (2000, 3 ed) 127. This paragraph was cited with approval in *S v Dodo* [2001] ZACC 16, 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 17; and *Van Rooyen & Others v State & Others (General Council of the Bar of South Africa intervening)* [2002] ZACC 8, 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 34.

<sup>42</sup> *Seedorf* & *Sibanda* (note 1 above) at 12-36. The idea of a distinctively South African model that would be developed over time was emphasised by Ackermann J in *De Lange v Smuts* [1998] ZACC 6, 1998 (3) SA 785 (CC) at para 60.

<sup>43</sup> *Ibid*.



fragile institutional position of the Court.<sup>44</sup> Lest its power be wrestled away by a one-party-dominant legislature, a sensitive executive or a dissatisfied public, it generally tiptoes through the interpretation and enforcement of rights in a way that does not undermine the legislative or executive process.<sup>45</sup> On other occasions, its members are more outspoken. In extra-curial remarks in 2010, Chief Justice Ngcobo pointed out that the Constitutional Court is the final arbiter when it comes to deciding whether a branch of government has exercised its powers in accordance with the Constitution or not: 'It is a necessary component of the doctrine of the separation of powers that courts have a constitutional obligation to ensure that the exercise of power by the other branches of government occurs within constitutional bounds.'<sup>46</sup>

As Seedorf and Sibanda recognise, the formal notion that a completely independent legislature controls an independent executive is illusory.<sup>47</sup> The departure from a model of strict division between the branches is also evident in the overlap of personnel. It is not at all unusual in a democracy that the executive, for example, also comprises members of the legislature. It is also not unusual in a democracy that an effective balance of power exists in a legislature. This state of affairs has been true in South Africa over the first 20 years of multiparty constitutional democracy. In South Africa, the system reflected in the text and worked out in practice results in an executive that holds far more power than the legislature: indeed, thus far there has been little practical separation between the legislature and the executive in the national sphere of government. For this reason, citizens often turn to the judiciary as a check on power wielded by the national legislature and national executive.

The Court's attitude to the separation of powers was shaped not only by 'the large degree of latitude' described in *First Certification Judgment*, but also by the presence of socio-economic rights in the Bill of Rights. By including socio-economic rights in the text of the Constitution, the drafters committed South Africa to a non-absolute model of separation of powers. Judges are permitted to decide whether

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<sup>44</sup> In an address to the National Assembly on the occasion of bidding farewell to former Chief Justice Sandile Ngcobo, and welcoming Chief Justice Mogoeng Mogoeng, President Jacob Zuma illustrated the fragile position the Court finds itself in reiterating government's views that courts should not interfere with the work of the Executive, 'especially with regards to policy formulation', because 'the Executive must be allowed to conduct its administration and policy making work as freely as it possibly can', and also because 'we must not get a sense that there are those who wish to co-govern the country through the courts when they have not won the popular vote during elections. This interferes with the independence of the judiciary.' Available at: <<http://www.thepresidency.gov.za/pebble.asp?relid=5159&t=79>>.

<sup>45</sup> See, especially, T Roux *The Politics of Principle: The First South African Constitutional Court 1995–2005* (2013).

<sup>46</sup> S Ngcobo 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) 22 *Stellenbosch Law Review* 37 at 40. See also Jaco Barnard-Naude 'Zuma Reignites Separation of Powers Debate' *Thought Leader* (2 November 2011), available at <<http://www.thoughtleader.co.za/jacobarnardnaude/2011/11/02/zuma-reignites-separation-of-powers-debate/>>.

<sup>47</sup> Seedorf & Sibanda (note 1 above) at 12-15. Notwithstanding the institutional separation of Parliament and the national executive, the Constitution makes provision for the involvement of the executive in the legislative function by allowing members of the Cabinet to initiate and introduce legislation in Parliament (s 73(2)). The President also enjoys the power to summon Parliament to an extraordinary sitting to discuss special business (s 63(2)).

the legislature and the executive have done enough to progressively realise rights to housing, health, water, food and social security.

#### IV RECENT CASE LAW ON THE SEPARATION OF POWERS

##### A Non Socio-Economic Rights Cases

In *DPP Transvaal v Minister of Justice and Constitutional Development*,<sup>48</sup> Ngcobo J repeated the proposition that it is the executive's duty to develop policy and to determine what should be incorporated in a policy:

It is not ordinarily the function of [courts]... 'to tell the executive how to formulate policy. To do so is to interfere in the functioning of the executive. The function of the courts is to ensure that the executive observes the limits on the exercise of its power.'<sup>49</sup>

Similarly, in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* the Court warned that courts should be slow to interfere with the constitutionally mandated powers of coordinate branches of government.<sup>50</sup> Moseneke DCJ stated that the separation of powers doctrine 'must find the careful equilibrium that is imposed on our constitutional arrangements by our peculiar history.'<sup>51</sup> He then explained:

[I]t must ensure effective executive government to minister to the endemic deprivation of the poor and marginalised and yet all public power must be under constitutional control. Our system of separation of powers must give due recognition to the popular will as expressed legislatively provided that the laws and policies in issue are consistent with constitutional dictates.<sup>52</sup>

Moseneke DCJ's acknowledgment that all public power is subject to constitutional control is significant, if now trite law.<sup>53</sup> He acknowledges that courts will

<sup>48</sup> [2009] ZACC 8, 2009 (4) SA 222 (CC).

<sup>49</sup> *Ibid* at para 184.

<sup>50</sup> [2010] ZACC 6, 2012 (4) SA 618 (CC).

<sup>51</sup> *Ibid* at para 91.

<sup>52</sup> *Ibid*.

<sup>53</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC) and *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* ('Pharmaceutical Manufacturers') [2000] ZACC 1, 2000 (2) SA 674 (CC) at para 33 stand for the now well-established proposition that: 'The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the 'adoption of the Interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. See also *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4, 2002 (4) SA 317 (CC). On the rule of law, generally, see F Michelman 'The Rule of Law, Legality and Constitutional Supremacy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 11. On the place of the rule of law in terms of FC s 1, see J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13. Michael Bishop and Alistair Price have recently developed legality or rule of law jurisprudence in new and sophisticated ways that take their cue from Professor Michelman's work. See M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 1; A Price 'The Content and Justification of Rationality Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 37. *International Trade Administration Commission v SCAW* (note 50 above) at para 24.

occasionally have to interfere in questions of policy: even if they only do so in terms of rationality review. Moseneke DCJ then observes that courts not only have a right to intervene but that they had a *duty* to do so to prevent violations of the Constitution.<sup>54</sup>

The Court in *Doctors for Life International* echoed the above position.<sup>55</sup> The *Doctors for Life* Court adopted a substantive understanding of the duties underlying political rights in the Constitution and recognised that those rights can impose positive duties on the state. Ngcobo J developed a rich tapestry of jurisprudential reasoning in giving content to rights to ‘public participation’. He had regard to the historical context<sup>56</sup> of the rights and the cultural backdrop of *lekegotlha/bosberade/imbizo*.<sup>57</sup> He also offered an extensive appraisal of international and foreign law.<sup>58</sup> The multiplicity of considerations invoked in this case ensured that the content of those rights and provisions which require public participation was amply developed. These developments – and the strictures placed on coordinate branches – did not result in antagonism towards the other spheres of government. It constituted, instead, a nuanced dialogue with other organs of state as to how the other branches could develop the meaning of the apposite rights and provisions.<sup>59</sup>

## B Socio-Economic Rights Cases

The reach of socio-economic rights jurisprudence in South Africa has been both lauded and criticised. Commentators such as David Bilchitz have strongly criticised the Court for failing to give meaning to socio-economic rights because of its reliance on reasonableness in respect of measures taken to implement the goals of such rights.<sup>60</sup> Marius Pieterse suggests, in a different key, that post-1996 courts have developed a unique model of separation of powers to engage socio-economic rights – one dramatically different from the basic model offered by Locke and Montesquieu. He argues that courts are ‘constitutionally obliged to pronounce on the validity of legislation and policy in the socio-economic sphere. To the extent that imposing such a mandate on the judiciary may imply a derogation from participatory democracy, such derogation has irrevocably taken place. Denying this reality would be counterproductive.’<sup>61</sup>

On the other hand, the Court’s focus on reasonableness has been welcomed as a ‘good doctrinal basis for a transformative interpretation of socio-economic

<sup>54</sup> Ibid at para 92.

<sup>55</sup> *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11, 2006 (6) SA 416 (CC).

<sup>56</sup> Ibid at paras 112, 174 and 244.

<sup>57</sup> Ibid at para 101.

<sup>58</sup> Ibid at paras 90 to 109.

<sup>59</sup> See T Roux ‘Democracy’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 10.

<sup>60</sup> See D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2008) 176–177.

<sup>61</sup> M Pieterse ‘Coming to Terms with Judicial Enforcement of Socio-economic Rights’ (2004) 20 *South African Journal on Human Rights* 383, 404.

rights'.<sup>62</sup> The key to the Court's understanding of government's responsibilities in respect of socio-economic rights is the notion of reasonableness. The wording is derived from those sections of the Bill of Rights which require the state to take 'reasonable measures' to achieve the purpose of the right. The Court in *Grootboom*<sup>63</sup> sought to give meaning to this idea of reasonable measures, saying that these would be 'balanced and flexible',<sup>64</sup> require 'continuous review',<sup>65</sup> and could not exclude a 'significant segment of society'.<sup>66</sup>

In defining 'reasonableness' so broadly, the Court in *Grootboom* was mindful of its perceived role within the three coordinate branches of government. In analysing the actual policy at play, it was diplomatic in its review of the state's housing obligations. It acknowledged that, whilst the state has faced major difficulties in the implementation of housing in some areas,<sup>67</sup> it had made significant strides.<sup>68</sup> But it did not refrain from evaluating government policy. In particular, it found that the policy did not provide for relief for those in desperate need,<sup>69</sup> such as those denied access to housing due to evictions or natural disasters. The Court even delved into the use of provincial budgets and held that it was essential that a reasonable part of the national housing budget be devoted to those in desperate need, even as it stressed that the precise allocation of such budget was for national government to decide.<sup>70</sup> The Court further found that effective implementation was required for the fulfilment of the right, requiring national government to at least plan, budget and monitor for the fulfilment of immediate needs and the management of crises.<sup>71</sup>

In *TAC 2*,<sup>72</sup> the Court was tasked with determining the reasonableness of the state's policy towards the provision of nevirapine. The Court did not shy away from evaluating the policy. It looked at issues around the efficacy of the drug itself,<sup>73</sup> the resistance posed by the drug,<sup>74</sup> the safety of the drug,<sup>75</sup> the capacity of government in implementing the policy in respect of the drug,<sup>76</sup> the facilities available for the implementation of the policy,<sup>77</sup> as well as the availability of formula-feed in public hospitals as a substitute for breast-feeding.<sup>78</sup> These

<sup>62</sup> See C Steinberg 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-economic Rights Jurisprudence' (2006) 123 *South African Law Journal* 264.

<sup>63</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46 (CC).

<sup>64</sup> *Ibid* at para 43.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid* at para 53.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid* at para 66.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid* at para 68.

<sup>72</sup> *Minister of Health & Others v Treatment Action Campaign & Others* [2002] ZACC 15, 2002 (5) SA 721 (CC).

<sup>73</sup> *Ibid* at paras 57–58.

<sup>74</sup> *Ibid* at para 59.

<sup>75</sup> *Ibid* at paras 60–64.

<sup>76</sup> *Ibid* at para 65.

<sup>77</sup> *Ibid* at para 84.

<sup>78</sup> *Ibid* at para 91.

considerations would normally fall exclusively within the domain of the executive. But the Court found that if a court should hold that the state has failed to meet its constitutional obligations:

... it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.<sup>79</sup>

The Court accordingly ordered the government to remove the restrictions that prevented nevirapine from being made available at public hospitals and clinics, as well as *permit* and *facilitate* the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission.<sup>80</sup> Although the order was premised on allowing government to adapt its policy in accordance with its constitutional obligations, and despite the fact that the order has been criticised convincingly for its lack of specificity,<sup>81</sup> it nevertheless spearheaded an eventual change in policy. The order demonstrates the transformative power of the Court, and the fact that the judiciary can play an effective role in the development of policy more generally.

In *Blue Moonlight*<sup>82</sup> the Court took the City of Johannesburg's budgeting ability to task. It contended that 'it is not good enough for the City to state that it has not budgeted for something, if it *should* indeed have planned or budgeted for it in the fulfillment of its obligations'.<sup>83</sup> The case turned on the reasonableness of the City's housing policy in respect of its provision for temporary housing in the event of evictions by private owners. The policy simply did not provide for such housing in this regard – it only applied to evictions instituted by the City. The Court then held that this differentiation in the City's policy between relocations undertaken by the City and those evicted by private landowners was unreasonable and therefore constitutionally infirm.<sup>84</sup>

*Grootboom*, *TAC 2*, and *Blue Moonlight* demonstrate that the Constitutional Court has not shied away from telling the state how to fulfil its duties in terms of the Constitution, or delving substantially into policy. This stance is particularly apparent in *TAC 2*. The Court acknowledged that the decision made by the Court would 'call for a change in policy'.<sup>85</sup> Thus, where a decision does call for a change in policy because that policy constitutes a *prima facie* violation of rights – as was the case in *OUTA* – the Court cannot, according to its own precedent, unduly hide behind separation of powers. It should rather recognise its role as a court or forum of last instance – not only as a court in the true judicial sense of the word, but potentially also a court in the democratic sense of the ability to exercise influence over policy.

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<sup>79</sup> Ibid at para 99.

<sup>80</sup> Ibid at para 135.

<sup>81</sup> See Bilchitz (note 60 above) at 162–163. Bilchitz notes further that the lack of specificity in the order meant that several months after the judgment, government in several provinces had made little attempt to comply with the Court's order.

<sup>82</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) SA 104 (CC).

<sup>83</sup> Ibid at para 74 (our emphasis).

<sup>84</sup> Ibid at para 89.

<sup>85</sup> Ibid at para 115.

This position is less controversial than it appears. The nature of contemporary South African democracy means that courts are often relied upon to resolve what are essentially political disputes. Neither the legislature nor opposition parties have enough support to effectively challenge this executive power.<sup>86</sup> The Court may well end up retreating into less of an ‘activist’ role – but in the context of the constitutional text that governs South African democracy, it is not strange for the Court to have a say in policy. Indeed, as Pieterse argues, ‘it is short-sighted to view direct representative democracy as the only “true” form of democracy and then to characterise all alternative avenues of human rights protection as undemocratic’,<sup>87</sup> particularly where ‘resort to the judiciary is justified when necessitated by a lack of responsiveness on the part of the “democratic” branches’.<sup>88</sup>

Theunis Roux has echoed this view.<sup>89</sup> In his view, the Court often starts a judgment by acknowledging that separation of powers constraints require that it not interfere in the terrain of executive policy. The Court then proceeds to interfere nevertheless. It is almost as if the Court seeks to soften or ameliorate the effect of its intervention by stating that it will not run roughshod over the terrain of the other branches – as if by respectfully acknowledging that it should not intervene, the intervention is more acceptable.<sup>90</sup> The Court followed this pattern of reasoning in cases such as *Grootboom* and *TAC 2* and does so too in *International Trade Administration Commission*. In Roux’s view this adjudicative model was not mandated by the Constitution but rather constitutes a *modus vivendi* with the political branches at a time when the Court still needs to build legitimacy and support.<sup>91</sup>

It can also be argued that the socio-economic rights provisions in the Constitution would not make sense if they did not require the courts to occasionally review policy. Objectives inherent in claims for housing, health, water and the like invite the Court to interrogate and ‘intervene’ in policy issues quite comfortably, as does the fact that the Constitution itself mandates and permits the Court to consider the progressive realisation of rights by the state.

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<sup>86</sup> For more on the appropriate role of courts in a one-party dominant democracy, see S Choudhry ‘He had a Mandate: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 1.

<sup>87</sup> Pieterse (note 61 above) at 392.

<sup>88</sup> *Ibid.*

<sup>89</sup> T Roux *The Politics of Principle* (note 45 above); T Roux ‘Principle and Pragmatism in the Constitutional Court of South Africa’ (2009) 7 *International Journal of Constitutional Law* 106; T Roux ‘The Constitutional Framework and the Deepening of Democracy in South Africa’ (2005) 18(6) *Policy, Issues and Actors* 1.

<sup>90</sup> See S Woolman ‘Humility, Michelman’s Method and the Constitutional Court: Rereading the *First Certification Judgment* and Reaffirming the Distinction between Law and Politics’ (2013) 24 *Stellenbosch Law Review* 242 (Good reasons exist for the Court to claim that it is engaged solely in legal interpretation, and not the hurly burly of politics.)

<sup>91</sup> According to Roux, the Court has positioned itself as a necessary ‘conversationalist’ in the democratic process. Roux (note 89 above).



## V SEPARATION OF POWERS IN OUTA

In *OUTA* Moseneke DCJ made three different points regarding the separation of powers doctrine:

- (a) ‘*absent any proof of unlawfulness or fraud or corruption*, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive, subject to budgetary appropriations by Parliament’;<sup>92</sup>
- (b) ‘the collection and ordering of public resources almost inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order’;<sup>93</sup> and
- (c) ‘a court considering the grant of an interim interdict against the exercise of power within the camp of executive government or legislative branch must have the separation of powers consideration at the forefront.’<sup>94</sup>

This series of statements demonstrates the difficulties presented by the Court’s ‘pick and choose’ tactic in relation to disputes that call the separation of powers doctrine into play. A litigant will invariably be unsure about which direction his or her case may take because decisions which call for ‘policy-laden and polycentric decision making’ are premised on uncertainties – sometimes courts *are* well suited to make a decision of this order, whilst at other times, they are not. Sometimes they are willing. Other times they are not.

If this imperfect dilemma is to be accepted, then the question that needs to be asked is whether, in the context of a broader political environment, the Court was well-suited to rule on this interim interdict. Here, perhaps, it is necessary to differentiate between what the Court *did* within the broader political environment in which it operates, and what we submit the Court *should* have done.

Although the issue at hand dealt with an interim interdict, and thus did not invite consideration of the merits of e-tolling, we submit that the Court *should* have engaged on a *prima facie* level with the merits of e-tolling. Certainly, the e-tolling policy would be a decision best made by those qualified to do so. However, its potential impact on the rights of South Africans of e-tolling is not marginal. We provide three examples:

- A range of socio-economic rights would be compromised by the increased costs of transportation, and particularly that of access to food. The extent of this is not yet clear, but it is certain that e-tolling did not differentiate between single-occupant private motor vehicle users, for example, and vehicles transporting such basic necessities as food. The price of food (and other vital commodities) will increase, hitting the most vulnerable in society most severely. The fact that the e-tolling system does not make this differentiation demonstrates a lack of consideration on the part of government to consider the impact of the system on the actual lived circumstances of those affected by it.

<sup>92</sup> *OUTA* (note 2 above) at para 67.

<sup>93</sup> *Ibid* at para 68.

<sup>94</sup> *Ibid*.

- The right to freedom of movement would be harmed by the fact that an individual cannot move freely and independently around the car-centric Gauteng city region, unless that individual has the available resources to pay for e-tolling. Although it may convincingly be argued that e-tolling encourages the use of public transport, the Gauteng city region has a predominantly informal public transport system. Despite its efficacy in transporting many Gautengers to and from their destinations of choice – and despite the fact that public transport is exempt from e-tolling – many elect to use a private motor vehicle if one is available. They are perceived to be safer and more convenient.
- The right to just administrative action would be undermined by the fact that existing mechanisms of public consultation, as envisaged by the SANRAL Act,<sup>95</sup> failed to recognise that *urban* tolling, where people’s livelihoods are more at risk, is less desirable than, say, a tolling system from Johannesburg to Durban. The SANRAL Act was not created for the purposes of tolling *urban* roads *within* a city. The implementation of the Act did not provide for the kind of consultation an urban tolling system requires.

Consideration of the above factors would not necessarily have resulted in a decision in favour of OUTA. But had they been considered, the Court would have had to enter into a broader discussion about the impact of urban tolling on a variety of rights, and specifically the impact of urban tolling on Gauteng’s urban environment.

Instead, the Court was at pains to stress its ostensibly limited role within the constitutional matrix that is the separation of powers. It held that ‘a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is *constitutionally appropriate* to grant the interdict.’<sup>96</sup> Beyond the common law, the Court argued:

The separation of powers is an even more vital tenet of our constitutional democracy . . . . [T]he Constitution requires courts to ensure that all branches of government act *within the law*. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.<sup>97</sup>

However, contrary to the Court’s finding, upholding the High Court’s order would not have resulted in harm to its institutional legitimacy. The granting of an interim interdict would not have overturned the state’s policy, but rather sent a signal to the executive of the need to further reflect on the actual impact of e-tolling on users. It would have required the executive to take into account *how* e-tolling could impact on the rights of road users. In other words, politically it would have been ‘safe’ for the Court to have ruled against government in the e-tolling case because a negative decision would not have resulted in a *permanent* end to the system. Instead it would have initiated a rights-based conversation on

<sup>95</sup> SANRAL Act.

<sup>96</sup> *OUTA* (note 2 above) at para 66.

<sup>97</sup> *Ibid* at para 44.

the impact of the policy. This interim finding does not involve an intrusion *per se* on policy, but rather an exercise of the Court's constitutional responsibility to voice concerns on policies that have a palpable effect on the rights of those affected by such policy.

## VI COMPARATIVE JURISPRUDENCE: THE WHITHERING OF NON-JUSTICIABILITY

Keen observers of constitutional law can detect increasing signs that, even in matters of policy which may previously have been regarded as on (or outside) the periphery of courts' jurisdiction, courts in the United States and the United Kingdom are increasingly willing to intervene in what has been traditionally regarded as the domain of the executive. Theunis Roux writes of the connection between democratisation and the expansion of judicial power.<sup>98</sup> We refer to this phenomenon as the erosion of the doctrine of non-justiciability.

In the UK it has been stated that if a matter engages in one or more rights enshrined in the European Convention on Human Rights and Freedoms, this puts an end to questions of justiciability. Some have even detected signs of the complete abandonment of non-justiciability doctrine.<sup>99</sup> In the context of the UK, Laws LJ has observed, extra-curially, that 'save as regards the Queen in Parliament there is in principle always jurisdiction in the court to review the decisions of public bodies'.<sup>100</sup> In jurisdictions such as the US the idea of a judicial 'no go' area – known as the 'political question doctrine' – has effectively been replaced by a more flexible and pragmatic test of deference.<sup>101</sup>

### A Political Question Doctrine

The political question doctrine can trace its modern origins to *Marbury v Madison*.<sup>102</sup> This doctrine aims to codify and clarify the extent to which US courts should be permitted to interfere in matters traditionally understood as falling within the domain of the executive. The political question doctrine holds that questions that

<sup>98</sup> Theunis Roux writes that internationally over the past 30 years, the tendency has been for the judicial branch to be given (or to claim for itself) greater oversight powers over the legislative and executive branches. See Roux (note 91 above) at 4, citing C Tate & V Torbjörn (eds) *The Global Expansion of Judicial Power* (1995).

<sup>99</sup> I Leigh & L Masterman *Making Rights Real: The Human Rights Act in its First Decade* (2008) at 103.

<sup>100</sup> J Laws 'Law and Democracy' (1995) *Public Law* 72, n 49.

<sup>101</sup> This also evident from the fact that the political question doctrine is increasingly under attack in the United States. In recent years the US Supreme Court has embraced the view that it alone among the three branches of government has the power and competency to provide the full substantive meaning of all constitutional questions. See R Barkow 'More Supreme than the Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 *Columbia Law Review* 237.

<sup>102</sup> 5 US (1 Cranch) 137 (1803) at 165–166 (Justice Marshall stated: 'By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to this country in his political character and to his own conscience... The acts of such an officer can never be examinable by the courts.' According to Franck the judgment in *Marbury v Madison* was a Faustian pact in which 'a fragile federal judiciary bent first on establishing its supremacy in domestic matters' was looking for 'a convenient, relatively inexpensive "giveback" to throw to the political branches and the states'. T Franck *Political Questions/Judicial Answers* (1992) 10–12.

can be labelled as ‘political’ should be authoritatively resolved, not by the courts, but rather by one (or both) of the political branches.<sup>103</sup> The political nature of such questions therefore renders them non justiciable. The doctrine was first developed most expansively in *Baker v Carr*.<sup>104</sup> In *Baker v Carr*, the Supreme Court set out the following six criteria for determining the threshold issue of whether a matter is ‘political’ and therefore non-justiciable:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>105</sup>

If any one of the *Baker* criteria is met a claim can be dismissed as non justiciable.

The plain effect of *Baker v Carr* is to oust the Court’s jurisdiction with regard to issues characterised as political issues. Unsurprisingly, the *Baker* criteria have been described as ‘unsatisfactory’, ‘useless’ and ‘confusing’.<sup>106</sup> Whereas rumours of the death of the political question doctrine may be greatly exaggerated,<sup>107</sup> constitutional scholars increasingly argue that the political question doctrine is in decline because it is at odds with the doctrine of judicial supremacy developed over recent years.<sup>108</sup>

The sentiment that the doctrine is no longer relevant<sup>109</sup> became especially prevalent in the wake of *Bush v Gore*.<sup>110</sup> The Supreme Court essentially decided the outcome of the 2000 US presidential election.<sup>111</sup> The constitutionality of a unilateral judicial determination of the outcome of an election is still a matter of much debate. Most academics agree that the matter was *justiciable* (courts are not barred by *Baker v Carr* from determining election controversies)<sup>112</sup> but wrongly decided. Although the case may not strictly have been barred by the *Baker* factors,

<sup>103</sup> J Choper ‘The Political Question Doctrine: Suggested Criteria’ (2005) 54 *Duke Law Journal* 1456.

<sup>104</sup> 369 US 186 (1962).

<sup>105</sup> *Ibid* at 217.

<sup>106</sup> E Chemerinsky *Constitutional Law: Principles and Policies* (2002, 2 ed) 129–130.

<sup>107</sup> See M V Gillen ‘The Rebirth of the Political Question Doctrine’ (2008) 23 2 *Natural Resources & Environment* 23.

<sup>108</sup> See M Tushnet ‘Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine’ (2002) 80 *North Carolina Law Review* 1203.

<sup>109</sup> See, for example, American academic commentary in this regard: E Chemerinsky ‘*Bush v Gore* was not Justiciable’ (2001) 76 *Notre Dame Law Review* 1093; Tushnet (note 108 above); and Barkow (note 103 above).

<sup>110</sup> 531 US 98 (2000).

<sup>111</sup> *Bush v Gore* 531 US 98 (2000) at 110–11. See L Weinberg ‘When Courts Decide Elections: The Constitutionality of *Bush v Gore*’ (2002) *Boston University Law Review*. See also Chemerinsky (note 106 above); Tushnet (note 108 above); and Barkow (note 101 above).

<sup>112</sup> See also *Baker v Carr* (note 104 above) at 237 (held that inequitable apportionment of the suffrage is actionable under the Equal Protection Clause and does not present a nonjusticiable ‘political question’).

the case and its outcome was so intensely *political* that it is not surprising that this case led Mark Tushnet to write of the disappearance of the political question doctrine. Tushnet writes of a new constitutional boldness ‘refusing to temper legal with political judgment’.<sup>113</sup>

South Africa has declined to adopt any doctrine resembling the political question doctrine. The Court cannot simply label a matter as ‘political’ and decline to subject it to constitutional scrutiny. This stance has been attributed to the Constitutional Court’s strong conception of judicial review.<sup>114</sup> The specific reference to the executive and the legislature in the application provision – FC s 8(1) – means that the executive is bound by the Constitution.<sup>115</sup> The US Constitution does not have a similar section which indicates unambiguously that the executive is bound by the Constitution. Section 83(b) of the South African Constitution requires the President to uphold and defend the Constitution as supreme law of the land. According to Currie and De Waal, our courts are likely to subject all executive action to the courts, but defer to the executive in certain matters such as matters relating to foreign policy.<sup>116</sup> We agree with the view of Justice Ackermann in *De Lange v Smuts* that, in a substantive constitutional state such as ours, there can be no so-called political question doctrine leading to a conclusion different to that dictated by the Constitution.<sup>117</sup>

Theunis Roux has supported the view that there is no equivalent of the political question doctrine in South African constitutional law.<sup>118</sup> He cites the judgment in *President of the RSA v SARFU*,<sup>119</sup> where the Court held that one of its functions was to exercise exclusive jurisdiction ‘in a number of crucial political areas...in respect of issues which would inevitably have important political consequences.’<sup>120</sup> Roux concludes that political decision-making is a systemic function of the Constitutional Court.

<sup>113</sup> Tushnet (note 108 above) at 1234. The demise of the doctrine has also been predicted in states such as Nigeria, which has adopted the US constitutional structure. See E Nwauche ‘Is the End Near for the Political Question Doctrine in Nigeria?’ paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa (Nairobi, April 2007, copy on file with the authors) (Supremacist tendencies of the Nigerian judiciary are encouraged by the immense popularity which the judiciary enjoys. Nwauche attributes the demise of the political question doctrine in Nigeria to the fact that judges locate their legitimacy in the people; this may make them less cautious and encourage a head-on collision with other branches of government.)

<sup>114</sup> Seedorf & Sibanda (note 1 above) 12-52.

<sup>115</sup> See S Woolman ‘Application’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, OS, 2006) Chapter 31; I Currie & J de Waal *The Bill of Rights Handbook* (5 ed, 2005).

<sup>116</sup> See *Kaunda v President of the Republic of South Africa* [2004] ZACC 5, 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 77.

<sup>117</sup> *De Lange v Smuts* (note 42 above) at para 60.

<sup>118</sup> Roux ‘Principle and Pragmatism’ (note 89 above). See also *Mlokoti v Amatbole* 2009 (6) SA 354 (E) and *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another* 2006 (2) SA 52 (C).

<sup>119</sup> [1999] ZACC 9, 1999 (4) SA 147 (CC).

<sup>120</sup> *Ibid* at paras 72–73. See also *King v Attorneys Fidelity Fund Board of Control* [2005] ZASCA 96, 2006 (1) SA 474 (SCA).

## B The Impact of Austerity

The question of whether courts can interfere in matters concerning resource allocation by the state has acquired a particular currency in the context of economic austerity. In some European jurisdictions, courts have recently shown a willingness to interfere in austerity measures taken by governments.

A 2012 decision (*Harz 1*)<sup>121</sup> of the German Federal Constitutional Court illustrates the willingness of an apex court to pronounce on a government's resource allocation. The German Constitutional Court was asked to decide whether the cash benefits for asylum seekers provided under the Asylum Seekers Benefit Act complied with the constitutional right to a minimum standard of living. It ruled that the relevant provisions were incompatible with the fundamental right to a minimum standard of living, guaranteed by article 1 (right to human dignity) in conjunction with article 20 (social state principle) of the German Constitution. The Court emphasised that an existential minimum must be guaranteed. *Harz 1* is significant because, for the first time, the German Constitutional Court declared that social benefits provided for by law do not live up to the constitutionally protected standards.

The Latvian Constitutional Court has also been fairly progressive in intervening in government policy on resource allocation. In a case on the constitutionality of the state pension law, the court essentially pronounced on austerity measures taken by government.<sup>122</sup> Since the Latvian economy was rapidly declining in 2009, the Latvian Parliament enacted a Disbursement Law<sup>123</sup> which decreased the allowance received by current pensioners by 10 per cent and decreased the amount to be received by future pensioners by 70 per cent. It is interesting that, in defending the law, the government referred to the liabilities it had under loan agreements with international creditors.<sup>124</sup> The Latvian Court found the law unconstitutional and in violation of an individual's right to a pension. It did so, in large part, because Parliament had not considered less restrictive alternatives to the limitation of the right.<sup>125</sup> Significantly, the Court refused to recognise loan conditions as a valid justification for the reduction in pension. Constitutional courts, as the Latvian Court shows, need not necessarily accept that a government's arguments regarding resource constraints trump individual rights.

## VII CONCLUSION

Geoff Budlender has observed that cases involving resource allocation often lead to an almost reflex contention by government that policy and polycentric

<sup>121</sup> BVerfGE, BvL 10/10 of (18 July 2012).

<sup>122</sup> Case No 2009-43-01. The case is also known as: On Compliance of the First Part of Section 3 of State Pensions and State Allowance Disbursement in 2009 insofar as it applies to State Old-Age Pension with Article 1, Article 91, Article 105 and Article 109 of the Satversme.

<sup>123</sup> Law on State Pension and State Allowance Disbursement (referred to as Disbursement Law).

<sup>124</sup> These creditors included the EU and the IMF.

<sup>125</sup> The Court also argued that the law was unconstitutional since it had not provided an adequate transition period before the new law came into effect and it had not included a future compensation for the reduced pensions. See the summary of the case at ESCR Net available at <<http://www.escr-net.org/docs/i/1285934>>.



questions are involved, and that a court should adopt a position of deference or abstinence.<sup>126</sup> By labelling the e-tolling cases as falling in the heartland of the executive function, Moseneke DCJ adopts a position of abstinence. The door for academic enquiry into the constitutionality of the e-tolling scheme is, however, not closed.

Not long ago, Judge O'Regan wrote that 'we may have not yet achieved a fully articulated doctrine of separation of powers.'<sup>127</sup> Twenty years after the drafting of the Constitution, the Court's current jurisprudence suggests that her analysis still holds. No clear doctrine on the separation of powers exists. The Court has proceeded to approach cases that raise such concerns on an ad hoc basis. And yet, whether one adheres to a distinction between socio-economic rights cases and non-socio-economic cases, it is clear that South African courts regularly intrude into what can best be described as the 'executive terrain' of resource allocation and budgeting.

Judicial review would be toothless if it did not allow judges to intervene in even the most sensitive policy issues. The principle of separation of powers should ultimately also be interpreted as a check on the powers of the executive and the legislature. Checking executive and legislative powers is not only a core function of the doctrine, it is also explicitly required by the text of the South African Constitution and the extant jurisprudence of the Constitutional Court.

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<sup>126</sup> G Budlender 'The Judicial Role in Cases Involving Resource Allocation' (April 2011) *Advocate* 35 at 36.

<sup>127</sup> K O'Regan 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' (2005) 8(1) *Potchefstroom Electronic Law Review* 120, 146.

# The Separation of Powers in Interim Interdict Applications

Ngwako Raboshakga\*

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## I INTRODUCTION

The decision of the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*<sup>1</sup> (*OUTA*) turns on the never-ending debate on the nature of our constitutionally entrenched doctrine of the separation of powers. In their thought-provoking contribution, Swart and Coggin criticise the manner in which the *OUTA* Court articulated and applied the doctrine of separation of powers.<sup>2</sup> This reply both engages their critique and identifies a more constitutionally compliant reading of the Court's reasoning and conclusions in *OUTA*.

Let's begin with a brief summary of the facts and findings in *OUTA*.<sup>3</sup> The case arrived at the Constitutional Court in the form of an application for leave to appeal a judgment of the North Gauteng High Court. Various organisations – led by the Opposition to Urban Tolling Alliance (*OUTA*) – have opposed decisions taken by several organs of state that led to e-tolling on some of Gauteng's freeways. *OUTA* obtained an interim interdict in the High Court preventing the levying and collecting of e-tolls on the affected freeways pending the outcome of an administrative review of the government's decision.

The Constitutional Court granted leave to appeal and reversed the High Court's granting of the interim interdict. The Constitutional Court found that the common-law interim interdict test developed by the Appellate Division (as it

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<sup>1</sup> *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18, 2012 (6) SA 223 (CC), 2012 (11) BCLR 1148 (CC) ('*OUTA*').

<sup>2</sup> M Swart & T Coggin 'The Road not Taken: Separation of Powers, Interim Interdicts, Rationality Review and E-Tolling in *National Treasury v Opposition to Urban Tolling*' (2013) 5 *Constitutional Court Review* 346.

<sup>3</sup> The background, facts and outcome of *OUTA* are summarised in detail in Swart & Coggin (note 2 above) at 347–349. In this note I provide only a brief summary for context. A more detailed summary may also be found in N Raboshakga 'The Place of Separation of Powers in Interim Interdict Cases against the State: *National Treasury & Others v Opposition to Urban Tolling Alliance & Others*' (2014) *South African Law Journal* (forthcoming).

then was) in *Setlogelo v Setlogelo*<sup>4</sup> had to be adapted to give effect to the separation of powers doctrine.<sup>5</sup> According to the *OUTA* Court, the principle of separation of powers demands that an interim interdict against the state can only be granted in the ‘clearest of cases’, or where the applicant had made a ‘strong case’, or if the applicant could show that ‘exceptional circumstances’ existed. Given the absence of those criteria, the *OUTA* Court set aside the interim interdict granted by the High Court.

As I have contended elsewhere,<sup>6</sup> the *OUTA* Court defines the separation of powers doctrine in a manner that is extremely deferential toward the executive branch of government. In so doing, ‘the court ... opened up the *Setlogelo* test in a manner which will generally favour the position of the government at the expense ... of the party seeking an interim interdict.’<sup>7</sup> That said, future courts – and the Constitutional Court itself – are likely to seek an alternative reading of *OUTA* that better accords with constitutional rights and principles, and is more consistent with the prevailing jurisprudence on the separation of powers.

Swart and Coggin seek to make the case for judicial intervention, in the form of the granting of an interim interdict, in cases such as *OUTA*. They rely on decisions in which the Court has intervened against the state – despite the policy-laden and polycentric nature of the matters. Despite the apparently deferential language used by the *OUTA* Court, an alternative, and perhaps more generous, reading narrows the linguistic gap between *OUTA* and extant jurisprudence on separation of powers.

To be clear, I share Swart and Coggin’s concern that the Constitutional Court in *OUTA* has, potentially, set a particularly worrisome precedent in this kind of interdict matter. However, in the spirit of interpretive charity,<sup>8</sup> it is worth giving the Court the benefit of the doubt and to explore alternative readings of *OUTA* that do not set an overly deferential standard.

This note challenges Swart and Coggin’s view that *OUTA* amounts to judicial ‘abstinence’.<sup>9</sup> One can read *OUTA* consistently with the Court’s earlier, and laudable, jurisprudence on the separation of powers, particularly in socio-economic rights cases, and reach the conclusion that its standards for granting interim interdicts against the state will be more moderate where the Court is convinced that fundamental rights are under threat.

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<sup>4</sup> *Setlogelo v Setlogelo* 1914 AD 221. The *Setlogelo* test entails that the party applying for an interim interdict must establish that (a) there was a prima facie right which it was seeking to enforce, even if it was open to some doubt; (b) there was a reasonable apprehension of irreparable and imminent harm to that right if an interdict was not granted; (c) the balance of convenience favoured the grant of the interdict; and (d) there was no other alternative remedy available.

<sup>5</sup> *OUTA* (note 1 above) 47.

<sup>6</sup> Raboshakga (note 3 above).

<sup>7</sup> Raboshakga (note 3 above).

<sup>8</sup> See F Michelman ‘On the Uses of Interpretive Charity: Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 term of the Constitutional Court of South Africa’ (2008) 1 *Constitutional Court Review* 1.

<sup>9</sup> Swart & Coggin (note 2 above) at 364.

II ONE READING OF SWART AND COGGIN

Swart and Coggin contend that the *OUTA* Court deferred to government policy principally because (a) decisions surrounding e-tolling lay within the realm of the executive and (b) those decisions involve issues of a heavily polycentric, resource allocation and financial nature.<sup>10</sup> They argue that this ‘hands off’ approach runs against the grain of the Court’s formulation of the doctrine of separation of powers and muddles the degree of deference the Court should accord in these matters.<sup>11</sup>

Swart and Coggin identify the following four excerpts from the *OUTA* judgment as particularly problematic:

1. ‘Thus, the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the National Executive subject to budgetary appropriations by Parliament.’<sup>12</sup>
2. ‘[T]he collection and ordering of public resources inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order.’<sup>13</sup>
3. ‘A court considering the grant of an interim interdict against the exercise of power within the camp of Government must have the separation of powers consideration at the *very forefront*.’<sup>14</sup>
4. ‘[A] court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.’<sup>15</sup>

Swart and Coggin submit that the above statements reveal that the Court was ‘at pains to stress its ostensibly limited role within the constitutional matrix that is the separation of powers’. They argue that the Court lost sight of the potential impact of the e-tolling system on the actual, lived circumstances of those affected, and its impact on their fundamental rights to food, to movement and to just administrative action.<sup>16</sup> They compare the Constitutional Court’s jurisprudence in *Grootboom*,<sup>17</sup> *Treatment Action Campaign*<sup>18</sup> and *Blue Moonlight*<sup>19</sup> with *OUTA* to demonstrate that ‘the Court has not [in the past] shied away from telling the state how to fulfil its duties in terms of the Constitution, or delving substantially

<sup>10</sup> Swart & Coggin (note 2 above).

<sup>11</sup> *Ibid.*

<sup>12</sup> *OUTA* (note 1 above) at para 67; Swart & Coggin (note 2 above).

<sup>13</sup> *OUTA* (note 1 above) at para 68; Swart & Coggin (note 2 above).

<sup>14</sup> *Ibid.* (emphasis added).

<sup>15</sup> *OUTA* (note 1 above) at para 66; Swart & Coggin (note 2 above).

<sup>16</sup> Swart & Coggin (note 2 above) at 359.

<sup>17</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46 (CC).

<sup>18</sup> *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) (‘TAC 2’).

<sup>19</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC).

into policy'.<sup>20</sup> Indeed, the facts in those three cases present classic polycentric and policy-laden issues. I agree with Swart and Coggin that the Court's articulation of the doctrine of separation of powers in socio-economic rights cases is laudable and strikes the correct balance between respect and intervention. In particular, the Court in *TAC 2*, although cautious, did not shy away from evaluating resource allocation and budgeting. In all three cases, despite the polycentric issues at play, the Court ordered the government to undertake certain measures to achieve the rights of vulnerable people.

Swart and Coggin *then* employ foreign law to demonstrate that courts are becoming more comfortable with increased judicial intervention in matters involving allocation of resources, an area 'traditionally regarded as the domain of the executive'.<sup>21</sup> The political question doctrine has largely been abandoned in the United States, the United Kingdom and Germany.<sup>22</sup> To buttress this contention, they rely on critical views of academics regarding the 'political question' doctrine in the United States, a question that turns on the proper construction of the separation of powers doctrine.<sup>23</sup> They further point out that '[in] some European jurisdictions, courts have recently shown a willingness to interfere in austerity measures [which concern resource allocation] ... by governments.'<sup>24</sup> Swart and Coggin, not surprisingly, hold the view that our own separation of powers doctrine did not prevent the Court from granting an interim interdict against the Government in favour of Gauteng motorists.<sup>25</sup>

### III AN ALTERNATIVE READING OF THE *OUTA* JUDGMENT

In setting out an alternative reading of the *OUTA* judgment I respond to three aspects of Swart and Coggin's article, namely (a) their comparison of the *OUTA* judgment and the Court's socio-economic rights jurisprudence; and (b) their characterisation of the *OUTA* judgment approach as one of judicial 'abstinence' or one akin to the American political question doctrine.

Where Swart and Coggin see the *OUTA* Court's approach as incompatible with its holdings in the aforementioned socio-economic rights cases, I argue that the two approaches are actually conceptually similar. To the extent that some difference exists, it is justified by the distinct nature of the remedies at stake.

The separation of powers doctrine as applied in socio-economic rights cases was set out in *Treatment Action Campaign*<sup>26</sup> as follows:

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<sup>20</sup> Swart & Coggin (note 2 above) at 356.

<sup>21</sup> *Ibid* at 360.

<sup>22</sup> They show that in the United States, for example, 'the idea of a judicial "no go" area ... has effectively been replaced by a more flexible and pragmatic test of deference'. *Ibid* at 360.

<sup>23</sup> *Ibid* at 360–361.

<sup>24</sup> *Ibid* at 363.

<sup>25</sup> *Ibid* at 360.

<sup>26</sup> In *TAC 2* (note 18 above), the Treatment Action Campaign challenged government's policy decision to restrict the provision of Nevirapine (a drug for the prevention of mother to child HIV infection) to only two research sites per province in the public health sector for two years; after which the government would consider a comprehensive distribution of Nevirapine.

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.<sup>27</sup>

The above excerpt provides clear justification for judicial deference when courts adjudicate matters with budgetary implications. However, such deference does not mean that ‘courts cannot or should not make orders that have an impact on the domain of the other branches of government’.<sup>28</sup> Our courts have repeatedly sought to clarify that our conception of democracy does not permit the judiciary to abdicate its duty to defend the Constitution and to intervene against the other branches of state where the Constitution so mandates.<sup>29</sup>

In *Treatment Action Campaign*, the Court described this formulation of separation of powers as ‘the deference that courts should show to decisions taken by the executive concerning the formulation of its policies’.<sup>30</sup> Deference is quite distinct from the *non-justiciability* that underlies the *political question doctrine*. Deference accommodates judicial intervention. It rejects the concept of judicial ‘no go’ areas in favour of constant institutional comity between the three branches. Indeed, Swart and Coggin themselves show how the absolutist political question doctrine ‘has effectively been replaced by a more flexible and pragmatic test of deference’.<sup>31</sup>

A deferential formulation of the separation of powers doctrine allows courts to intervene in cases against the state. At the same time judicial respect for policy decisions taken by the other branches of government – for reasons of both inter-governmental respect, the polycentric nature of the matter at hand,<sup>32</sup> and other factors which a court must consider – might well justify a court’s ruling in favour of the state. Accordingly, the principle of separation of powers is but a factor in applying a constitutionality test.

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<sup>27</sup> *TAC 2* (note 18 above) at para 38. The Court in *TAC 2* also held that ‘there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation’. Ibid at para 8 (footnote omitted). This statement was repeated in *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC) at para 199.

<sup>28</sup> *Doctors for Life* (note 27 above) at para 199.

<sup>29</sup> Ibid at para 37–38; *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21, 2008 (1) SA 474 (CC) at para 81; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15, 2004 (4) SA 490 (CC) at para 48.

<sup>30</sup> *TAC 2* (note 18 above) para 22.

<sup>31</sup> Swart & Coggin (note 2 above) at 360 (emphasis added).

<sup>32</sup> S Seedorf & S Sibanda ‘Separation of Powers’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2008, OS, 2nd Edition) Chapter 12, 12-49.



One of the ways to give effect to this approach to the separation of powers doctrine is to use the review standard of reasonableness employed in socio-economic rights and administrative justice cases.<sup>33</sup> In applying a reasonableness standard a court should, ideally, consider and engage with any relevant constitutional rights. This engagement with the relevant constitutional rights may outweigh separation of powers concerns. Swart and Coggin, as I read them, support this approach. Accordingly, if a reading of *OUTA* that accords with this approach is possible, it should undoubtedly be preferred over an alternative reading.

In *OUTA*, the separation of powers doctrine arises as part of assessment of the balance of convenience test within the *Setlogelo* test for interim interdicts.<sup>34</sup> Traditionally, the balance of convenience test has been understood as follows:

A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant if interim relief is not granted as against the harm a respondent will bear, if the interdict is granted. Thus a court must assess all relevant factors carefully in order to decide where the balance of convenience rests.<sup>35</sup>

This balance of convenience test is strikingly similar to the reasonableness test that applies in socio-economic rights cases. Both tests allow for the consideration of all relevant factors (ie a proportionality exercise) before deciding whether judicial intervention is warranted. One relevant factor is the principle of separation of powers. Of particular import is that a proportionality inquiry in both tests allows courts to consider the constitutional rights at stake.

The Constitutional Court's reasonableness approach in socio-economic rights jurisprudence has been criticised for its failure to determine the scope and content of the rights.<sup>36</sup> While this method often has the effect of placing the separation of powers doctrine in (apparent) contention with the socio-economic rights enshrined in the Constitution, its purpose is undoubtedly the enforcement of those rights.<sup>37</sup>

The application of the separation of powers doctrine in the manner set out above has a similar effect in interim interdict matters. The Court in *OUTA* recognised that where an interim interdict was applied for against the state, the separation of powers doctrine must be considered in applying the balance of convenience test. As the balance of convenience test already entails a proportionality enquiry, the principle of separation of powers is but one factor among many. In such an enquiry, the separation of powers may, on some occasions, come into contention with arguments that favour the granting of an interim interdict, say for example, the relevant constitutional rights. *OUTA* actually acknowledges the relevance of constitutional rights within the context of the *Setlogelo* balance of convenience test. Moseneke DCJ held that an 'important consideration would be whether the harm

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<sup>33</sup> Ibid at 12-60.

<sup>34</sup> A summary of the *Setlogelo* test is set out in note 4 above.

<sup>35</sup> *OUTA* (note 1 above) at para 55.

<sup>36</sup> See D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 135-76; M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 *South African Journal of Human Rights* 383, 407.

<sup>37</sup> See S Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) 223-237.

apprehended by the claimant amounts to breach of one or more fundamental rights warranted by the Bill of Rights.<sup>38</sup> The *OUTA* Court upheld the appeal against the interim interdict because it found that the law and policy that lay at the heart of *OUTA* – at this early stage of the argument – failed to constitute an obvious breach of one or more fundamental rights.<sup>39</sup>

Swart and Coggin rightly criticise the fact that the *OUTA* Court failed to take into account the constitutional rights to freedom of movement and access to food.<sup>40</sup> It is, therefore, unclear why the Court swiftly concluded that there could be no breach of fundamental rights.<sup>41</sup> The answer may lie in the manner in which *OUTA* presented its case: In their arguments, the applicants did not demonstrate that the public's rights to movement or food would be infringed if e-tolling commenced.<sup>42</sup>

Nevertheless, the fact that the *OUTA* Court concluded that there was no breach of constitutional rights does not amount to an adherence to a general principle that courts ought to disregard relevant constitutional rights in interim interdict cases, or always subordinate those rights to concerns related to the separation of powers. In interim interdict cases against the state, the separation of powers doctrine is simply one factor to consider. The test adopted by the *OUTA* Court provides the space for a consideration of competing interests, in particular, rights interpretation and enforcement. The balance of convenience test is thus conceptually similar to the reasonableness inquiry conducted in socio-economic rights cases.

Swart and Coggin fail to address the Court's willingness to take into account constitutional rights where they were relevant. One must therefore pause before describing *OUTA* as an instance of judicial 'abstinence'.

Again, I am sympathetic to Swart and Coggin's overarching concerns. The language used by the *OUTA* Court to show how the role of separation of powers doctrine tips the scales in favour of the state in interim interdict cases ('clearest of cases', 'strong case' and 'exceptional circumstances') is much stronger and less indicative of a willingness for judicial intervention than the comparable language used in socio-economic rights cases. The temptation exists to conclude that the Court in *OUTA* denied itself the authority to intervene in what was a sensitive, polycentric and policy-laden case.

The crucial distinction is the nature of the order in interim interdict cases such as *OUTA*, and socio-economic rights cases. The former is an interim order pending the outcome of the review application of state conduct. The latter

<sup>38</sup> *OUTA* (note 1 above) at para 47.

<sup>39</sup> *Ibid.*

<sup>40</sup> Swart & Coggin (note 2 above) at 358–359.

<sup>41</sup> See Raboshakga (note 3 above) (Contends that the rights to freedom of movement and of access to food 'ought to have been considered by the Constitutional Court in deciding whether this case amounts to one of the "clearest of cases" for purposes of granting an interim interdict'.)

<sup>42</sup> In its submissions before the Court, *OUTA* did not raise the application of these rights. Only the Road Freight Association (which applied to the Constitutional Court to be admitted as an intervening party) raised the right to freedom of movement (Road Freight Association's Heads of Argument at paras 53–5). However, the submissions of the Road Freight Association were not considered because the Court refused to admit it as an intervening party. *OUTA* (note 1 above) at para 2.

cases concern orders that have final effect and are made after a determinative finding regarding a law or a policy's constitutionality or unconstitutionality. On the alternative reading of *OUTA*, the Court was not establishing a new general rule of 'abstinence' in policy-laden or polycentric matters. Instead, the Court was emphasising that, in the context of interim interdict cases against the state, the doctrine of separation of powers may possess greater weight than in other circumstances. A good reason for this distinction exists. The right that the applicant seeks to protect would not have been shown to have been abridged at the time the interim interdict is granted. Under such circumstances, courts must tread cautiously in order to respect the authority of the executive to make policy choices. Such choices may turn out to be perfectly consistent with constitutional rights.<sup>43</sup> In addition, the applicant's prospects of success for final relief are already accounted for in the traditional balance of convenience test.<sup>44</sup>

It is not uncommon for the principle of separation of powers to be weightier in specific kinds of cases, say an application to declare a parliamentary bill constitutionally invalid. The Court in *Doctors for Life International* found that in light of the principle of separation of powers, the Constitution should be interpreted to permit only the President to petition the Constitutional Court to consider the constitutionality of a parliamentary bill. Ngcobo J held that 'the rights of the public are therefore delayed while the political process is underway'.<sup>45</sup> Given that the Constitution affords the President the duty to assess the constitutionality of the bill, the principle of separation of powers is weightier than in cases where the President had already assented to the bill.

#### IV *OUTA* AS PRECEDENT

Future courts will likely prefer this alternative reading of *OUTA*. Indeed, one of the first High Court decisions to apply *OUTA* was *City of Cape Town v South African National Roads Agency Ltd*.<sup>46</sup> In response to a suggestion by SANRAL that *OUTA* had to be read to restrict the grant of interim interdicts against the state, the Western Cape High Court emphasised that *OUTA*:

does not enjoin a culture of indiscriminating deference by the courts ... when seized of applications for interim interdictal relief in particular to executive conduct. The judgment does not abjure the courts' constitutional duty to uphold the rule of law and to ensure, as

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<sup>43</sup> It is the constitutionally mandated role of the government to develop and implement policy for the benefit of the public at large, which in many instances may be done in fulfilment of rights enshrined in the Constitution. For example, with the Gauteng Freeway Improvement Project, the Government was plausibly engaged in the fulfilment of everyone's rights to movement (by improving the means of movement), food (by improving the means of transporting food), human dignity (by improving the services provided by the government), etc. It may be undesirable for such government programmes, with multiple effects and benefits, to be placed on hold in circumstances where it is not clear that such a move, all factors considered, would most accord with our constitutional scheme.

<sup>44</sup> *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) 383.

<sup>45</sup> *Doctors for Life* (note 27 above) at para 55. See also M Bishop & N Raboshakga 'National Legislative Authority' in S Woolman & M Bishop *Constitutional Law of South Africa* (2011, RS 3, 2nd Edition) Chapter 17, 17-37.

<sup>46</sup> *City of Cape Town v South African National Roads Agency Ltd* [2013] ZAWCHC at para 74.

far as possible, the achievement of effective remedies for breaches of fundamental rights, including the right to lawful, reasonable and procedurally fair administrative action.<sup>47</sup>

This passage indicates that future courts will likely adopt a more generous reading of *OUTA*, or at least be open to it.

The Court's own subsequent judgments also indicate a generous reading of *OUTA*. In *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others*,<sup>48</sup> the Constitutional Court heard an appeal of the decision of the South Gauteng High Court not to grant an interim interdict against the mass eviction of informal traders by the City of Johannesburg from the streets of the inner city. The City's stated object of this action was 'to rid the City of unsightly and disorderly trading areas [which] gave rise to disorderliness, criminality and obstruction of citizens' rights to the proper use and enjoyment of facilities in and around trading areas'.<sup>49</sup> In overturning the High Court's decision not to grant the interim interdict – in the context of applying the *Setlogelo* test – Moseneke ACJ emphasised that the City's conduct had violated the constitutional rights of the informal traders and their families. He said:

It must be added that the eviction of the traders involved constitutional issues of considerable significance. The ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it they faced 'humiliation and degradation'. Most traders, we were told, have dependants. Many of these dependants are children, who also have suffered hardship as the City denied their breadwinners' lawful entitlement to conduct their businesses. The City has not disputed this. The City's conduct has a direct and ongoing bearing on the rights of children, including their direct rights to basic nutrition, shelter and basic health care services.<sup>50</sup>

This line of reasoning appears to be consistent with Moseneke DCJ's statement in *OUTA*: 'It is not possible to define what will constitute the clearest of cases, but one of the important considerations will be to *what extent the fundamental constitutional rights of persons may be affected by the grant of a temporary interdict*'.<sup>51</sup>

Moseneke ACJ says nothing about separation of powers in *Informal Traders Forum*. This silence indicates that the defining distinction between a case in which the doctrine of separation of powers will have an overriding impact, and one in which it will not, is the extent to which the court is convinced that constitutional rights are adversely affected. Despite the fact that the City in *Informal Traders Forum* had made its decision to evict on the basis of a strongly held policy to revitalise the inner city, constitutional rights (and not separation of powers considerations) were clearly dispositive of the granting of the interim interdict against the state.

<sup>47</sup> *Ibid* at para 76.

<sup>48</sup> *SA Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8, 2014 (4) SA 371 (CC), 2014 (6) BCLR 726 (CC).

<sup>49</sup> *Ibid* at para 76.

<sup>50</sup> *Ibid* at para 31 (footnotes omitted).

<sup>51</sup> *OUTA* (note 1 above) at para 90 (emphasis added).

Put somewhat differently, the application for an interim interdict in *Informal Traders Forum* satisfied the ‘*clearest of cases*’ criterion because the constitutional rights of the informal traders would obviously have been breached if the interim interdict was not granted. The threat to constitutional rights outweighed separation of powers concerns. In *OUTA*, the Constitutional Court must be understood as holding that it was not so obvious that the constitutional rights of users of Gauteng freeways would be so deleteriously affected.

*OUTA*, interpreted in light of *Informal Traders Forum*, supports the granting of interim interdicts against the state when laws or policies are manifestly constitutionally infirm. If my reading of both *OUTA* and *Informal Traders Forum* is correct, then Swart and Coggin’s characterisation of *OUTA* as an instance of ‘judicial abstinence’ possesses somewhat less traction.

## V ON THE FACTS OF *OUTA*

Applying its gloss on the *Setlogelo* test in *OUTA*, the Court weighed the harm that would be suffered by Gauteng motorists and citizens if the interim interdict was not granted against the harm that SANRAL and the state would suffer if the interdict was granted. While another conceivable outcome exists, the separation of powers doctrine weighed in favour of the state’s interests and against the granting of the interdict.<sup>52</sup> In other words, the applicants had failed to establish that e-tolling constituted a *clear, strong* and *exceptional* impairment of their fundamental rights.

## VI CONCLUSION

What can be learned from my reconstruction of *OUTA*? I agree with my colleagues Swart and Coggins that the language employed by the Constitutional Court to define the relevance of separation of powers in *OUTA* is cause for concern. It tempts a reader to conclude that the Court is apt to deny itself the

<sup>52</sup> The factors taken by the Court in the balance of convenience test can be summarised as follows:

- (a) If SANRAL was to default, the government ran the risk of being called upon to pay the full outstanding debt of R20 billion;
- (b) The delay in implementing tolling had already cost R2.7 billion, SANRAL’s average monthly expenditure on the project would amount to R601 million for the 2012/13 financial year and absent e-tolling, that amount had to be funded by the National Treasury;
- (c) SANRAL’s credit worthiness rating had been downgraded by two notches, which downgrade was linked to the granting of the interdict;
- (d) The downgrade impacted SANRAL’s ability to finance other projects;
- (e) Parliament had already approved a special appropriation of R5.75 billion to reduce the impact of the tolls on Gauteng motorists, and, should the interim interdict remain in place, Parliament may have to appropriate more money from the national revenue fund;
- (f) Ninety-nine per cent of the burden of tolling will be borne by more affluent road users who make up the first and second quintile of income earners in Gauteng; and
- (g) The harm that the affected motorists would face if the decision to impose e-tolling was to be set aside by a court, was not irreparable because such motorists would have an enrichment claim to recover the tolls that were paid.’

*OUTA* (note 1 above) at paras 56, 62 and 69. In light of the serious financial consequences of granting the interdict it seems that, even if the rights to food and movement had been explicitly considered, the interim interdict would not have been justified. While the Court ought to have expressly mentioned its considerations of those rights, its failure to do so did not, in my view, affect the outcome.

authority to intervene in applications for interim interdicts against the state. However, my reconstruction of *OUTA* reveals that the Court set no untoward precedent that would abrogate its power to grant interim interdicts against the state. Instead, the Court's approach to interim interdicts is conceptually similar to the reasonableness test the Court has adopted in socio-economic rights cases. The separation of powers plays a role, but can be outweighed by other factors. On this reading of the judgment, *OUTA* does not countenance judicial 'abstinence'.

In both interim interdict and socio-economic rights cases, ample room exists for invoking constitutional rights to counterbalance the influence of the separation of powers doctrine. The Court in *OUTA* expressly acknowledged that it will be willing to grant an interim interdict where it is shown that 'one or more fundamental rights' may be breached. This recognition of the importance of achieving an appropriate balance between respect for the other branches of government on one hand, and the protection of constitutional rights on the other, strongly intimates that an inquiry into whether an interim interdict should be granted against an organ of state remains consistent with extant constitutional jurisprudence – more so than Swart and Coggin would seem to acknowledge. As *SA Informal Traders Forum*<sup>53</sup> demonstrates, future courts are likely to prefer this alternative, more generous, reading of *OUTA*.

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<sup>53</sup> *Informal Traders Forum* (note 48 above).



Symposium 3:  
*Glenister*, Public International Law and  
an Effective, Independent Security  
Service



# *Glenister* at the Coalface: Are the Police Part of an Effective Independent Security Service?

Vanessa Barolsky\*

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‘The law people are not right.’

Zamdela Informal Settlement Focus Group

‘As the people of the law they should be telling us and teaching us about law but if they take the law and put it under their boots, the boots are heavy and the law heavy too.’

Focus Group Respondent on the Police, Alexandra Township, 2013

## I DEFINING THE RULE OF LAW

In 1994, South Africa became a constitutional democracy. At the same time, the Constitution provided a foundation for the transformation of the state, the law and society, and it placed the rule of law and the principle of legality at the centre of the new democracy’s value system and institutional arrangements.

As Frank Michelman notes, ‘the judicially enforceable claim to legality inhabits South African law... as a norm sourced directly in the Final Constitution<sup>1</sup> and can be traced directly to s 1(c) of the Founding Provisions of the Constitution (‘Final Constitution’ or ‘FC’). FC s 1 identifies ‘the supremacy of the Constitution and the rule of law’ as one of four sets of core values of the new democratic state. As a result, the ‘rule of law’ doctrine (a) ‘informs the interpretation of many, possibly all, other rights’ and (b) has the status of a, ‘self-standing “justiciable and enforceable” claim’ and moreover a ‘justiciable constitutional right’.<sup>2</sup>

*Glenister v President of the Republic of South Africa & Others* found that changes to national legislation which replaced the Directorate of Special Operations, known as the Scorpions (DSO), with the Directorate for Priority Crime Investigation, known as the Hawks (DPCI), were unconstitutional. When refracted through the prism of rationality review and reasonableness review grounded in FC s 1(c), the Court took a rather robust view of what the rule of law doctrine requires.<sup>3</sup> Broadly speaking, *Glenister* found that corruption undermines the rights and freedoms in Chapter 2 of the Constitution, constitutes a fundamental threat to the rule

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<sup>1</sup> F Michelman ‘The Rule of Law, Legality and the Supremacy of the Constitution’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 11.

<sup>2</sup> *Ibid* at 11-2 (own emphasis).

<sup>3</sup> *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) at para 170.

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of law and concludes that it therefore ‘imperils our democracy’. Corruption is seen to undermine ‘the credibility of governments; the institutions and values of democracy; and ethical values and morality’ and to ‘endanger the stability and security of societies’.<sup>4</sup> In the face of this pernicious threat, the judgment found that the Constitution and the state’s international law agreements require the state to establish and maintain an independent body to combat corruption and organised crime. The judgment argues that ‘the very structure of our Constitution – in which the rule of law is a founding value...affords the obligation [to establish an independent body to combat corruption] a homely and emphatic welcome.’<sup>5</sup> The Hawks were found to be insufficiently independent to root out corruption. The *Glenister* Court held that the Hawks represented a failure by the state to create and to maintain an adequately independent anti-corruption entity that would (a) keep the governors accountable and (b) promote and protect and respect the rights and freedoms of the governed.

This article looks at the problem of corruption to which *Glenister* refers through a different disciplinary lens: sociology. It does not ignore the law, but utilises the voices of South African citizens to explore these problematics as they are captured in focus groups recently run by the Human Sciences Research Council (HSRC) throughout South Africa: in the township of Alexandra in Gauteng; the informal settlement, Zamdela, in the Free State; and an informal settlement falling under traditional jurisdiction, Violet Bank, in the province of Limpopo.

## II DEFINING CORRUPTION

Corruption is commonly referred to as the betrayal of public trust for reasons of private interest.<sup>6</sup> The Public Service Anti-Corruption Strategy of 2002 defines corruption as ‘any conduct or behaviour in relation to persons entrusted with responsibilities in public office which violates their duties as public officials and which is aimed at obtaining undue gratification of any kind for themselves or for others.’<sup>7</sup> In 2004, the Prevention and Combating of Corrupt Activities Act 12 of 2004 was enacted. In s 4(1) it defines corrupt activities related to public officials by providing that any:

- (a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
- (b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—
  - (i) that amounts to the—
    - (aa) illegal, dishonest unauthorised, incomplete, or biased; or

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid at para 205.

<sup>6</sup> DH Rosenbloom *Public Administration, Understanding Management, Politics and Law in the Public Service* (1989) 467.

<sup>7</sup> Department of Public Service and Administration ‘Public Service Anti-Corruption Strategy’ (January 2002) 11.

- (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory contractual or any other legal obligation;
- (ii) *that amounts to—*
- (aa) the abuse of a position of authority;
- (bb) a breach of trust; or
- (cc) the violation of a legal duty or a set of rules;
- (iii) designed to achieve an unjustified result: or
- (iv) that amounts to any other unauthorised or improper inducement to do or not to anything,
- is guilty of the offence of corrupt activities relating to public officers.<sup>8</sup>

The South African Police Service, specifically in terms of the recently released Green Paper on Policing, acknowledges that corruption exists at all levels of that organisation.<sup>9</sup> The Green Paper notes that ‘between 2002 and 2009 the police developed three different anti-corruption strategies which existed on paper but were never effectively implemented.’<sup>10</sup> A new strategy was launched in 2010, which focuses on the prevention, detection, investigation and resolution of corruption. The Green Paper attributes the failure of previous anti-corruption strategies to a number of factors: (a) a lack of buy-in by senior personnel, (b) a lack of systems and processes to ensure that anti-corruption strategies are implemented, and (c) a failure proactively to identify systemic corruption and to provide for adequate, efficient and fairly executed disciplinary processes.<sup>11</sup> The Green Paper relies, in part, on a Police Advisory Council Report (2006–2008), which found that the SAPS had, ‘insufficient capacity to investigate corruption, that codes of conduct and ethics were not adhered to, and that disciplinary issues were not dealt with timeously.’<sup>12</sup> Recent figures released in Parliament indicate that many high-ranking police officials have been found to have criminal records relating to crimes including rape, murders, cash-in-transit heists and lesser offences.<sup>13</sup> The Independent Police Investigative Directorate (IPID) set up to ensure oversight over the South African Police Service and Metro Police Services found that

<sup>8</sup> Prevention and Combating of Corrupt Activities Act 12 of 2004, s 4(1).

<sup>9</sup> Civilian Secretariat for Police *Green Paper on Policing* (2013) 48.

<sup>10</sup> *Ibid* at 49.

<sup>11</sup> *Ibid* at 50.

<sup>12</sup> *Ibid* at 48.

<sup>13</sup> See D Smith ‘Nearly 1,500 South African Police Exposed as Convicted Criminals: Officials Admit Total Includes Hundreds Of Senior Officers Who Have Committed Murder, Rape and Theft’ *The Guardian* (15 August 2013) available at <http://www.theguardian.com/world/2013/aug/15/south-african-police-convicted-criminals>. The article describes how, ‘the parliamentary portfolio committee on police heard that a major-general, 10 brigadiers, 21 colonels, 43 lieutenant-colonels, 10 majors, 163 captains and 706 warrant officers have been found guilty of serious offences. In total 1,448 members of the police have convictions, according to an audit up to January 2010. The crimes include murder, attempted murder, culpable homicide, rape, attempted rape, assault, aiding an escapee, theft, housebreaking, drug trafficking, kidnapping, robbery, malicious damage to property and domestic violence.’

during 2008/2009 and 2009/2010, at least 1 092 people lost their lives as a result of the use of force by the police, the highest number since the late 1990s.<sup>14</sup>

These findings by the state itself indicate that corruption in South Africa concerns more than a small spread of high-level incidents. It has become a systemic problem of power that rends the fabric of society and poses a direct challenge to the 'rule of law' culture to which our Constitution aspires.

The conventional definition of corruption generally identifies, 'an act of private abuse or private misuse or private appropriation as lying at the heart of the phenomenon of corruption'. The World Bank offers a pithy definition of corruption as an 'abuse of public office for private gain'.<sup>15</sup> Standard definitions of corruption rely on a liberal conception of state and society in which the private and public realms are unambiguously distinguished and the state exists as an essentially neutral entity. In this conception of the liberal polity, bureaucrats in the state are expected to operate in a similarly neutral fashion and partisanship can draw accusations of corruption. Bourdieu, Wacquant and Farage analyse the genesis of the modern state in terms of the emergence of a bureaucratic field created through the acts of bureaucratic agents. Thus, 'the state "comes into being" to the extent that these agents act in a neutral and disinterested manner vis-à-vis the public good'.<sup>16</sup>

Ivor Chipkin's definition is of more immediate interest for our purposes. Chipkin draws on 'classical' conceptions developed by Montesquieu in which 'corruption ... is a feature of any polity (democratic, aristocratic, monarchic or despotic) when its leaders fail to act on the basis of its core or foundational principles ... [W]e might say that a person or a party or a government is corrupt in South Africa to the extent that he/she/it behaved in a way that undermined the principles of the Constitution.'<sup>17</sup> This substantive definition of corruption would seem apposite to understand the nature of the challenges being faced in the South African context.

The reality in many post-colonial contexts is that, despite our liberal Constitution and an ostensibly liberal democratic state form, the distinctions between the realm of the 'private' as a domain of personalised relationships and networks is not as easily distinguished from the 'public' domain, a realm ostensibly governed by neutral rules enacted by dispassionate bureaucrats. The private and the public are deeply implicated in each other and mutually shape the nature of power in both domains. As anthropologists of the state have pointed out for some time, states are not simply 'a constellation of objects but a particular set of social relations'.<sup>18</sup>

Chipkin contends that the ANC does not have a liberal conception of the state. Instead the ANC's objective has been to utilise the state as a vehicle for the

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<sup>14</sup> See D Bruce 'Beyond Section 49: Control of the Use of Lethal Force' *South African Crime Quarterly* 36 (2011) 3.

<sup>15</sup> I Chipkin 'The Politics of Corruption: Two Competing Definitions' Public Affairs Research Institute (PARI) *Long Essay* Number 3 (October 2012) 3.

<sup>16</sup> *Ibid* at 21.

<sup>17</sup> *Ibid* at 3.

<sup>18</sup> Chipkin (note 15 above) at 20.



transformation of state and society in order to redress the inequities of the past. He writes:

In these situations the measure of public service is not the degree to which public servants deal impartially with the public, but the opposite. It is the degree to which the organisation and structures of the administration are tilted towards the service of blacks and Africans in particular.<sup>19</sup>

In his examination of the functioning of state hospitals and provincial health departments, Van Hold likewise points to the tension between the establishment of a neutral state bureaucracy in the Weberian sense and a nationalist project that seeks to transform state and society. On his account, a series of ‘informal rationales’ function in the state health bureaucracy that are ‘shaped by the imperative to undo racism and white domination in the state and in society more broadly, and that they tend to work against and erode the Weberian rationales for a meritocratic and effective state bureaucracy’.<sup>20</sup>

The gap between exemplary policies around corruption and the reality of state performance can, similarly, be tied to the functional opposition of state injunction (the Constitution) and state practitioner (day-to-day official practice). This tension or opposition, as Das has noted, ‘is always potentially disruptive of any simple sovereign directive’.<sup>21</sup> Das also argues that ‘many of the functionaries of the state themselves find the practices of the state to be illegible [indecipherable]’.<sup>22</sup> As Gillespie notes in her study of post-apartheid prisons, ‘warders faced with the task of implementing new corrections policy ... are often despondent, overwhelmed, or confused by the task that has been given to them. The work warders do in mediating that illegibility [obscurity] makes policy open to interpretation; makes of state practice a site of translation and improvisation’.<sup>23</sup>

The assumption of a direct relation between means and ends, which philosophers such as John Dewey have critiqued, leads to a blindness to the ways in which the democratic (and even idealist) impulse of policy is compromised by the realities of organisational life and routines of institutional life. This myopia with respect to the lived realities of institutions leads, as Selznick has argued, to a failure to understand the manifold ‘ways in which the inner, typically uncharted, informal life of large institutions affects the interrelations between purported ends and adopted means, and influences what occurs in the space between the two’.<sup>24</sup>

<sup>19</sup> Ibid at 9.

<sup>20</sup> K von Holdt ‘Nationalism, Bureaucracy and the Developmental State: The South African Case’ (2010) *South African Review of Sociology* 41 (1) 4.

<sup>21</sup> V Das as cited in K Gillespie ‘Moralizing Security: “Corrections” and the Post-Apartheid Prison’ (2008) 2 (1) *Race/Ethnicity: Multidisciplinary Global Contexts* 77.

<sup>22</sup> Ibid at 77.

<sup>23</sup> Ibid.

<sup>24</sup> P Selznick *TVA and the Grass Roots: A Study in the Sociology of Formal Organization* (1949).

This article therefore locates corruption within the context of the struggle to transform the criminal justice system in South Africa through policy and prescription and the equally difficult struggle of post-apartheid South Africans meaningfully to realise their status as law-making citizens. In this context, ‘corruption’ has become part of the daily practice of power in citizens’ interactions with the state, in particular its police service, and has established a reciprocal, if unequal, relationship of mutual personal ‘gratification’ that protects citizens against the predations of the state and which is used by them to gain small, temporal advantages in this predatory world. It is this daily predation which in fact ‘imperils our democracy’. The formal institutional checks and balances designed to curb the abuse of power and bring about a rule-of-law culture fast become empty and rarefied abstractions, as citizens grapple daily with a material environment that often seems to negate the spirit of the rights and values espoused by our Constitution.

### III THE RULE OF LAW: RHETORIC AND REALITY, PART 1

If, as Michelman argues, FC s 1(c) recognises the rule of law as a pervasive value, a justiciable principle and a grundnorm which informs the interpretation of most if not all other rights, in what way can we actually say that it has mitigated the abuse of public (and private) power exercised and pervasive practices of corruption? The concept and the doctrine of the rule of law has, from the time of Aristotle and Plato, been associated with restraint on the exercise of arbitrary power by governments. Dicey’s standard definition of the rule of law contains three key tenets:

1. ‘No man is punishable ...except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint; and
2. ‘Here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.’ This establishes a principle of equality before the law; and
3. ‘The general principles of the constitution ... are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts’<sup>25</sup>.

Michelman focuses his attention on the manner in which the South African Constitution is shot through with aspirations to the rule of law, that ‘[c]laims to freedom from arbitrary treatment stem from multiple constitutional roots’<sup>26</sup> and that the decisions of the Constitutional Court have repeatedly established this legality principle in practice.

In *Pharmaceutical Manufacturers Association of South Africa* the Constitutional Court was asked to review and to set aside the President’s decision to bring the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998 into

<sup>25</sup> D Clarke ‘The Many Meanings of the Rule of Law’ in K Jayasuriya (ed) *Law, Capitalism and Power in Asia* (1998) 27.

<sup>26</sup> Michelman (note 1 above) at 11-15.

operation on 30 April 1999.<sup>27</sup> This matter turned on no ordinary, run-of-the-mill determination. At its heart lay a question of profound constitutional importance. Does a South African court possess the power, under the Final Constitution, to review and to set aside a decision by the President of South Africa to bring an Act of Parliament into force? A decade earlier, in the dying days of apartheid, the answer would ordinarily have been ‘No’. In 2000 the Constitutional Court, in working its way up to a response, wrote that ‘under our new constitutional order the control of public power is always a constitutional matter’<sup>28</sup> and that ‘the exercise of all power must conform with the Constitution, and, in particular, the exercise of public power must meet the requirements of the rule of law – a foundational principle in the Constitution’.<sup>29</sup> In short, the answer to the question posed was now ‘Yes.’

It would be a mistake, however, to read the *Pharmaceutical Manufacturers* Court as merely signalling a shift of our legal system from parliamentary sovereignty to constitutional democracy. As Michelman rightly observes, the *Pharmaceutical Manufacturers* Court was staking out a position in which ‘the Final Constitution means by the rule of law something richer than that formula’s most traditional, formal, Diceyan signification’.<sup>30</sup>

It is when the sites pull together toward the vindication of human dignity, human rights, non-racialism, non-sexism, and the rest that the unity of the country’s law in their service figures as a true value. Accordingly, if we read FC s 1 holistically – so that the coupling of the rule of law to constitutional supremacy signifies the value of legal-systemic unity in the service of human dignity, non-racialism, and the rest – then ‘the rule of law’ signifies not just the rule of rules but the rule of justice, as the Final Constitution envisions justice. ‘Supremacy of the Constitution and the rule of law’ signifies the unity of the legal system in the service of transformation by, under, and according to law.<sup>31</sup>

The ‘desired societal condition’<sup>32</sup> to which Michelman refers, and to which the Court commits us, is indeed deeper and richer than more formalistic accounts in which the governors and the governed are subject to the same rules of the game. But how exactly is the Constitutional Court’s thicker conception of the rule of law meant to lead us toward the kind of egalitarian social democracy to which the Constitution’s founding provisions<sup>33</sup> ostensibly point?

Martin Krygier has critiqued conventional legal preoccupations with the ‘anatomy’ of the rule of law in the Diceyan tradition and an undue obsession with its formulaic institutional artifices. He asks us to pay careful attention to the teleology and sociology of the rule of law, ie its immanent rather than instrumental value (so often the preoccupation of development advocates and

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<sup>27</sup> *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

<sup>28</sup> Ibid at Explanatory Note.

<sup>29</sup> Ibid.

<sup>30</sup> Michelman (note 1 above) at 11-38.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid at 36.

<sup>33</sup> See J Fowkes ‘Founding Provisions’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 5, 2014) Chapter 13.

international agencies) and the conditions of its realisation in the complex social worlds in which rules have to rule.<sup>34</sup>

Krygier identifies two reasons to maintain a commitment to the rule of law: (1) it operates as a bulwark against arbitrariness ie ‘the reduction of reasonable fear of power’,<sup>35</sup> and (2) it tends to create a stable set of rules and regulations that defines expectations and makes co-operation between strangers possible in large modern societies. He then detects four conditions that are required for the rule of law to function as intended. The first concerns the reach of institutions that restrain both state actors and non-state actors. The second relates to the character of the norms that restrain and guide the behaviour of all social actors: ‘They have to be such that people can know what they require’.<sup>36</sup> The third demands ‘a real and knowable link between the norms and the ways they are *administered*. This [understanding] will often require complex practices of interpretation, and there is room for real and extensive controversy, but unless the controversy is about what the norms require, you have left the rule of law’.<sup>37</sup> The fourth, and most important, condition for the rule of law is for Krygier that ‘the institutionalised norms need to *count* as a source of restraint and a normative resource, usable and with some routine confidence used in social life’.<sup>38</sup> In sum, a rule-of-law culture is a living, breathing social and political phenomenon in which ‘what matters ... is how the law affects subjects’.<sup>39</sup> Again, the effect is not simply top down – as it is in traditional conception. Given that citizens’ direct interaction with high-level officials and organs of state is generally rare, the real measure of success for a rule-of-law culture is the extent to which ‘citizens are able and willing to use and to rely upon legal resources as cues, standards, models, and bargaining chips ... in relations with each other and with the state, as realistic (even if necessarily imperfect) indicators of what they and others can and are likely to do’.<sup>40</sup>

Krygier, drawing on Eugen Ehrlich’s work, takes these four aforementioned requirements to reflect the existence of ‘living law’. Ehrlich understood the ‘living law’ to be far more essential to the actual lives of communities than the formal activities of legal institutions. (However, Ehrlich was not interested in a reversal of conceptual hierarchy but in an understanding that the ‘[t]he interrelationships between official “rules for decision” and “living law” are complex and variable’).<sup>41</sup> Krygier concludes,

The only time the *rule* of law can occur, when then law might be said to rule, is when the law counts significantly, distinct and even in competition with other sources of influence, in the thoughts and behaviour, the normative economy, of significant sectors of a society.

<sup>34</sup> M Krygier ‘The Rule of Law: Legality, Teleology, Sociology’ University of New South Wales *Faculty of Law Research Series Paper* 65 (2006).

<sup>35</sup> *Ibid* at 12.

<sup>36</sup> *Ibid* at 13.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid* at 17.

<sup>40</sup> *Ibid* at 18.

<sup>41</sup> *Ibid* at 15.

But do we know what makes law count here?<sup>42</sup> To what extent do Krygier's conditions obtain in South Africa?<sup>43</sup> To what degree does law count and act as meaningful constraint on the abuse of power and the failure of leaders to act in terms of the core values of the Constitution?

As Woolman points out, the South African Constitution and its Bill of Rights are exemplary in the way in which they balance the requirements of security and freedom, on which all democracies necessarily rest.<sup>44</sup> The Constitution articulates a significantly different premise for security than that which characterised the apartheid state. This is a national security that is meant to reflect the 'will of the people' and to secure the conditions for equality and a better life. Section 198(a) of the Constitution, under governing principles for the security services, provides that '[n]ational security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life'. Also under the governing principles for the security services, s 198(e) asserts the principles of the rule of law by providing that, '[n]ational security must be pursued in compliance with the law, including international law'.

The Constitution also includes other important provisions that build upon this conception of security. FC s 12(1) reads:

Everyone has the right to freedom and security of the person, which includes the right—

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way.

Woolman shows how, through a complex web of provisions, 'the Final Constitution imposes positive obligations on members of the security services to entrench the normative underpinnings of our basic law'.<sup>45</sup> Under FC s 199(5), '[t]he security services must act, and must teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic'.<sup>46</sup> Section 196(6) also places a positive obligation on members of the security services *not* to obey a, 'manifestly illegal order' – thus placing the rule of law above the rule of person or power. FC s 205(3) describes the objects of the police service, namely to 'prevent, combat

<sup>42</sup> *Ibid* at 17.

<sup>43</sup> Even if we move beyond standard head counts regarding those citizens who fail to understand or to appreciate the content of our basic law and the Court that fleshes out its meaning (less than 30 per cent possess the vaguest sense of their importance), questions have been raised as to whether the Court itself has failed to articulate its decisions in a manner that makes them accessible to every other state actor and non-state actor and therefore fails to satisfy (Krygier-inflected) conditions necessary for the rule of law to survive. See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762.

<sup>44</sup> S Woolman 'Security Services' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 3, 2011) Chapter 23B.

<sup>45</sup> *Ibid* at 23B-2.

<sup>46</sup> *Ibid*.

and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law’.

The South African Police Service Act 68 of 1995 – though enacted a year earlier – can be partially read as enabling legislation for the constitutional objectives articulated above. (At the time, we possessed an Interim Constitution (1994) quite similar to the Final Constitution ultimately adopted (1997).) It requires, among other things, a new police service that can

- (a) ensure the safety and security of all persons and property in the national territory;
- (b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the [Interim] Constitution;
- (c) ensure co-operation between the Service and the communities it serves in the combating of crime;
- (d) reflect respect for victims of crime and an understanding of their needs; and
- (e) ensure effective civilian supervision over the Service.

The next section of this article will pit the constitutional and legislative aspirations identified above against the material ‘reality’ of South African citizens lives and thereby assess the extent to which the necessary conditions for a living rule-of-law culture (that Krygier outlines) actually obtain.

#### IV THE RULE OF LAW: RHETORIC AND REALITY, PART 2 (THE SUBJECT OF LAW)

As Etienne Balibar has noted, contemporary democracy has been marked by the transformation of the subject of the feudal prince into the modern subject. The modern citizen is subject to the law rather than the prince. At the same time, and even more profoundly, the subject of law also becomes a citizen who *makes the law*.<sup>47</sup> This transformation leads to the emergence of the citizen-subject, who is (ideally) both the maker of the law and the subject of the law.

The reality, both in developed and in post-colonial societies, has been a struggle for many citizens, particularly those marginalised by poverty, to become meaningful ‘makers of law’. Von Lieries contends that since ‘democracy and marginalisation have become intertwined in late modernity’,<sup>48</sup> and in post-apartheid South Africa in particular marginality is the rule rather than the exception.<sup>49</sup> Patrick Heller similarly claims that while we find a ‘high degree of consolidated representative democracy in democracies of the global south, such as Brazil, India, and South Africa, [that consolidation] should as such not be confused with a high degree of effective citizenship’.<sup>50</sup> In short, most South African citizens do not have the means to exercise their civil and political rights effectively.<sup>51</sup>

<sup>47</sup> E Balibar ‘Citizen Subject’ in E Cavada, P Connor & JL Nanc (eds) *Who Comes after the Subject?* (1991) 48.

<sup>48</sup> B von Lieries ‘Marginalisation and Citizenship in Post-Apartheid South Africa’ in S Robins (ed) *Limits to Liberation: Citizenship, Governance and Culture after Apartheid* (2005) 25.

<sup>49</sup> *Ibid* 23.

<sup>50</sup> P Heller ‘Democracy, Participatory Politics and Development: Some Comparative Lessons from Brazil, India and South Africa’ (2012) 44(4) *Polity* 646.

<sup>51</sup> *Ibid*.



According to some authors, the post-apartheid liberal imagination assumes an autonomous, individual agent, sovereign over his or her actions, free to ‘choose the value system adopted in our Constitution’<sup>52</sup>. Ross therefore argues that: ‘In making everyday lives, people juggle with terribly limited possibilities at hand. These are not “choices” in the sense implied by liberal notions of the sovereign subject.’<sup>53</sup> Swartz reaches similar conclusions in her study of young people in the township of Langa in the Western Cape.<sup>54</sup> Ross,<sup>55</sup> in her study of people living in an informal settlement on what are known as the ‘Cape Flats’ in the same province, has decisively shown that people living in disadvantaged contexts do not lack values or fail to distinguish between ‘right’ and ‘wrong’.<sup>56</sup> However, what her study reveals is that under conditions of endemic poverty people struggle to hold onto, and act in terms of, these values. The problem with the liberal rule-of-law model is that while individuals ‘internalise a normative model of the good life and a liberal model of decency’<sup>57</sup> and seek to achieve this against enormous daily material odds, when they fail [to act in accordance with this model], the failure is explained as an individual failure, which does not ‘acknowledge the erosion of the grounds on which social worlds are built, or how they are shaped by historical processes’.<sup>58</sup>

Heller argues that classical and contemporary theories of democracy generally take for granted the decisional autonomy of individuals as the foundation of democratic life. In many, although not all<sup>59</sup> of these theories, citizens are presumed to have the basic rights and the *capacity* to exercise free will, associate as they choose and vote for the party they believe best reflects their interests and concerns. This capacity of rights-bearing citizens to associate, deliberate and form preferences in turn produces the norms that underwrite the legitimacy of democratic political authority. But as Somers has argued, this view conflates the *status* of citizenship (a bundle of rights) with the *practice* of citizenship in the context of developing democracies. In developing democracies, where inequalities remain high and access to rights is often circumscribed by social position or compromised by institutional weaknesses (including the legacies of colonial rule), the problem of associational autonomy is so acute that it brings the very notion of citizenship into question.<sup>60</sup> As Hornberger concludes, ‘for human rights to offer the promise of justice and freedom, a certain subject position is required, and if it is absent, then this position needs to be produced’.<sup>61</sup> Human rights, constitutionalism and the rule of law in post-apartheid South Africa therefore concern not simply a set

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<sup>52</sup> The Presidency Republic of South Africa *National Development Plan: Vision for 2030* (2011) 422.

<sup>53</sup> FC Ross *Raw Life, New Hope: Decency, Housing and Everyday Life in A Post-Apartheid Community* (2009) 211.

<sup>54</sup> SG Swartz *The Moral Ecology of Township Youth* (PHD dissertation University of Cambridge) (2007).

<sup>55</sup> Ross (note 53 above).

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid* at 210.

<sup>58</sup> *Ibid* at 207.

<sup>59</sup> CF Walzer in *Spheres of Justice. A Defense of Pluralism and Equality* (1983).

<sup>60</sup> Heller (note 50 above) at 645.

<sup>61</sup> J Hornberger *Policing and Human Rights: The Meaning of Violence and Justice in the Everyday Policing of Johannesburg* (2011) 7.

of institutions or rules but a process of subject-making, ie ‘a grid of dispersed institutions, technologies and knowledge practices advancing society towards a collection of responsible subjects who can see themselves as rights-bearing individuals, responsible and self-controlling, productive and peaceful’.<sup>62</sup>

Bourdieu has assessed some of these processes of subject-making that are critical to incorporate the citizen within the law, and to turn ‘direct conflict between concerned parties into judicially regulated debate between officials acting by proxy’.<sup>63</sup> These citizen-creating capacities, he continues, ‘are not just skills that can be picked up on the street, but they are framed by and steeped in a middle-classness (if not upper-middle-classness) including access to higher education. ... [It may also require] a certain linguistic stance [or capacity].’<sup>64</sup> However, ‘when such subjectivities are an exception and where the availability of such juridical capital ... is limited, the application of human rights is challenging and threatening to those who apply them and to those who fall under them’.<sup>65</sup>

This conceptualisation of the problems that recur when ideal notions of constitutional democracies and rule-of-law cultures are superimposed upon communities, and even whole societies, that lack the material conditions to be active citizens or just happy self-actualising subjects is of critical importance in understanding the relationship of virtually all South African citizens to the criminal justice system. The vast majority of South Africans are not middle class, and continue to hold marginal or fragile positions within the polity. These citizens lack the ‘judicial capital’ to ensure a substantive relationship with and incorporation within the formal legal framework.

On the other hand, as Steinberg has noted, as a result of the history of policing in the South African context, or rather the absence of policing for black South Africans and the plethora of informal forms of self-regulation which arose as a result, many citizens continue to give halting and uneven consent to being policed. Steinberg argues, therefore, that the key challenge which the democratic dispensation faced in terms of policing was not in fact to establish the legitimacy of the new police service but to establish its authority over various other pre-existing forms of social regulation, which were often characterised by violence and division.<sup>66</sup>

These historical conditions of ‘non-policing’ created a particular subjectivity: ‘To be black and to live in Johannesburg (or any other major South African city, for that matter) was to seek protection.’<sup>67</sup> This protection was acquired on a profoundly particularist basis that led to division and exclusion: ‘While everybody in black urban South Africa sought protection, no single agency protected everyone. Wherever protection is exchanged for friendship, loyalty, money or from ethnic solidarity, some people are excluded. A host of informal

<sup>62</sup> Ibid at 7.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid at 8–9.

<sup>66</sup> J Steinberg ‘Establishing Police Authority and Civilian Compliance in Post-Apartheid Johannesburg: An Argument from the Work of Egon Bittner’ (2012) 22 (4) *Policing and Society: An International Journal of Research and Policy* 488.

<sup>67</sup> Ibid.

agencies bump shoulders and clash.<sup>68</sup> In the post-apartheid context, instead of the police becoming an agency which could ‘control the predatory violations of the conditions of coexistence among strangers’ (as influential police theorist Egon Bittner once envisaged the purpose of policing), the police, by focusing on effectively responding to calls for assistance and investigating cases, engaged in a distorted form of crime prevention, which sought to target ‘risk’ populations through heavy-handed and often brutal assertions of their authority against vulnerable communities. As a result, Steinberg concludes:

[F]or black urban South Africans, too little changed. The vital functions of keeping peace among strangers were still radically underprovided. People thus had little reason to abandon private sources of security for the police.<sup>69</sup>

## V THE STRUGGLE OVER POLICING

It should be clear by now, as Hornberger notes, that the police occupy a complex position in the new social formation that does not necessarily promote the dispassionate application of the law: ‘After the end of apartheid, as in many other so-called transitional countries, the police force was seen on the one hand as embodying the evils of the past, while on the other hand it was assigned the role to protect human rights.’<sup>70</sup> Instead their ‘disposition’ is located within a complex matrix of meaning which is rooted in an explosive mixture that includes persisting apartheid structures; the lower-class societal position of most police officers; popular ideas of the efficiency and expedience of violence; and a sense of powerlessness and failure among police officers in the face of limited resources, lack of skills and a crushing everyday culture of crime and disorder.<sup>71</sup> It comes then as no surprise that ‘the legalistic and technocratic common sense cultivated at the international level of human rights holds little power in everyday policing.’<sup>72</sup> The picture that emerges from everyday practice and multiple moments of encounter with state agents in Johannesburg is one in which the state’s authority is a personalised and unpredictable force, contributing substantially to its residents’ sense of insecurity and precariousness.<sup>73</sup>

A number of studies of policing in South Africa have noted the difficulties and unpredictability of transferring international ‘models’ of crime prevention to contexts outside of the environments in which they were initially formulated. South Africa’s early post-apartheid policing policy documents – the National Crime Prevention Strategy (NCPS) of 1996 and the White Paper on Safety and Security (1998) – were profoundly influenced by international ‘crime prevention’

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<sup>68</sup> Ibid at 488.

<sup>69</sup> Ibid at 491.

<sup>70</sup> Hornberger (note 61 above) at 94.

<sup>71</sup> Ibid at 9.

<sup>72</sup> Ibid at 12.

<sup>73</sup> Ibid at 14.

models of policing.<sup>74</sup> Brogden and Shearing note the way in which, at the time of the transition to democratic rule South Africa, it became enormously desirable for a range of actors to ‘market’ their use of international models of crime prevention and community policing:

[D]emocratic policing is being marketed as one commodity among others in an international technological supermarket. The approach being adopted is consistent with the marketing of other products where what is on offer is a result of research and development that has taken place elsewhere in the industrialised world.<sup>75</sup>

This “‘best practice” ... was therefore being defined and generated by a burgeoning international industry of police reform’.<sup>76</sup> However, as Steinberg notes, ‘the results of policy transfer, especially to societies in the process of a major transition, are often unknowable’.<sup>77</sup> Pfigu uses the concept of ‘travelling models’ to understand how global ideas such as community policing and crime prevention are recontextualised and reappropriated by a variety of actors at local and national levels, including by the communities in which these ideas are propagated, as well as by various other local actors, mediators and knowledge brokers. Communities interpret these ‘new’ ideas in terms of their own normative and cognitive frameworks, drawing on their own experience and local histories of, for example, ‘community policing’, to interpret and redefine imported Western conceptions of community policing. Travelling models are therefore subject to processes of local and national ‘translation’, which may fundamentally transform the meaning and practice of these models. Looking at these processes of translation can ‘[shed] new light on implementation, or how policy moves from policy formation to “front line practice” and vice versa’.<sup>78</sup> These processes of translation are ongoing, continually shifting meaning and practice around core concepts such as crime prevention.

In the more developed world, the function of the police is widely understood and accepted as necessary in order to create ‘conditions for the orderly coexistence of strangers,’ or, more specifically, to ‘control ... predatory violations of those conditions’.<sup>79</sup> This form of democratic policing is contingent on a ‘shared commitment to order’<sup>80</sup> in the city, ‘and it is precisely from this common commitment to order that the idea of police arises, for citizens accept that an agency must exist to deal with... breaches of the peace, and that to do so, this agency must have licence to use asymmetrical force over others’.<sup>81</sup>

<sup>74</sup> See E Pelser & A Louw ‘Where Did We Go Wrong? A Critical Assessment of Crime Prevention (2002) 2 *SA Crime Quarterly*; J Steinberg ‘Crime Prevention Goes Abroad: Policy Transfer And Policing in Post-Apartheid South Africa’ (2011) 15 *Theoretical Criminology* 349; M Brogden & C Shearing *Policing for a New South Africa* (1993); T Pfigu *Local Responses to a Travelling Model of Crime Prevention and Crime Management: Community Policing in Stellenbosch, South Africa* (PHD Dissertation University of Stellenbosch) (2012).

<sup>75</sup> Brogden & Shearing (note 74 above).

<sup>76</sup> Steinberg ‘Crime Prevention Goes Abroad’ (note 66 above) at 350.

<sup>77</sup> *Ibid.*

<sup>78</sup> Lendvai cited in Pfigu (note 74 above) at 52.

<sup>79</sup> Steinberg ‘Establishing Police Authority’ (note 66 above) at 482.

<sup>80</sup> *Ibid* at 481.

<sup>81</sup> *Ibid* at 481–482.

On the other hand, in Johannesburg, ‘the mundane but intense daily encounters between police and [many] residents of [the city] connect the police, as an institution that embodies the legal and political complexities of state transformation, with people’s everyday lives and with various forms of violence, crime and insecurity’.<sup>82</sup> The police are not viewed as a ‘neutral’ force at the boundary of state and society. Indeed, Hornberger’s study of policing in the inner city of Johannesburg reveals a highly particularised and personalised relationship between the police and residents of the inner city, evoked in the imagery of a phrase used by residents with whom she engaged as ‘my police ... your police’.<sup>83</sup>

How then to understand the ‘my police/your police’ experience of many South African? Wolfe asks us to look at the interpersonal social networks at play in the ‘interstices’ of the formal system.<sup>84</sup> Informal social ties based on rules of reciprocity and shared moral codes, often ‘supplement’ macro-institutional frameworks by becoming the means through which the system itself works.

In South Africa, the police, local politicians and even agents of the judicial system, instead of consistently acting as representatives of the law, may enter into complex relationships of reciprocity and exchange with the social actors that they supposedly have to ‘control’. Thus, far from being an external force to the systems of social relationships or networks where particular perceptions and practices of violence are developed, they constitute an integral part of those same systems. The very same state agents will act as an incarnation of the formal institutional system on some occasions, and just as frequently participate in the networks representing particular personal or corporate interests.

Thus relationships with the police are often centred around ‘capturing’ the support and coercive force of certain police officers through personal relationships, which is seen to be critical to urban survival and the management of the predatory behaviour of both the police themselves and other residents in a crowded urban landscape. As one focus group respondent explained: ‘They’ve [the police] got their own people whom they help.’<sup>85</sup> In the rough and tumble of township and informal settlement life, as opposed to the somewhat less turbulent and privately secured space of middle class South Africans,

police officers are seen as power brokers to be captured by means of special relations and employed to determine the momentary hierarchy and victory of one moral claim over the other. A competition emerges to gain the best access to this source of power in order to strengthen a claim.<sup>86</sup>

A young woman in Alexandra Township captures the essence of these personal relationships with police, and the dissatisfaction with more ‘formal’ security arrangements in the following brief account:

There was a policeman we knew... and every time there was a problem we use to call him ... But when he left we had to go to the police station and it’s up to them that they come

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<sup>82</sup> Hornberger (note 61 above) at 14.

<sup>83</sup> Ibid at 216.

<sup>84</sup> E Wolfe *Eastern Europe and the People without History* (1982).

<sup>85</sup> Alexandra focus group women 25+ (2013).

<sup>86</sup> Hornberger (note 61 above) at 220.

or not. He [the policeman] did this because he knew my brother and did crime with them. So that was good when he was there we got help quickly now we have to go straight to the police station because he is no longer there.<sup>87</sup>

Another Alexandra resident described how she ensured that the police actually took her case seriously:

If I didn't know some of the officials there who followed up this case they were going to release him, our case wasn't going to go anywhere, so we were lucky because there were people who knew me who worked at the police station and they made sure that the guy is locked up.<sup>88</sup>

This world of considerable informality is one in which residents' relationships with the police can be seen as a form of 'micro-governance' through which residents attempt to manage the everyday fluidity of an unregulated environment.

But what we see here is more than just a novel form of micro-governance. In this everyday realm, 'the legal and formal dichotomies of the criminal and the not criminal, the legal and the illegal, right and wrong, as well as justified and unjustified, have blurred and no longer hold. Instead, multiple and competing moralities are applied.'<sup>89</sup>

In this fluid environment the experience of many citizens is that the police are directly involved in criminal activities. A few insights from focus-group participants are particularly helpful in understanding what is actually going on in the world around us:

1. There was a policeman who worked in the suburbs, he did housebreakings and bank robbery with guys from the township, they found out and people asked him why he did such a despicable thing when he is a policeman.<sup>90</sup>
2. If I am a criminal and I know the police I work with and I am arrested at any other police station they will come to my rescue because they know what they are going to gain from what I have stolen.<sup>91</sup>
3. If you go to the police station to report housebreaking and the police is involved in that crime, your case is not going to go anywhere.<sup>92</sup>
4. Yes instead of doing their job they make deals with drug dealers, you would think that they are there to arrest the drug dealers but they're actually there to collect the stuff.<sup>93</sup>

The police are also understood to be directly involved in extraordinary acts of violence:

1. I don't trust the police nowadays. They shot my child, till today they have not attended the court, they have not phoned me to let me know how far the case is at court. They hurt my child, they never took him to the hospital; I took him to the

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<sup>87</sup> Alexandra focus group women 18–24 (2013).

<sup>88</sup> Alexandra focus group women 25+ (2013).

<sup>89</sup> Hornberger (note 61 above) at 220.

<sup>90</sup> Alexandra focus group women 25+ (2013).

<sup>91</sup> Alexandra focus group women 18–24 (2013).

<sup>92</sup> Alexandra focus group women 25+ (2013).

<sup>93</sup> Alexandra focus group women 25+ (2013).



- hospital myself. They went to the hospital and told us they found him stealing but when I asked them what he stole they never responded until today.<sup>94</sup>
2. They said I stabbed someone. Then they took me away and I was beaten and they said I will tell the truth because my pants were full of blood ... they didn't take a statement or anything I was beaten up and they said I must go because they had to question other people.<sup>95</sup>
  3. [They are guilty of sins of omission, of failing to respond to calls for assistance]: 'There was a guy who got shot at the park, we phoned the police ... when we phoned they told us there are no vans ... They only came the following day at 7am and asked where the guy was shot ... When they took that guy to the clinic he was still okay but the following day after 5pm they phoned to let us know that he died.'<sup>96</sup>
  4. Police fail to respond to calls for assistance because, 'they don't have a van', but 'I always see the vans at shisanyama (bring and braai) with girls, but when you phone you are told there are no vans. Sometimes they just roam around chasing after girls whilst on duty with the vans, the vans are supposed be at the station in case there's a call out, instead they go to the butchery with the vans and they chill at the malls.'<sup>97</sup>

In this environment particularist relationships with the police are pervasive and necessary to make the law work, and turn on a number of axes of power and reciprocity. Young women attempting to press a claim at a police station are both subject to sexual predation and simultaneously utilise their sexuality to gain small advantage for their claims: '[I]f she has curves they will jump. And when I leave one of them will propose to me and will take me where I am going.'<sup>98</sup> Sexuality can also assist to bargain away criminal allegations: 'But if you are pretty they will say "Oh my sister, you are so beautiful and you are doing such silly things, why did you do that?" If they are attracted to you at first glance then you will be treated better.'<sup>99</sup> Or it can be used to offer protection for relatives engaged in criminal activities: 'I remember my brother went to steal and he told me that when the police come I must take off my jean and wear a shirt and open it a bit in front. I did just that and I went to stand by the door, they forgot why they were there ... they asked for my numbers and I gave it to them because I wanted them to leave.'<sup>100</sup>

At the same time, women find little succour when they seek redress for patriarchal violence:

My uncle used to hit my aunt and she will go to the police station to report the violence but they will just laugh at her because they knew my uncle and they would laugh at her because she was ugly and they would say 'what man would hit a person because of you when you are so ugly?'<sup>101</sup>

For any claim to be expedited or even responded to, material inducements are frequently required.

This focus group exchange captures some of these enforced reciprocities:

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<sup>94</sup> Alexandra focus group women 25+ (2013).

<sup>95</sup> Zamdela focus group men 25+ (2013).

<sup>96</sup> Alexandra focus group women 25+ (2013).

<sup>97</sup> Alexandra focus group women 25+ (2013).

<sup>98</sup> Alexandra focus group women 18–24 (2013).

<sup>99</sup> Alexandra focus group women 18–24 (2013).

<sup>100</sup> Alexandra focus group women 18–24 (2013).

<sup>101</sup> Alexandra focus group women 18–24 (2013).

- Respondents: Even if you scream they won't come.  
 Interviewer: Why don't they come?  
 Rs: Aaah they want money.  
 T: We don't know why they are not doing their job; money talks, so if you are poor they won't attend you.  
 M: Yes. If you get raped and you call the police and you don't have money, they won't come but if they know that you are rich, they come quickly because they know they are going to get something, 'I will eat there.'  
 Interviewer: How do you know this?  
 Rs: We see these things happen. (*Respondents agreeing*)<sup>102</sup>

As much as money is required to press claims, it can be used to quash claims. The respondents in a focus group collectively asserted, 'Yes police love money when a person has money they just ignore their crimes'.<sup>103</sup> Another young man explained his personal experience, 'I was once arrested for public drinking but I gave them R150 and they dropped me off and let me go.'<sup>104</sup> Women in a focus group in Violet Bank also explained how the rule of law is subordinated to the rule of money:

- Interviewer: All eight of you are saying the police are not doing anything?  
 Respondents: They [the police] love money. A criminal pays them R600 and they leave him alone but the crime is still going on and it's growing.<sup>105</sup>

Devaluation of claims on the basis of material status is linked, in the South African context, directly to devaluation on the basis of race. The police are seen to be complicit in the continued devaluation of black lives in post-apartheid South Africa and therefore the claims of black citizens can be ignored or dismissed:

- L: I think the police are controlled by white people because most of the time they don't really care about us blacks, if they get a call saying somebody has stolen from a white person there go there running, mostly their cases are being attended to.  
 Interviewer: Is it true what L is saying?  
 Rs: Yes it's true.  
 Rs: We are not given the same treatment.<sup>106</sup>

The personalised relationships that residents form with police are made possible by the extremely fractious nature of the police organisation itself, which Hornberger finds to be characterised by competing individual loyalties and personal interests. As a result it is, 'their [police] internal rationales, often unintelligible to outsiders, which determine whether they intervene on your behalf or on behalf of someone else.'<sup>107</sup>

Here legitimacy is not acquired as an overarching organisational value but is granted in a particularistic fashion to and by citizens depending on the extent to which police intervene on their behalf in any given situation. Moreover, as Hornberger writes:

<sup>102</sup> Alexandra focus group women 25+ (2013).

<sup>103</sup> Violet Bank focus group men 18–24 (2013).

<sup>104</sup> Violet Bank focus group men 18–24 (2013).

<sup>105</sup> Violet Bank focus group women 25+ (2013).

<sup>106</sup> Violet Bank focus group women 25+ (2013).

<sup>107</sup> Hornberger (*supra*) at 225.

It becomes obvious that policemen do not always imagine themselves in their everyday practices to be operating from the same organisation with a shared organisational rationale.<sup>108</sup> There is no official, unbiased, coherent policing to be reinterpreted and made sense of by local people, but only the practice by local police officers ... and the trajectories of the internal working rationale, which is given meaning by local people.<sup>109</sup>

As a result our police services are shaped by a range of different police cultures which can appear confusing to residents interacting with the security services. On one hand, some police hold a personal sense of mission, which characterises policing culture worldwide. On the other hand the organisation is also characterised by what Hornberger calls ‘docket culture’, which, in the face of the enormous workloads that many South African detectives carry, involves closing dockets as ‘undetected’ whether or not investigations have been carried out in order, literally, to reduce the pile of dockets.

It comes as little surprise, as Hornberger concludes, that the official, formal world of policing appears to be a mere fiction, a distant noise, to residents of townships, informal settlements and inner-city precincts.<sup>110</sup>

## VI THE ‘PRECARIOUS’ VALENCE OF THE LAW

While the law stands at the centre of the liberal imaginary as a principle of universality, neutrality and fairness, in South Africa, ‘everyday injustices have to be suffered without reference to a meaningful idea of Law standing above all.’<sup>111</sup>

As one focus group respondent argued, ‘so there’s nowhere we can say we know for sure that at this police station we’ve got police that are reliable, police that are protecting us’.<sup>112</sup> Such statements reflect the fact that these struggles for legal legitimacy and the creation of a rule of law culture cannot concern the institutions themselves but must address the complex local regulatory environment in South Africa in which the salience of human rights and the law itself are a source of considerable contestation. As Ashforth notes: ‘Despite the “small miracle” of democratic transformation to date, the South African state still has a long way to go before the legitimacy of governance can be taken for granted as a cultural foundation of political power.’<sup>113</sup>

Systematic violence plays a central role in this disjunction between the rule of law and the rule of personalised, arbitrary power. So while state discourse envisages a society based on context-transcending universal human rights mediated and enforced through law (an essentially juridical conception of society), communities themselves engage in complex mediations and appropriations of the discourse of rights, particularly in relation to the overturning of generational and gendered hierarchies, which the rights discourse appears to imply. Frequently it is the body, particularly the gendered as well as the youthful body, which is the

<sup>108</sup> Ibid at 225.

<sup>109</sup> Ibid at 226.

<sup>110</sup> Ibid at 225.

<sup>111</sup> A Ashforth *Witchcraft, Violence and Democracy in South Africa* (2005) xii.

<sup>112</sup> Alexandra Focus Group, Women 25+ (2013).

<sup>113</sup> A Ashforth ‘An Epidemic of Witchcraft? The Implications of AIDS for the Post-Apartheid State’ (2002) 61 (1) *African Studies* 122.

site of these contestations, as well as the site where these contestations are policed through violence in various forms of ‘disciplinary’ practice, whether the beating of children, the rape of women or violence against the transgendered other.<sup>114</sup>

Another disjunction between the neutral conception of the rule of law and the lived experience of many South Africans turns on the informal forms of regulation that existed before, during and after apartheid and which continue to operate in the absence of other reliable forms of law enforcement. This authority structure therefore stands outside state law and is policed with private violence. A group of older men in the township of Shoshanguve explains: ‘The real parents were our grandparents who could use corporal punishment.’<sup>115</sup> In such a genealogical society the subject is defined in terms of a predetermined hierarchy, particularly based on gender and generational divisions, rather than individual volition and self-making. These are not contractual relationships between equal legal subjects, as the state envisages in its efforts to legally govern relationships between parent and child, man and woman. They are *bond* relationships ‘embodied in inequality’<sup>116</sup> and include the ‘right to violence in the interests of nurture’.<sup>117</sup>

The attempt to apply state law and in particular the ‘law of rights’ to the bond relationship is seen as having unleashed unnatural forms of social disorder. As older women in Atteridgeville note: ‘When we were growing up it was tough because of apartheid but at least there was order, discipline and respect.’<sup>118</sup> State law is simultaneously seen as ‘interfering’ in relationships of intimacy in the realm of the private, and as an intruder in the ‘public’ domain, particularly in relation to the policing of social bonds based on a communitarian as opposed to legal ethic.

Yet another disjunction between the procedural conception of the rule of law and the lived experience of many South Africans flows from the failure of the law to take account of African conceptions and practices of justice predicated upon the notion that the community, rather than the individual, is the site of justice. As Hund and M Koto-Rammopon write:

Punishment and the resolution of disputes will lay emphasis upon law as expressing the will and traditions of the community. There is no distinction between legal and moral

<sup>114</sup> South Africa has one of the highest rates of reported rape in the world – recorded as 113.5 incidents per 100 000 of the population in 2002 to the United Nations Office on Drugs and Crime. While comparative statistics may be affected by higher reporting rates in South Africa than other countries, various forms of sexual violence are extremely high. In 2010/2011 the South African police recorded a total of 56 272 cases of rape and sexual assault and a ratio of 132.4 incidents of sexual offences per 100 000 of the population. South Africa has also been increasingly affected by violent attacks against gay South Africans, in particular by a phenomenon called ‘corrective rape’, usually against lesbian women, allegedly carried out to ‘correct’ these women’s sexual orientation. In March 2011 it was reported that activists who had collected 170 000 signatures from 163 countries demanding that corrective rape be recognised as a ‘hate crime’ met with senior officials of the Ministry of Justice and Constitutional Development who undertook to address the matter (IRIN).

<sup>115</sup> V Barolsky ‘“A Better Life for All”, Social Cohesion and the Governance of Life in Post-Apartheid South Africa’ (2012) 38 *Social Dynamics: A Journal of African Studies* 143.

<sup>116</sup> S van Zyl ‘Explaining Violence in South Africa: Some Psychoanalytic Considerations’ (1990) Centre for the Study of Violence and Reconciliation (CSVR) 7.

<sup>117</sup> Ibid at 9.

<sup>118</sup> V Barolsky (note 115 above) at 143.

issues ... The person at the bar of judgment is there, in principle, as a whole man, bringing with him his status, occupation, and the entire history of all his social relations. Justice is substantive and is directed to a particular case in a particular social context and not to the creation of a general rule or precedent.<sup>119</sup>

Crais similarly notes how the community as a whole displaces the individual as the subject of the law:

Typically infractions involved as much the person directly involved as the community of which he or she was a member. Thus people could be found guilty of offences they themselves did not commit ... the central issue revolved around the restoration of balance within the community, less personal culpability or the restoration to the individual of the harm done to them.<sup>120</sup>

In each of these settings, the law of the state is not the law of the people. As older men in Nyanga observe: 'When gangs attack one of our friends we group ourselves to discipline them, but according to *South African* law we are regarded as people who are taking law into own hands.'<sup>121</sup>

Why is South Africa subject to these persistent disjunctions between the rule of law and the law as lived? As John Comaroff points out, unlike European nation-states, which were characterised by 'the emergence of a sense of nationhood based, imaginatively and affectively, on horizontal connection',<sup>122</sup> the relationship of extreme exploitation and exclusion established between the colonial state and the colonised, meant that a similar horizontal 'imagining' of national identity did not occur in the colonial environment and what were produced were 'states *sans* nations'.<sup>123</sup> Ekeh explains the disjunction in terms of the existence of two publics under colonial rule, the traditional and the civic. The 'primordial public' (the 'traditional') contained colonial subjects and operated in terms of collective claims and moral imperatives. The 'civic public', ie the bureaucratic, individualised and regulatory environment created by the colonial administration, was seen by colonial subjects as an 'amoral' environment that imposed no moral obligations on them.<sup>124</sup> According to Comaroff, these two public realms were the product of the colonial state's contradictory effort, 'to convert "natives" (simultaneously and contradictorily) into *both* right-bearing citizens and culture-bearing ethnic subjects'.<sup>125</sup>

These tensions between the individual subject of a rule-of-law culture and the collective subject of more indigenous, localised forms of law – these tensions between competing visions of 'justice' – partially explain why the uptake of the rule of law culture to which the Constitution aspires has been so slow. The post-apartheid state may posit the Constitution as the basis of a new solidarity, but

<sup>119</sup> J Hund & M Koto-Rammopon 'Justice in a South African Township: The Sociology of *Makogtla*' (1983) 6 *Comparative and International Law Journal of Southern Africa* 201.

<sup>120</sup> C Crais *The Politics of Evil Magic, State Power and the Political Imagination in South Africa* (2002) 86.

<sup>121</sup> Barolsky (note 115 above) 144.

<sup>122</sup> J Comaroff 'Reflections on the Colonial State, in South Africa and Elsewhere: Factions, Fragments, Facts and Fictions' (1998) 3 *Social Identities* 321.

<sup>123</sup> *Ibid* at 343.

<sup>124</sup> P Ekeh 'Colonialism and the Two Publics in Africa: A Theoretical Statement' (1975) 17 (1) *Comparative Studies in Society and History* 1.

<sup>125</sup> Comaroff (note 122 above) at 344.

change takes time and is met with resistance. As a group of older men in the township of Nyanga explained: 'In our new society we have a new challenge of democracy where talk are (sic) things like human rights and children's rights.'<sup>126</sup>

Ethnographic work by Lars Burr<sup>127</sup>, Fiona Ross,<sup>128</sup> Mark Hunter,<sup>129</sup> Suren Pillay<sup>130</sup> and Nthabiseng Motsemme<sup>131</sup> reveals 'the multiple overlapping domains of law and moral systems that have evolved (both as part of and in resistance to) the colonial and apartheid eras'.<sup>132</sup> The 'moral and ethical foundations of the law'<sup>133</sup> are in conflict in ways that sometimes contest the sovereignty of the state through the assertion of alternative regimes of social control.

Von Holdt et al have argued, therefore, that South African society must be characterised as 'precarious': 'A precarious society is characterised by social fragmentation and competing local moral orders which not only generates precarious lives, but a social world in which society itself becomes precarious.'<sup>134</sup>

What is at issue here, to put it bluntly, is whether we possess the very conditions of constitution of the nation, let alone the creation of a constitutional democracy based upon the rule of law.

## VII CONCLUSION

This article has sought to grapple with some of the complexities related to the struggle to realise the rule of law substantively as a pervasive norm and justiciable claim through an effective and independent security service in a material and social world of profound fragmentation, normative contestation, deprivation and institutional disarray. This is not to say that this ideal, as it is being articulated and to some extent realised in the judgments of the courts of post-apartheid South Africa, ought to be reconsidered. This article simply sounds a cautionary note. We must adopt a chastened sense of the social world within which these assertions of the rule of law operate and find ways in which these two worlds might be harmonised so that a principle of legality might one day be fully realised.

<sup>126</sup> Barolsky (note 115 above) at 138.

<sup>127</sup> L Buur 'Democracy & its Discontents: Vigilantism, Sovereignty & Human Rights in South Africa' (2008) 35 *Review of African Political Economy* 118.

<sup>128</sup> Ross (note 53 above).

<sup>129</sup> M Hunter *Love in the time of Aids: Inequality, gender, and rights in South Africa* (2010).

<sup>130</sup> S Pillay *Crime, Community and the Governance of Violence in Post-Apartheid South Africa* (2008) 35 (2) *Politikon* 141-158.

<sup>131</sup> N Motsemme 'Loving in a time of hopelessness: on township women's subjectivities in a time of HIV/AIDS' in N Gasa (ed) *Women in South African History: Basus'imbokodo, Bawel'imilambo / They Remove Boulders and Cross Rivers* (2008).

<sup>132</sup> Buur (note 127 above).

<sup>133</sup> *Ibid* at 4.

<sup>134</sup> K von Holdt M Langa S Molapo N Mogapi K Ngubeni J Dlamini & A Kirsten *The Smoke that calls. Insurgent Citizenship, Collective Violence and the Struggle for a Place in the New South Africa: Eight Case Studies of Community Protest and Xenophobic Violence* Johannesburg, Centre for the Study of Violence and Reconciliation (CSVR) and Society Work and Development Institute (SWOP) (2011) 7.



# Domesticating International Standards: The Direction of International Human Rights Law in South Africa

Bonita Meyersfeld\*

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## I INTRODUCTION

All nation states, to varying degrees, participate in the international political order. Such participation usually triggers an engagement with the global rules that comprise international law. This global system of laws often comes into tension with a state's national laws and policies. This dynamic relationship raises a challenge every nation state faces: How do the two systems of law – international law and domestic law – intertwine, and how should the state's courts, executive and legislature engage this system?

As a general matter, the friction between a state's law and international law often revolves around the rights of the individual. International human rights law requires states to respect a panoply of human rights. National laws and policies are quite often found to be inconsistent with international human rights law.

This article analyses this tension in respect of South Africa. South Africa's engagement with international law, both during and after apartheid, presents a most interesting evolution. This piece traces the arc from the antagonistic days of apartheid, when the state and its institutions denied the application of international law,<sup>1</sup> to the robust inclusion of international law in the Interim Constitution<sup>2</sup> to the more layered articulation of international law in the (Final) Constitution of the Republic of South Africa, 1996 ('FC').

In 2014, after 20 years of rich constitutional jurisprudence, we can now see an embryonic resistance to international law that characterises the responses of so many governments. South Africa is, in some *formal* respects, emulating the same antagonism towards international law as was present under apartheid. Of course, this article does not to compare the two regimes in a fashionably crude fashion: The difference between rule under a fascist, minority, racist government and life,

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<sup>1</sup> J Dugard 'The Conflict between International Law and South African Law: Another Divisive Factor in South African Society' (1986) 2 *South African Journal on Human Rights* 1.

<sup>2</sup> Constitution of the Republic of South Africa, Act 200 of 1993 ('Interim Constitution').

however challenging, under a new constitutional democracy expressly committed to the rule of law and human rights could not be starker. The objective, rather, is to be clear about the current positioning of international human rights law with our constitutional framework and the extent to which our own human rights standards in South Africa may be impeded by the persistent resistance to international norms in favour of national policies.

This article focuses primarily on FC s 231. FC s 231 regulates the implementation of treaty law in South Africa. This provision sets out the steps the executive and the legislature must take in order for a treaty to be part of South African law: (1) the executive signs the treaty; (2) Parliament approves the treaty in order for the treaty to bind the Republic; (3) Parliament must then enact legislation to make the treaty part of domestic or municipal South African law.

FC s 231 is, however, not alone. FC ss 232 and 233, when read with FC s 231, raise a host of thorny questions: (a) What is the distinction between *being bound* by an international agreement, on the one hand, and an international agreement *being law* in South Africa, on the other? (b) How does the answer to this first question square with the requirements of FC s 232, namely that customary international law ‘is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’? and (c) How *should* our country engage the complex rubric of international human rights law?<sup>3</sup>

The nub of the international law question discussed in this article is as follows. If South Africa has signed an international agreement or treaty but has not yet incorporated the treaty’s obligations into domestic law, what does that mean for the state’s obligations vis-à-vis that treaty’s content? In particular, where a treaty addresses human rights, can South Africa sign an undertaking to be bound vis-à-vis states at the international level and *not* vis-à-vis South Africans until it has been ratified by Parliament?

## II THE HISTORY OF INTERNATIONAL HUMAN RIGHTS LAW IN SOUTH AFRICA

During apartheid, international law played a powerful role in undermining the South African government’s policies.<sup>4</sup> International *human rights* law delineated global standards of racial integration, equality and democratic governance. International law became the touchstone by which South African lawyers

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<sup>3</sup> Lilian Chenwi offers a third reason, which underwrites the arguments herein: namely, that international human rights law ‘sets more precise norms than the Bill of Rights in the Constitution and provides clarity with regard to the adoption, content and interpretation of national laws’. L Chenwi ‘Using International Human Rights Law to Promote Constitutional Rights: The (Potential) Role of the South African Parliament’ (2011) 15 *Law, Democracy and Development* 314.

<sup>4</sup> See J Dugard *International Law: A South African Perspective* (3 Ed, 2010) 23–24. Dugard provides some rich examples. International law on the right to movement was used by anti-apartheid activists, Desmond Tutu and Robert Sobukwe, in challenging restrictions placed on their right to travel. See *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T); *Sobukwe v Minister of Justice* 1972 (1) SA 693 (A). The human rights provisions of the Charter of the United Nations were used to challenge the segregation of South African cities along racial lines. See *S v Adams*; *S v Werner* 1981 (1) SA 187 (A). Political activists, kidnapped from neighbouring countries, argued that their arrest was contrary to the principles of international law. See *Nduli v Minister of Justice* 1978 (1) SA 893 (A); *S v Ebrahim* [1991] ZASCA 3, 1991 (2) SA 553 (A)).

operating in apartheid could refer and on which they could rely to challenge the validity and legitimacy of apartheid laws. Equally, with the passion and ideology that galvanised the democratic transition in the early 1990s, almost all principles of international human rights law were embraced, integrated and, at times, enhanced in the new South African constitutional order.<sup>5</sup>

International law, therefore, has been both the mirror to reflect the disgrace of apartheid and a source of law that has guided the construction of the current South African constitutional democracy. Given this positive reading of the relationship, and South Africa's maturation, it is intriguing to consider the current rapport between international human rights law and South African constitutional law.

The Constitutional Court regularly hears arguments that connect the position of international law vis-à-vis a particular provision of the Bill of Rights. FC s 39 provides that a court 'must consider' international law when interpreting the Bill of Rights. This consideration, and its complexity, came to the fore in *Glenister v President of the Republic of South Africa* ('*Glenister*').<sup>6</sup> *Glenister*, the latest in a line of cases regarding the application of international law in South Africa, involved a challenge to the constitutionality of the legislative framework that created the Directorate for Priority Crime Investigation (commonly referred to as the Hawks) and the disbandment of its predecessor body, the Directorate of Special Operations (commonly referred to as the Scorpions). One of the key questions was whether this new legislative framework was consistent with South Africa's constitutional and international obligations to combat corruption.

The *Glenister* Court held that South Africa's constitutional obligations, read together with its regional and international undertakings, impose very specific obligations on government to have an anti-corruption unit with particular 'structural and operational attributes'.<sup>7</sup> A minority of the *Glenister* Court strongly opposed this interpretation of international human rights law (as well as majority's construction of the constitutional provisions at issue).

The tension between the closely split majority judgment and minority opinion reveals an increasing discomfort with international human rights law in South Africa. This review of the position of international human rights law and treaties in South African law is necessary not only from the point of view of legal doctrine, but also because the government's arguments in *Glenister* echo, in a

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<sup>5</sup> See FC Chapter 2. FC s 9, for example, incorporates international standards of non-discrimination and expands these standards by including sexual orientation as an expressly prohibited ground of discrimination. See *Kaunda and Ors v President of the Republic of South Africa* [2004] ZACC 5, 2005 (4) SA 235 (CC) at para 35 (Chaskalson CJ notes that the 'Bill of Rights is extensive and covers conventional and less conventional rights in detail.') See also J Dugard 'Kaleidoscope: International Law and the South African Constitution' (1997) 1 *European Journal of International Law* 84.

<sup>6</sup> *Glenister v The President of the Republic of South Africa and Others* [2011] ZACC 6, 2011 (3) SA 347 (CC) ('*Glenister*'). This case is often referred to as '*Glenister IP*'. *Glenister I* involved a challenge by Mr Hugh Glenister against a decision taken by Cabinet to initiate legislation dissolving the Directorate of Special Operations (commonly known as the Scorpions). The Constitutional Court, relying on principles of separation of powers, dismissed the application. See *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19, 2009 (1) SA 287 (CC). *Glenister II*, as described herein, is the case which I engage in this article.

<sup>7</sup> *Glenister* (note 6 above) at para 174.

decidedly disquieting register, the apartheid government's chauvinistic approach to international human rights law.

An important caveat is in order. I do not suggest that *all* international law should be incorporated into South African law. On the contrary; international law itself must be reviewed and interrogated for its own laissez-faire predisposition toward capitalist, mercantilist and authoritarian economic frameworks alike. The critique in this article focuses solely on international human rights law. The government's opposition to certain principles of international economic law, for example, may well be necessary to achieve the very values imposed by the international human rights law regime.<sup>8</sup> This article focuses solely on the legal position of international human rights law subsequent to the legal and political quagmires that characterise the arguments heard and the judgments rendered in *Glenister*.

### III THE FACTS AND CONTEXT OF GLENISTER

The facts of, and background to, *Glenister* are mired in the conflict between former president Thabo Mbeki and current president, Jacob Zuma. The divergent ideologies of the two ANC leaders led to the early resignation of Mr Mbeki from The Presidency and the appointment of Mr Zuma as the president of the ANC. (the deputy president at the time became the interim leader of the country).

One of the points of conflict between Mr Mbeki and Mr Zuma was the role of the Scorpions. The Scorpions were an elite crime-fighting unit within the National Prosecuting Authority (NPA). They were armed with three unique characteristics. They possessed unique powers of search and seizure and interrogation (unique powers). They were mandated to combat organised crime and corruption (unique mandate). Although they were a policing and investigatory unit, they were not housed within the South African Police Service, but rather, in the NPA (unique location). The combination of these three characteristics gave the Scorpions the independence and the power to investigate allegations of criminal conduct within the police and the government without fear of intervention. The Scorpions were accountable to the Director of the NPA. The NPA imposed checks and balances on the unit's use of its statutory powers.<sup>9</sup>

During Mbeki's term of office, the Scorpions began investigations into Mr Zuma and his financial advisers. Mr Zuma proclaimed his innocence, accusing the Scorpions of malicious investigation and of being an instrument of persecution by Mr Mbeki. The Khampepe Commission of Inquiry, established to review the DSO, recommended that the Scorpions should remain within the NPA (albeit with certain adjustments).<sup>10</sup>

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<sup>8</sup> The impact of international economic law on the development of human rights law and black economic empowerment at a national level came to the fore in the matter of *Piero Foresti, Laura De Carli v Republic of South Africa*, 2010, available at <[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651\\_En&caseId=C90](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90)>

<sup>9</sup> *Glenister* (note 6 above) at paras 139–140.

<sup>10</sup> *Ibid* at para 6.

Soon thereafter, at the ruling party's national conference in December 2007, two seminal political episodes transpired. First, the party passed a resolution that President Mbeki should step down as leader of the party. Mr Zuma would, as a consequence, take up the position of ANC president. Second, the party adopted a resolution calling for a single police service and the dissolution of the Scorpions. This decree became known as the Polokwane Resolution.<sup>11</sup>

Two years after the Polokwane Resolution, President Zuma enacted legislation that disbanded the Directorate of Special Operations (the Scorpions) and replaced it with the Directorate of Priority Crime Investigation (DPCI).<sup>12</sup> The mandate of the new unit, the Hawks, remained the same as that of the Scorpions. It retained the same powers. The key difference, however, was its placement in the governance of South Africa, moving from the national prosecuting authority to the police service.

Hugh Glenister, a South African citizen, challenged the new legislative framework. The core issue facing the Court was whether this new investigative unit was sufficiently independent to fulfil South Africa's obligation to prevent and combat corruption. This inquiry raised several questions. Was South Africa obliged to combat corruption under the South African Constitution and/or under international law? If this obligation did exist, how specific is that obligation?

#### IV THE MAJORITY DECISION IN GLENISTER

##### A Finding the Legal Source of the Obligation to Prevent and Combat Corruption

In the absence of express provisions in the Constitution, the Court had to determine whether the South African government is legally obliged to combat and prevent corruption. The *Glenister* Court ultimately decided this query in the affirmative. In reaching this conclusion, it spent a great deal of time considering the source of this obligation. The *Glenister* Court was presented with two options. The obligation to combat and prevent corruption could be read into the various provisions of the Constitution that reflect a commitment to transparency, effective governance and the enforcement of fundamental rights. Alternatively, the obligation could be said to emanate directly from very specific international law obligations to prevent and to combat corruption in specific ways, including the United Nations Convention against Corruption (Convention against Corruption),<sup>13</sup> as refracted to various provisions in the Constitution committed to the incorporation of international law into domestic law.

The applicant argued that South Africa was bound by international law and, specifically, by the international law standards of independence for a state's anti-corruption body.<sup>14</sup> The applicant first asked the *Glenister* Court to hold that South

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<sup>11</sup> Ibid at para 8.

<sup>12</sup> Ibid at paras 1–2.

<sup>13</sup> United Nations Convention Against Corruption, 31 October 2003, 2349 *United Nations Treaty Series* 41 (A/58/422). South Africa signed the Convention against Corruption on 9 December 2003 and ratified it on 22 November 2004.

<sup>14</sup> *Glenister* (note 6 above) at para 17.

Africa has an obligation to create an independent anti-corruption unit to fight corruption.<sup>15</sup> It did so on the grounds that the Convention against Corruption is law in South Africa and requires the government to place the anti-corruption unit in the prosecuting authority as opposed to the South African Police Service (SAPS).<sup>16</sup> The respondent conceded that the government was obliged to combat and prevent corruption but that such obligations, and their contours, are to be found in the text of the Constitution. The respondent argued that the Constitution contained no specific requirement(s) regulating the composition or the location of the government's anti-corruption body.

The point of contention, therefore, was not whether the government has an obligation to combat and prevent corruption. Rather, the two crisp points for determination were: (i) What is the source of this obligation; and (ii) How does one interpret that obligation with regard to the location of an anti-corruption unit in our country's governance structures?<sup>17</sup>

The first question, the question of source, highlights the tension between national and international law. If the *Glenister* Court found international law as the source of the anti-corruption obligation, then the government would not only be obliged 'to establish and maintain an independent body to combat corruption and organised crime'.<sup>18</sup> In addition, such a unit would be obliged to have specific 'structural and operational attributes' to be said to be independent.<sup>19</sup>

The question of source, therefore, was a seminal precursor to the ultimate point of dispute: Were the Hawks independent enough? The analysis of these questions reveals a methodology of aligning national and international law in South Africa that should not be lost in the politically fraught debate around the Hawks.

### **B Question One: The Source of the Obligation to Create an Anti-Corruption Unit**

The majority of the *Glenister* Court held that the legislative framework creating the Hawks was indeed unconstitutional. In placing the Hawks in the SAPS, the state was in breach of South Africa's obligations to create a genuinely independent anti-corruption unit.

The majority's point of departure, however, is based not on South Africa's international law obligations. The Court is unambiguous: The obligation to eradicate corruption *in a specific manner* lies firmly within the Constitution. The majority's reasoning is that the various components of the Constitution would be rendered meaningless *without* 'a concrete and effective mechanism to

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<sup>15</sup> Ibid at para 17.

<sup>16</sup> Ibid at para 163.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid at para 174.



prevent and root out corruption and cognate corrupt practices'.<sup>20</sup> The principles of governmental accountability, transparency, budgetary accountability, and responsiveness are notions that have inherent to them the absence of corruption.<sup>21</sup> The right to have a government oppose corruption is *the same* as a right to a transparent and accountable government.

The Court confirmed that corruption is a 'scourge in our country',<sup>22</sup> 'poses a real danger to our developing democracy',<sup>23</sup> and undermines the ability of the government to 'meet its commitment to fight poverty and to deliver on other socio-economic rights'.<sup>24</sup> This connection between corruption and individual rights is further reinforced in the majority judgment of Moseneke DCJ and Cameron J as follows:

There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.<sup>25</sup>

For the majority, therefore, an anti-corruption unit is inextricably linked to the fulfilment of our Bill of Rights.<sup>26</sup>

### **C Question Two: The Content of the Obligation to Create an Anti-Corruption Unit**

This axiomatic point leads the Court to the second question. Is there a standard specified set of requirements for the creation of such a unit in order for it to meet the standard of independence inherent in this obligation? Put pithily: Is there a requirement that an anti-corruption unit should be placed outside the police?

The *Glenister* Court then engages international law 'to understand the content of the constitutionally imposed requirement of independence'.<sup>27</sup> This move brings squarely into focus the nature of South Africa's international law obligations.

The specific international law instrument vis-à-vis corruption is the Convention against Corruption. The South African government had signed this Convention but, at the time of the case, it had not yet been incorporated into South African law.

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<sup>20</sup> Ibid at para 175. See *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) (O'Regan reiterates basic point of constitutional interpretation: No provision of constitution can be rendered redundant as the result of the interpretation of another constitutional provision or meaningless after the disposition of a constitutional matter.)

<sup>21</sup> *Glenister* (note 6 above) at para 176.

<sup>22</sup> Ibid at para 57.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid at para 166.

<sup>26</sup> Ibid at para 177.

<sup>27</sup> Ibid at para 178.

This raises a number of questions. Could the Convention against Corruption be used to inform the content of the obligation to establish an anti-corruption unit? Was the Convention against Corruption *law* in South Africa? Was the Convention binding, in which case could its constitutive elements be used as a benchmark of the independence of the Hawks? Or was the Convention extraneous to South Africa's obligation because it had not yet been ratified by the state?

## V THE CONSTITUTIONAL FRAMEWORK VIS-À-VIS INTERNATIONAL HUMAN RIGHTS TREATIES

South African law contains a number of provisions regarding the role and status of international law in South Africa.

### A Process of Treaty Implementation

What about treaties? Two procedures must be followed for the implementation of treaty law in South Africa. The state must first sign the treaty, at which point the state is bound by the treaty, at the international law. The treaty, however, does not become domestic or municipal law in South Africa until it is enacted as such by the legislature. The detail of, and distinction between, these two parts of treaty law are described below.

The critical constitutional provision for understanding the status and force of treaty obligations is FC s 231(2). This section provides that: 'An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces' unless the agreement is a self-executing treaty.

Parliament acts as a 'check' on the executive. It must sign off on the executive's conduct under FC s 231(1) by signing international agreements. In practice, therefore, the executive may sign as many 'international agreements' as it deems fit. But these agreements will not be incorporated into South African domestic law unless and until they are approved by parliamentary resolution.

What, in practice, does this process entail?<sup>28</sup> According to the Rules of the National Assembly,<sup>29</sup> when Parliament's approval is sought for an international agreement in terms of FC s 231(2), 'a copy of the agreement must be submitted to the Speaker together with an explanatory memorandum'.<sup>30</sup> The explanatory memorandum (a) must address the history, objectives and implications of the agreement;<sup>31</sup> (b) must provide a legal opinion by a state law adviser 'as to whether the agreement is consistent with the domestic law of the Republic, including the Constitution, with the international obligations of the Republic and with

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<sup>28</sup> This process was described in *President of the Republic of South Africa and Ors v Quagliani, President of the Republic of South Africa and Ors v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others* [2009] ZACC 1, 2009 (4) BCLR 345 (CC) at paras 16–17.

<sup>29</sup> Rules of the National Assembly, available at <<http://www.pmg.org.za/docs/2009/NARules0811.pdf>>.

<sup>30</sup> Ibid at Rule 306(1).

<sup>31</sup> Ibid at Rule 306(2)(a).

international law in general;<sup>32</sup> (c) must identify any self-executing provisions;<sup>33</sup> (d) must proffer an account of the projected financial and other costs of the agreement for the state;<sup>34</sup> and (e) must supply any other information necessary to enable the National Assembly to render a decision.<sup>35</sup>

Once the agreement and explanatory memorandum is tabled (by the Speaker of the National Assembly),<sup>36</sup> the matter is then referred for ‘consideration and report’ to the relevant parliamentary portfolio committee or any other relevant parliamentary committee.<sup>37</sup> The committee investigates the subject of the international agreement, consulting with other portfolios if necessary, and then reports back to the National Assembly, stating whether it recommends approval or rejection of the treaty.<sup>38</sup> This decision is then placed on an Order Paper for decision.<sup>39</sup> In this way, Parliament is able to enquire into the suitability of the proposed international agreement for incorporation into South African law.

If Parliament is satisfied that the treaty is suitable for South Africa, then it will enact the necessary legislation. FC s 231(4) therefore imposes a further layer of parliamentary control by providing that an international agreement ‘becomes law in the Republic when it is enacted into law by national legislation...’.

## **B The Tension in FC s 231 When Interpreting International Human Rights Treaties**

The Constitution envisages a two-part process to South Africa’s incorporation of international agreements. The first stage requires Parliament to *approve* the international agreement by resolution in order for it to *bind* the Republic on a domestic level. It then requires the national executive to ratify the international agreement in order for it to bind the Republic on an international level<sup>40</sup>. The second part requires an *Act* of Parliament in order for the international agreement to become *part* of domestic South African law.

What is the distinction between the Republic *being bound* by an international agreement, on an international level, on the one hand, and an international agreement *being law* in South Africa, on the other? And how does this square with FC s 232? FC s 232 provides that customary international law ‘is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’? Once we answer these two technical questions, we can answer a third, perhaps more pertinent, inquiry: How *should* our country engage the complex rubric of international human rights law?<sup>41</sup>

<sup>32</sup> Ibid at Rule 306(2)(b).

<sup>33</sup> Ibid at Rule 306(2)(c). For a discussion regarding self-executing provisions, see Dugard ‘Kaleidoscope’ (note 5 above) at 83.

<sup>34</sup> Rule 306(2)(d) of the Rules of the National Assembly (note 29 above).

<sup>35</sup> Ibid at Rule 306(2)(e).

<sup>36</sup> Ibid at Rule 307(1)(a).

<sup>37</sup> Ibid at Rule 307(1)(b).

<sup>38</sup> Ibid at Rules 307(2)–(3).

<sup>39</sup> Ibid at Rule 307(4).

<sup>40</sup> For further discussion see F Sucker ‘Approval of an International Treaty in Parliament: How does Section 231(2) “Bind the Republic”?’ (2013) 5 Constitutional Court Review 417.

<sup>41</sup> Chenwi (note 3 above) at 314.

### C The Glenister Court's Approach to these Tensions

In *Glenister*, the majority of the Constitutional Court held that:

[The duty to combat corruption] exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.<sup>42</sup>

This act of 'appropriation' is a refreshingly novel concept. At first blush, this notion seems to endorse a monist approach to incorporation of international law. But this appropriation, according to the *Glenister* Court, is not about incorporation of an externally defined international norm directly into South African law. Rather, the appropriation occurs via FC s 7(2), read together with FC s 8(1), which collectively impose an obligation on the government to take positive steps to respect, protect, promote and fulfil constitutional rights.

The Court then turns to international law to *interpret* what such reasonable effective steps might be. In other words, the majority does not recognise that international law alone could ground *Glenister's* claim. The Court uses international law to interpret the Bill of Rights as it is so mandated by FC s 39(1)(b). It has done so since *S v Makwanyane*.<sup>43</sup> Instead of recognising that international law alone could ground *Glenister's* claim, the Court holds that the act of appropriation does not 'incorporate international agreements into our Constitution'<sup>44</sup> nor does it import some type of 'extraneous obligation, derived from international law and imported as an alien element into our Constitution: It is sourced from our legislation and from our domesticated international obligations and is therefore an intrinsic part of the Constitution itself and the rights and duties it creates.'<sup>45</sup>

The strong language of international law's 'otherness' may disappoint international law theorists committed to monism. However, the judgment accurately represents the constitutional position that, bar certain exceptions, treaties do not become law in South Africa until entrenched by an Act of Parliament. It also pushes back against the notion that the obligation to combat corruption is absent from the Constitution. As far as international human rights law is concerned, however, these dual propositions create a strange anomaly. South Africa may sign international human rights law treaties and thereby undertake to protect the human rights of South Africans. But these rights will not be enforceable by citizens of South Africa 'unless and until' Parliament passes the necessary enacting legislation (or you have a set of wise, sympathetic judges

<sup>42</sup> *Glenister* (note 6 above) at para 189.

<sup>43</sup> *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) at paras 13–14 (The Court notes that public international law may be used 'as tools of interpretation. International agreements and customary international law accordingly provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate case, reports of specialized agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].')

<sup>44</sup> *Glenister* (note 6 above) at para 195.

<sup>45</sup> *Ibid* at para 197.

who understand the need to integrate international law and constitutional law in a politically tense climate). While it is true that South Africa, when ratifying these agreements, will be bound vis-à-vis other states, this is meaningless in respect of human rights treaties which are enforced, not by other states (although technically this is possible) but by individuals in domestic courts.<sup>46</sup>

## VI TO WHOM IS THE STATE RESPONSIBLE WHEN RATIFYING A HUMAN RIGHTS TREATY?

This potential frustration raises a fundamental question of international human rights law in terms of the South African Constitution: To whom is the state responsible under international law? If our state is only responsible under international human rights law to other states, then the bi-partite process of FC s 231 is an acceptable approach to international human rights law. However, if a state is responsible not only towards other states but also individuals, it then becomes less clear whether the staggered approach of FC s 231 to treaty incorporation makes sense. Can we somehow find a more appealing degree of consistency between the principles of international law and the South African Constitution's approach to its incorporation? Put differently, does a constitutionally compliant, more streamlined approach exist for the incorporation of human rights treaties into South African law? It is this question to which I now turn.

### **A State Responsibility in International Human Rights Law: State Responsibility to the Individual**

While traditionally international law only bound states vis-à-vis other states, it has morphed into a system which now also binds the state vis-à-vis individuals.<sup>47</sup> A brief history of state responsibility supports this article's contention that South Africa may have to adopt a more robust approach to international human rights law and its incorporation into our domestic or municipal law.

Historically, international law was rooted in and limited by the notion of state sovereignty. What happens within the boundaries of a state is the exclusive concern of that state. Two narrow exceptions obtained. In the context of diplomatic relations and the protection of foreign nationals living abroad, states had an obligation to respect the rights of individuals.<sup>48</sup> These rights, however, flowed from the legal fiction that the individuals in question constituted part of the state and that a violation committed against the foreign national constituted a violation against the state from which that individual hailed.<sup>49</sup>

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<sup>46</sup> See briefly HJ Steiner & P Alston *International Human Rights In Context* (2000, 2nd edition) 987, noting that the 'international human rights system does not typically place delinquent states in political bankruptcy and through some form of receivership take over the administration of a country in order to ensure the enjoyment of human rights'.

<sup>47</sup> See MN Shaw *International Law* (6 Ed, 2008) 131 and BC Meyersfeld *Domestic Violence in International Law* (1 Ed, 2010) 195.

<sup>48</sup> See Steiner & Alston (note 46 above) at 82.

<sup>49</sup> Meyersfeld (note 47 above) at 195–196 and 258. For an extensive and still relevant discussion of these principles, see AV Freeman *The International Responsibility of States for Denial of Justice* (1938) and C Eagleton *The Responsibility of States in International Law* (1928). See also Shaw (note 47 above) at 131.

In the late 19th to early 20th century, the state-centric nature of international law began subtly to shift.<sup>50</sup> Human rights law and humanitarian intervention were some of the first areas of international law to recognise the rights of the individual, especially in cases ‘in which a State maltreats its subjects in a manner which shocks the conscience of mankind’.<sup>51</sup> These doctrines introduced the notion that a state could be liable, not only for conduct committed against another state, but also for conduct committed against a state’s own citizens. This shift led to the question as to whether an individual possesses, or can possess, rights given to her or him directly by customary international law or treaties.<sup>52</sup> Underlying this movement was the issue of so-called ‘fundamental rights’ of the individual. As fundamental, these rights could be protected by international law as against the sovereign power of the state.<sup>53</sup> John Locke had originally articulated this duty as the government’s obligation not to act capriciously towards its citizens.<sup>54</sup>

This change reached its pinnacle after the Holocaust. The establishment of the United Nations created a set of supra-standards of political and legal instruments which spoke, not only to states, but also to the rights, interests and freedoms of the individual. According to Lauterpacht, the Charter of the United Nations finally recognises the dual proposition that ‘the individual human being ...[is] entitled to fundamental human rights and freedoms’ and ‘fundamental human rights [are] superior to the law of the sovereign State’.<sup>55</sup> The reverberation of ‘never again’ resulted in the tapestry of the Universal Declaration of Human Rights in 1948<sup>56</sup> and, in 1966, the two rights covenants, namely the International Covenant on Economic, Social and Cultural Rights<sup>57</sup> and the International Covenant on Civil and Political Rights.<sup>58</sup> These treaties, together with authoritative statements from the International Court of Justice, confirmed that states are not the only relevant actors in international law and that individuals can acquire international rights under treaties.<sup>59</sup>

The most authoritative guidance on the responsibility of states is the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles).<sup>60</sup> The ILC Articles provide a

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<sup>50</sup> H Lauterpacht *International Law and Human Rights* (1968) 32.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* See also Freeman (note 49 above) at 18.

<sup>53</sup> Lauterpacht (note 50 above) at 49.

<sup>54</sup> J Locke *Questions Concerning the Law of Nature with an Introduction* (text and translation by R Horwitz, J Straus Clay and D Clay) (1990) 213.

<sup>55</sup> Lauterpacht (note 50 above) at 38.

<sup>56</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

<sup>57</sup> International Covenant on Economic, Social and Cultural Rights (CESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 *United Nations Treaty Series* 3.

<sup>58</sup> International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 *United Nations Treaty Series* 171.

<sup>59</sup> Lauterpacht (note 50 above) at 23.

<sup>60</sup> International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third Session: Draft Articles of Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) UN Doc A/56/10, 43 (ILC Articles). For commentary regarding the status in international law of these articles, see J Crawford *The International Law Commission’s Articles on State Responsibility* (2002); O Schachter ‘United Nations Law’ (1994) 88 *American Journal of International Law* 5; and Meyersfeld (note 47 above) at 194.



comprehensive description of the circumstances in which a state is responsible for internationally wrongful acts, the obligation of states to remedy such acts and applicable reparations. The introductory commentary to the ILC Articles confirms that the articles apply irrespective of ‘whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole’.<sup>61</sup> Article 33(1) of the ILC Articles provides that a delinquent state may be responsible to one or more states or to the international community as a whole but that this is ‘without prejudice to any right, arising from the international responsibility of a state, which may accrue directly to any person or entity other than a State’.<sup>62</sup> Therefore, where a state’s international obligation is owed to its citizens, those citizens may invoke the principles of state responsibility to compel states to remedy their breach of the duties in question. The former special rapporteur on state responsibility, James Crawford, points out that:

A State’s responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.<sup>62</sup>

Although not beyond contention,<sup>63</sup> it is now largely accepted that an individual may be a subject of international law, bearing both rights and responsibilities.<sup>64</sup>

Interesting precedent for this statement exists in the European Court of Justice (ECJ). In *Francovich*, the ECJ asked whether, under the system of European Community Law, a private individual who has been adversely affected by the failure of a member state to implement a directive (Directive 80/897) is ‘entitled to require the State itself to give effect to those provisions of that directive which are sufficiently precise and unconditional, by directly invoking the Community legislation against the Member State in default so as to obtain the guarantees which that State itself should have provided’.<sup>65</sup> In contrast, the South African Constitutional Court, as in *Glenister*, has not incorporated the provisions of international or regional law into its reasoning. It has relied on FC s 7(2) (correctly) to reflect the international principles of ‘respect, promote and protect’ human rights.

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<sup>61</sup> ILC Articles (note 60 above) at para 5 of Commentary.

<sup>62</sup> Crawford (note 60 above) 209.

<sup>63</sup> See Lauterpacht (note 50 above) at 5 (Describes the debate regarding the status of individuals in international law and whether they may be subjects of the law of nations). See, generally, JH Currie *Public International Law* (2008) 18 (Argues in favour of the status of an individual as a subject in international law). See also A Randelzhofer ‘The Legal Position of the Individual under Present International Law’ in A Randelzhofer & C Tomuschat (eds) *State Responsibility and the Individual: Reparations in Instances of Grave Violations of Human Rights* (1993) 231, 235.

<sup>64</sup> Crawford (note 60 above) at 5.

<sup>65</sup> See Case C-6/90 *Andrea Francovich and Danila Bonifazi v Italian Republic* 1991 ECR I-5357, 31. The European Court of Justice held that, based on broad principles of state responsibility, individuals may be entitled to redress, since ‘the possibility of obtaining redress from the Member State is particularly indispensable ... where the full effectiveness of Community rules is subject to prior action on the part of the State ... It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.’

## **B State Responsibility in International Human Rights Law: State Autonomy versus International Human Rights Obligations**

It is a trite principle of international law that ‘a state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law’.<sup>66</sup> Therefore, if a state is responsible under international law both to other states *and* to individuals, then the prohibition against using internal mechanisms as an excuse not to be bound should apply both when a claim is made against a delinquent state by another state *and* when a claim is made by an individual citizen. *Glenister* reflects the second type of claim.

When a government signs a human rights treaty, it is bound internationally to perform the obligations contained therein and not to act in any manner that is inconsistent with the treaty provisions.<sup>67</sup> South Africa should not be able to say (as minority’s logic would have it): We are bound to comply with the Convention against Corruption vis-à-vis Germany or the United Kingdom or any other state signatory of the Convention against Corruption, but not vis-à-vis our own citizens.

One cannot ignore, however, the importance of the separation between the three arms of government. The executive dominates this domain in a manner that it does not enjoy with respect to wholly domestic affairs. The minority opinion in *Glenister* speaks emphatically to the separation of powers and the importance of judicial abstinence in questioning political judgments.<sup>68</sup>

Ngcobo J explains the practicalities of this separation. He expresses the view that the government’s judgment to transfer the anti-corruption unit out of the NPA and into the SAPS ‘is political and may not always coincide with views of social scientists or other experts’.<sup>69</sup> This statement is a truism. It does not, however, entirely denude the Court of its responsibility to challenge political decisions in constitutional matters, especially in respect of international law.<sup>70</sup>

The Court will always struggle with the balance between executive deference versus judicial oversight of the executive. This is a tension that is designed into the fabric of a constitutional democracy and this debate will be the benchmark of a successful and robust court.

When entering this debate, we must be wary of undue deference. An oversimplification of the judicial deference to the executive ‘may yield cramped results’ in constitutional decision-making and this includes the application and

<sup>66</sup> Article 27 of the Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 *United Nations Treaty Series* 331.

<sup>67</sup> Article 18 of the VCLT.

<sup>68</sup> *Glenister* (note 6 above) at para 67.

<sup>69</sup> *Ibid.*

<sup>70</sup> FC s 167(5) provides that the Constitutional Court may decide whether an Act of Parliament or conduct of the President is constitutional. On the ability of courts to challenge unconstitutional acts undertaken by the executive beyond our border, or its obligations to vouchsafe the rights of foreign nationals within our borders, see S Woolman ‘Application’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS 2006) Chapter 31.

integration of international human rights law in South Africa.<sup>71</sup> To be clear, the primary responsibility for the protection of vulnerable groups properly rests with the executive and the legislature, and, according to the clear separation of powers imposed by our constitutional framework, it is proper that policies for their protection should be determined by the elected arms of government. As Ngcobo J writes:

There is no requirement that the state must use the best method possible or the most effective methods to combat crime including corruption. While this is an ideal to strive for, it is not a constitutional requirement. The state must ‘enable the police service to discharge its responsibilities effectively.’ That is all that the obligation entails.<sup>72</sup>

Ngcobo J is correct that international law does not prescribe overly-specific mechanisms to combat corruption and that the Constitution is not prescriptive in this regard. He is correct in maintaining that the Constitution does not specifically require that an anti-corruption unit be placed in the NPA versus SAPS. But the Constitution does not dispose of most of the public law or private law disputes prior to their arrival before a court of law.

For example, the Constitution did not say that Nevirapine must be supplied to South Africans living with HIV/AIDs (*Treatment Action Campaign*) or that the death penalty is unlawful (*Makwanyane*). And yet in both matters, and with respect to hundreds of other specific laws and government policies, the Constitutional Court has not only found policies unconstitutional but also directed the government to adopt alternative policies.<sup>73</sup>

Ngcobo J’s position that the government is not bound to adopt the *most* effective methods of implementing its human rights obligations is susceptible to challenge.<sup>74</sup> International law increasingly requires a standard of efficacy when implementing human rights obligations. For example, General Comment 9 on the domestic application of the International Covenant on Economic, Social and Cultural Rights engages the key principle that a state must use the most effective method at the domestic level to implement the provisions of the ICESCR.<sup>75</sup> The means of domestication ‘should be consistent with the full discharge of its

<sup>71</sup> See D Davis & K Klare ‘Transformative Constitutionalism and the Common and Customary Law’ (2010) 2 *South African Journal on Human Rights* 15.

<sup>72</sup> *Glenister* (note 6 above) at para 111.

<sup>73</sup> *Minister of Health and Others v Treatment Action Campaign (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC) and *Makwanyane* (note 43 above).

<sup>74</sup> See, eg, S Woolman & H Botha ‘Limitations’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS 2006) Chapter 31 citing *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18, 1998 (2) SA 38 (CC), 1998 (1) SACR 227 (CC), 1997 (12) BCLR 1675 (CC) (As the Constitutional Court recognised in *Sanderson*, rights and remedies under the South African Constitution are both linked and flexible. Justice Kriegler, on behalf of the *Sanderson* Court writes: ‘Our flexibility in providing remedies may affect our understanding of the right.’ At the same time, the Court has acknowledged that its role, in Bill of Rights litigation, does not give it the power to supplant a government policy with what it believes to be the optimal solution to a social problem. The government’s policy need be only reasonable and justifiable.)

<sup>75</sup> Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights Draft General Comment No 9: The domestic application of the Covenant, adopted at the 51st meeting on 1 December 1998 E/C.12/1998/24 3 December 1998 (General Comment No 9).

obligations by the State party<sup>76</sup> and ‘account should be taken of the means which have proved to be most effective ...in ensuring the protection of other human rights’.<sup>77</sup>

At the very least, a state must give effect to its international obligations in a manner that is adequate and effective. To the extent that a state uses means that differ from established effective methodologies, such differences must be justified.<sup>78</sup> This approach resonates with our own limitations clause jurisprudence that requires a *prima facie* violation of a fundamental right to be a reasonable and justifiable (but *not perfect*) abrogation of constitutional obligations.<sup>79</sup> Similar statements exist in respect of the right to education. General Comment No 13 provides that the right to education it should be ‘interpreted to be of continuing nature for moving as expeditiously and effectively as possible towards the realization of this right and is of immediate effect’.<sup>80</sup> The progressive realisation of the right to education has been interpreted to mean that ‘States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realization of article 13’.<sup>81</sup>

As regards corruption, international human rights law has articulated clear principles regarding best practices. There is no reason why the South African government should not meet – and indeed surpass – international best practices.

While a commitment to the separation of powers is part of the intrinsic structure of the Final Constitution, one must take care that this fundamental feature of our political order does not undermine the text’s clear commitment to fundamental human rights and values.<sup>82</sup> Yet even the *Glenister* Court majority judgment, with its singularly nuanced approach towards the incorporation of international anti-corruption standards, engages the language of deference to executive power in the field of foreign relations. It describes the independence requirement of an anti-corruption unit as not some type of ‘extraneous obligation, derived from international law and imported as an alien element into our Constitution’<sup>83</sup> but rather an intrinsic feature of our basic law. This may be rhetorical but it speaks to a genuine divide that the Court perceives between that which is truly South African and that which is foreign. Future cases will test the spirit in which those words were written.

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<sup>76</sup> Ibid at para 5.

<sup>77</sup> Ibid at para 7.

<sup>78</sup> Ibid at paras 6–8.

<sup>79</sup> See S Woolman & H Botha ‘Limitations’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (note 74 above).

<sup>80</sup> General Comment No 13 on the Right to Education (Art 13 of the International Covenant on Economic, Social and Cultural Rights) 3.

<sup>81</sup> Ibid at para 44.

<sup>82</sup> For a theory on how to square the foundational commitment to a constitutional scheme predicated on the separated of powers with a text equally committed to promotion, protection and fulfilment of fundamental rights, see J Fowkes ‘Founding Provisions’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13. For other recent theories, see T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013); S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (2013).

<sup>83</sup> Ibid at para 197.

## VII AN ASSESSMENT OF INTERNATIONAL LAW: A NON-COERCIVE COMPLIANCE THEORY

Perhaps one of the strongest mechanisms for integrating international human rights law into domestic law is not through the formal portals of courts and treaties but rather through amorphous but still powerful techniques of naming and shaming. Elsewhere I have referred to these powerful techniques of naming and shaming as the non-coercive compliance theory. This theory relies on an array of international and transnational processes through which international law permeates states' boundaries, influencing their conduct vis-à-vis other states and vis-à-vis their own citizens.<sup>84</sup>

The non-coercive compliance theory distinguishes between compliance that stems from force or compulsion and compliance that flows from enlightened self-interest.<sup>85</sup> Of course, not all states care about their reputation. Many states are quite satisfied to be rogue states. (Interestingly enough, many rogue states seek to justify their actions with regard to international law standards). Outliers notwithstanding, most states engage in some manner of international or diplomatic engagement in which they would like to be presented in the best possible light. Such mechanisms encompass reporting and supervision procedures. Periodic country reports are reviewed by UN treaty monitoring committees. On other occasions, special rapporteur assessments and committee reports note discrepancies between the requirements of international law and state conduct. These 'soft', non-coercive assessments of compliance are augmented by complaints procedures for individuals or states under optional protocols.<sup>86</sup>

The name and shame approach is by no means meant to supplant having principles of international human rights law made justiciable at the national level.<sup>87</sup> But as Louis Henkin eloquently observes:

The purpose of international law is to influence states to recognise and accept human rights, to reflect these rights in their national constitutions and laws, to respect and ensure their enjoyment through national institutions and incorporate them into national ways of life.<sup>88</sup>

For the moment international law works in South Africa. Its objectives and 'essence' are, through one mechanism or another, incorporated into the Constitution and South African domestic law. But we must be clear that it does so *without* the direct application or incorporation of human rights treaties. The success of international law can best be traced to this country's liberation as well as its amorphous spirit of transformation.

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<sup>84</sup> See Meyersfeld (note 47 above) at 253.

<sup>85</sup> For a discussion of the motives that compel states to comply with international law, see Koh's discussion of Chayeses' managerial model versus Franck's fairness theory. HH Koh 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599, 2610–2611.

<sup>86</sup> Schachter (note 60 above) at 10–16. See also Meyersfeld (note 47 above) at 257.

<sup>87</sup> See F Viljoen *International Human Rights Law in Africa* (1995) 8.

<sup>88</sup> L Henkin 'International Human Rights and Rights in the United States' in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 25.

Ideally, South Africans should be able to found a claim based on the provisions of a human rights treaty which has been concluded by the executive – even in the absence of parliamentary approval. The *Glenister* Court could have interpreted the provisions of FC s 231 as demanding compliance with international law (as it is required to do by FC s 39(1)(b) read together with FC ss 230–233) and held that South Africans have a right to be free from corruption and that that right exists in part because of the treaty obligations undertaken by the South African government. When the government signs and ratifies a human rights treaty, its purport and object should distinguish it from other treaties and bind the government not only vis-à-vis other states but also at home, in its own courts – even if it has not yet been adopted by Parliament.<sup>89</sup> Fortunately, as noted above, FC s 39(1)(b) continues to ensure that the government’s international commitment to human rights remains a reality, domestically, for those living in South Africa, at home.

## VIII CONCLUSION

The Constitutional Court remains dedicated to finding solutions to disputes in our basic law and extant domestic law rather than international law. Believers in the power of international law may find this approach frustrating. However, it may well be the appropriate approach: Especially in politically volatile disputes in which courts are asked to intervene.<sup>90</sup> Notwithstanding this preference for the domestic, the Court has refined the use of FC s 39 in *Glenister*.<sup>91</sup> The Court has set a precedent for the grounding of a government obligation in the Constitution, while creating a clear pathway for the specificity and content of the obligation to be understood with reference to international law standards, including in respect of treaties which South Africa may have signed but not yet incorporated.

The Court did not need international law to found the obligation to prevent and combat corruption. It did, however, need international law to interpret the reach and content of that obligation. And this is perhaps the most powerful take home point about *Glenister*: International law is at its most powerful when it can be used, consistent with national law, to manoeuvre legal justice around the antics of powerful political factions that characterise any government regime.

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<sup>89</sup> See further Sucker (note 40 above).

<sup>90</sup> For good reasons why the Court shied away from such intervention during a period when it had to establish and to protect its own institutional legitimacy, see T Roux *The Politics of Principle* (note 82 above).

<sup>91</sup> For a more extensive, nuance and critical analysis of the use of the term ‘must consider international law’ in FC s 39(1)(b) in *Glenister*, see J Tuovinen ‘What to Do with International Law? Three Flaws in *Glenister*’ (2013) 5 *Constitutional Court Review* 435.



# Approval of an International Treaty in Parliament: How Does Section 231(2) ‘Bind the Republic’?

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## I INTRODUCTION

Here’s a question that exorcises jurist and academic alike: When and how is South Africa bound by an international treaty<sup>1</sup> at the international level and/or the domestic level?

This uncertainty has been made patently obvious in several judgments of the Constitutional Court.<sup>2</sup> *Glenister v President of the Republic of South Africa* (‘*Glenister*’) is the most recent manifestation.<sup>3</sup> In *Glenister*, this question of how and when South Africa is bound arose because the relevant international treaty, the United Nations Convention against Corruption 2003 (Corruption Convention)<sup>4</sup>, was signed and ratified by the national executive,<sup>5</sup> but not incorporated in South African law.<sup>6</sup>

The Court was unable to establish whether the Corruption Convention was approved by resolution in the National Assembly and the National Council of Provinces (Parliament) as required in FC s 231(2).<sup>7</sup> In justifying its conclusions, the *Glenister* Court focuses on para 2 of FC s 231 and the binding effect of such

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<sup>1</sup> International treaties, agreements and conventions are used as synonyms in terms of art 2(1) VCLT, see especially J Dugard *International Law: A South African Perspective* (2011) 60.

<sup>2</sup> See, eg, *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6, 2010 (4) SA 618 (CC), 2010 (5) BCLR 457 (CC); *President of the Republic of South Africa v Quagliani and Others* [2009] ZACC 1, 2009 (2) SA 466 (CC), 2009 (4) BCLR 345 (CC) at 355.

<sup>3</sup> *Glenister v President of the Republic of South Africa* (‘*Glenister*’) [2011] ZACC 6, 2011 (3) SA 347 (CC). For more related case discussions, see MD Stubbs ‘Three-Level Games: Thoughts on *Glenister*, *Scaw* and International Law’ (2011) 4 *Constitutional Court Review* 137; S Choudhry ‘“He had a Mandate”: The South African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 1; M Lewis & P Stenning ‘Considering the *Glenister* Judgment: Independence Requirements for Anti-Corruption Institutions’ (2012) 39 *SA Crime Quarterly* 11.

<sup>4</sup> United Nations Convention against Corruption, 31 October 2003, 2349 UNTS 41 (Doc A58/422); (2004) 43 *ILM* 37. The Convention entered into force on 14 December 2005.

<sup>5</sup> South Africa signed the Convention on 9 December 2003 and ratified it on 22 November 2004, available at [http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg\\_no=XVIII-14&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=XVIII-14&chapter=18&lang=en) (accessed on 22 August 2013).

<sup>6</sup> For more detailed background on the case, see B Meyersfeld ‘Domesticating International Standards: The Direction of International Human Rights Law in South Africa’ in this issue.

<sup>7</sup> *Glenister* (note 3 above) at para 85, fn 64 (Court, in fn 64, explains that it was unable to find a ‘notice in the *Government Gazette* for the general information of the public’)

an approval for South Africa. It's worth noting that a closely split minority and majority disagree as to how an international treaty approved by resolution in Parliament binds South Africa.<sup>8</sup>

The *Glenister* Court contends that an approval has direct effect in terms of the Republic's obligations at international law<sup>9</sup> and domestic constitutional effect,<sup>10</sup> when international obligations entered into are 'intrinsic to the Constitution itself'.<sup>11</sup> The minority counters that an approval binds South Africa only on the international plane.<sup>12</sup>

This judicial disagreement must give us pause. For we have, as yet, no definitive answer to the question as to how an approval of an international treaty by resolution in Parliament, binds South Africa.

According to FC s 231(2) '[a]n international agreement binds the Republic only after it has been approved by resolution in' Parliament, 'unless it is an agreement referred to in subsection (3)'.<sup>13</sup> In contrast to both the minority and majority judgment, I suggest that an approval, as required in FC s 231(2), does not bind South Africa at the international level. Thus, in order that the endorsement 'binds the Republic' to have legal effect, it must have domestic effect in terms of a good faith obligation. This requirement, in turn, has significant implications for the reasoning in *Glenister*.

## II INTERNATIONAL LEVEL

### A International treaty-making by the national executive

International treaty-making concerns the negotiating of and entering into treaties. The manner in which international treaties are negotiated and entered into is governed by the intention and consent of the parties.<sup>14</sup> In summary, the different steps of the international treaty-making process and their legal effects are as follows:

<sup>8</sup> For further questionable features of the judgment, see J Tuovinen 'What to Do with International Law? Three Flaws in *Glenister*' in this issue.

<sup>9</sup> *Glenister* (note 3 above) at para 181.

<sup>10</sup> *Glenister* (note 3 above) at para 182: 'An international agreement approved by Parliament becomes binding on the Republic. But that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved "binds the Republic". That ... has significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights.'

<sup>11</sup> *Ibid* at para 195: '[The] duty in international law to create an anti-corruption unit that has the necessary independence ... exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.'

<sup>12</sup> *Ibid* at paras 89 & 92: '[A]n international agreement signed by the executive does not automatically bind the Republic unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of Parliament ... An international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane.'

<sup>13</sup> Constitution of the Republic of South Africa, 1996 ('Constitution' or 'FC').

<sup>14</sup> See, eg, art 24 VCLT.

The successful outcome of negotiations is the adoption<sup>15</sup> and authentication<sup>16</sup> of the agreed text. Authentication can be achieved for example by signature or incorporating the text in the final act of a conference.<sup>17</sup> The purpose of adoption and authentication is to agree on one final version of the text with which to work. It does not, by itself, express consent to be bound by the international treaty.

According to art 11 Vienna Convention on the Law of Treaties (VCLT<sup>18</sup>), consent to be bound by a treaty towards other signatory states to fulfil the treaty, to honour the provisions of the treaty and to execute the treaty in good faith<sup>19</sup> can be expressed by signature, ratification, acceptance<sup>20</sup> or accession. In addition, consent may be accomplished by any other means, if so agreed between the parties.<sup>21</sup> These conditions are worth spinning out in slightly more detail.

Where a treaty is not subject to ratification or acceptance, the signature of the national executive establishes consent to be bound towards other signatory states to fulfil the treaty.<sup>22</sup>

Where a treaty is subject to ratification,<sup>23</sup> a formal exchange or deposit<sup>24</sup> of the instruments of ratification, as provided for in the treaty, is necessary to bring the treaty into force. Formal international treaties usually require ratification or acceptance after their signature. When this occurs, the signature of South Africa's national executive will not establish consent to be bound, nor will it

<sup>15</sup> Art 9 VCLT: '(1) The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2. (2) The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.'

<sup>16</sup> Art 10 VCLT: 'The text of a treaty is established as authentic and definitive: (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or (b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.'

<sup>17</sup> I Brownlie *Principles of Public International Law* (2008) 610.

<sup>18</sup> Vienna Convention on the Law of Treaties (2005) 1155 *United Nations Treaty Series* 331, adopted 23 May 1969, entered into force 27 January 1980.

<sup>19</sup> Art 26 VCLT places an obligation upon a state that has become a party to a treaty to execute the treaty in good faith.

<sup>20</sup> Acceptance (or approval) is sometimes used in place of ratification and does not equal the procedure described in s 231(2) of the Constitution. According to art 2(1) VCLT acceptance, approval and accession 'mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'. This is a matter of terminology not of substance. See P Malanczuk *Akehurst's Modern Introduction to International Law* (1997) 134.

<sup>21</sup> See, eg, exchange of instruments constituting a treaty, art 13 VCLT.

<sup>22</sup> Art 12 VCLT lists the circumstances under which a signature is binding. See MN Shaw *International Law* (2008) 910; *United Nations Yearbook of the International Law Commission* (1966) Vol II 196. In *Glenister*, the Court does not account for these situations 'the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement'. *Glenister* (note 3 above) at para 95.

<sup>23</sup> In general, treaties indicate whether ratification is required. Where no indication is present, the intention of the parties will have to be ascertained from the surrounding circumstances (art 14 VCLT). As to whether ratification is required or not see, eg, G Fitzmaurice 'Do Treaties need Ratification?' (1934) 15 *British Yearbook of International Law* 129; H Blix 'The Requirement of Ratification' (1953) 30 *British Yearbook of International Law* 352; Malanczuk (note 20 above) at 132.

<sup>24</sup> Malanczuk (note 20 above) at 132: 'Usually treaties provide that instruments of ratification shall be deposited with a state or international organisation which is appointed by the treaty to act as the depositary.'

create an obligation to ratify the treaty.<sup>25</sup> It ‘will mean no more than that the state representatives have agreed upon an acceptable text, which will be forwarded<sup>26</sup> to the South African government for its internal decision as to whether to accept or reject the treaty.<sup>27</sup> Rather, according to art 18(1) of the VCLT, a signature of this ilk binds South Africa to refrain from acts which would defeat the object and purpose of the treaty, at least until such time as it has made its intention clear not to become a party to the treaty.<sup>28</sup>

According to art 2(1) of the VCLT, ratification, acceptance, approval<sup>29</sup> or accession<sup>30</sup> are in each case international acts ‘whereby a State establishes on the international plane its consent to be bound by a treaty’. Thus, ratification of an international treaty by the national executive through formal exchange or deposit of the instruments of ratification binds South Africa at the international level. This international procedure must therefore be distinguished conceptually from an approval in the internal constitutional sense: a required consent by resolution in the South African Parliament. There is, however, an important link.<sup>31</sup>

For all forms of treaty consent, the same obligation of good faith applies. Countries must refrain from acts that are calculated to frustrate the objects of the treaty, ‘pending the entry into force of the treaty and provided that such entry into force is not unduly delayed’<sup>32</sup>.

The question of the identity of the representative of the state vested with international treaty-making power will depend upon each state’s domestic (constitutional) law and varies from state to state.<sup>33</sup> International law leaves it to each state to determine who may negotiate and enter into treaties on its behalf.<sup>34</sup>

In *Glenister*, the Constitutional Court states that the national executive is assigned ‘the authority to negotiate and sign’<sup>35</sup> international treaties, ‘whereas the

<sup>25</sup> Brownlie (note 17 above) at 610.

<sup>26</sup> Shaw (note 22 above) at 911.

<sup>27</sup> South Africa has signed many treaties which have not been ratified (eg, the International Covenant on Economic Social and Cultural Rights (CESCR), signed 1994). According to the ICJ such signed but not ratified ‘treaties may constitute an accurate expression of the understanding of the parties at the time of signature’, *Qatar v Bahrain* ICJ Reports (2001) 40, 68.

<sup>28</sup> Confirmed in *Certain German Interests in Polish Upper Silesia*, PCIJ, Ser A no 7 (1926) 30; L McNair *The Law of the Treaties* (1986) 199–205; Brownlie (note 17 above) at 610; J Klabbbers ‘How to Defeat a Treaty’s Object and Purpose Pending Entry into Force: Towards Manifest Intent’ (2001) 34 *Vanderbilt Journal of Transnational Law* 283. For example, the Clinton administration signed the Rome Statute of the International Criminal Court on behalf of the US (31 December 2000). On 6 May 2002, the Bush administration withdrew its signature and announced ‘that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature.’ Statement available at <<http://2001-2009.state.gov/t/pa/prs/ps/2002/9968.htm>> (accessed on 30 July 2013).

<sup>29</sup> Malanczuk (note 20 above) at 132.

<sup>30</sup> Accession occurs when a state did not sign the treaty but formally accepts its provisions. It can also be the only means of becoming a party to an instrument eg a convention approved by the General Assembly of the United Nations, see eg Brownlie (note 17 above) 611; Shaw (note 22 above) 913.

<sup>31</sup> See Brownlie (note 17 above) at 610.

<sup>32</sup> Art 18(2) VCLT.

<sup>33</sup> See also Shaw (note 22 above) at 908.

<sup>34</sup> See, eg, *Cameroon v Nigeria* ICJ Reports (10 October 2002) (2002) 303, 429.

<sup>35</sup> *Glenister* (note 3 above) at para 89.

ratification ... fall[s] within the province of parliament'.<sup>36</sup> However, according to FC s 231(1): 'The negotiating and signing of all international agreements is the responsibility of the national executive'. Thus, treaties are negotiated and signed by the national executive.<sup>37</sup> This provision does not differentiate further between the different steps of international treaty-making such as adoption, authentication, ratification, accession or acceptance and is silent regarding the respective competent authority. Ratification and accession of international treaties are mentioned in sub-s (3) merely with regard to the determination of whether approval by resolution in Parliament in terms of sub-s (2) is required or not.<sup>38</sup> In particular, sub-s (2) does not empower Parliament to ratify international treaties. It may only internally approve them as a precondition for the national executive to legally ratify them.<sup>39</sup> On an *argumentum e contrario*, therefore, sub-s (1) is to be understood as referring to all official acts on behalf of South Africa relating to international treaty-making, including expressing South Africa's intention and/or consent to be bound by, and to enter into an international treaty.

It follows that international treaty-making in South Africa falls exclusively within the competence of the national executive. Given that this power embraces the international procedure to endorse an earlier signature which brings the treaty into force by a formal exchange or deposit of instruments of ratification, the national executive has the power to ratify international treaties.

## B Approval by Resolution in Parliament

In order to demonstrate that, pace the position of the *Glenister* Court,<sup>40</sup> approving a resolution in Parliament as required in FC s 231(2) has no binding effect at international level, the (legal) nature of such an approval demands clarification.

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<sup>36</sup> *Glenister* (note 3 above) at para 95. Dugard adopts a self-contradictory position regarding treaty-making power. On the one hand he argues that '[n]ow under the 1996 Constitution, the executive and Parliament share [treaty-making] power. In terms of s 231 the national executive has the responsibility of negotiating and signing international agreements' (Dugard (note 1 above) at 416 (my emphasis)). He seems to include the approval by resolution in Parliament in the treaty-making power, because he carries on to explain when an approval is required. On the other hand, he states: 'Section 231(1) confers on the 'national executive' the responsibility for the making of treaties[.] ... the power to enter into treaties' (Dugard (note 1 above) at 60). The confusion by the Court and Dugard flow from the fact that both do not seem to differentiate between the official (external) ratification and the (internal) approval. The latter appears to hold true for H Strydom & K Hopkins 'International Law & International Agreements' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2008) (They, at the same time, accept exclusive treaty-making power of the national executive.) This confusion is further explained below.

<sup>37</sup> According to FC s 85: 'The executive authority of the Republic is vested in the President' and 'the President exercises the executive authority, together with the other members of the Cabinet'. In practice, the Department of International Relations and Cooperation is responsible for the drafting and the negotiation of treaties. See N Botha 'Treaty Making in South Africa: a reassessment' (2000) 25 *South African Yearbook of International Law* 69, 73, 74.

<sup>38</sup> FC s 231(3): 'An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.' (my emphasis).

<sup>39</sup> See below II.B.

<sup>40</sup> *Glenister* (note 3 above) at para 91.

FC s 231(2) requires that the national executive obtain consent in the form of an approval by resolution in Parliament before endorsing the earlier signature and ratifying the international treaty.<sup>41</sup> More specifically, this paragraph determines that, should a treaty be subject to ratification (or accession), or not be of a technical, administrative or executive nature (in terms of sub-s (3)), approval by resolution in Parliament is necessary. Viewed in this light, FC s 231(2) and s 231(3) are provisions solely related to internal constitutional requirements of how South Africa effects ratification (or accession) and that they serve to secure parliamentary participation in the decision-making process when entering into rights and obligations at international level. As noted above, such internal procedural rules will vary from country to country. International law articulates no regulation as to how national legal systems are to give effect to ratification or accession.<sup>42</sup> We can now see why compliance with such internal constitutional requirements is utterly irrelevant for the entering into force of international treaties and does not influence whether an international treaty is binding for South Africa at the international level.

Let's illustrate the aforementioned point in greater detail: If Parliament approves an international treaty by resolution and the national executive does not, for whatever reason, endorse the earlier signature thereafter, then the international treaty does *not* bind South Africa at the international level. Only the formal exchange of the official instruments required for the ratification, accession or acceptance usually conveys the intention and consent to be bound by the treaty.<sup>43</sup> In terms of the language of FC s 231(2), no indication exists that the endorsement – ‘binds the Republic’ – was intended to commit South Africa towards other signatory states until the exchange of official binding ratification documents by national executives. The words ‘*only after* it has been approved’ intimates that the drafters anticipated some commitment at some point in time by Parliament to the treaty concerned. That intimation is just that: and it buttresses my contention that the language of FC s 231 does not speak (clearly) to the matter.

Let's turn the problem around. If the national executive, as the representative of South Africa, ratifies a treaty without approval by resolution in Parliament, namely, without obtaining parliamentary consent, then it would constitute a violation of FC s 231(2)<sup>44</sup> and of their obligation to act in a collaborative manner in exercising its authority.<sup>45</sup> However, according to art 27 of the VCLT, South Africa cannot invoke a violation of its internal laws and procedures as justification for its failure to discharge its duties in terms of the international treaty in question

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<sup>41</sup> A similar approach is followed in the US. The US Senate must approve all treaties. Malanczuk (note 20 above) at 65.

<sup>42</sup> See also Shaw (note 22 above) at 912 (States that the question is a matter for internal law alone and lies outside the scope of international law.)

<sup>43</sup> Cf *Glenister* (note 3 above) at para 91: ‘The approval ... conveys South Africa’s intention ... to be bound at the international level by the provisions of the agreement.’ See I.I.A.

<sup>44</sup> Note that the Court could not establish whether the Corruption Convention was in fact approved by resolution in Parliament or not. See *Glenister* (note 3 above) at para 85, fn 64.

<sup>45</sup> See *President of the Republic of South Africa v Quaghtani and Others* (note 2 above.)



and/or to comply with its international obligations to other states.<sup>46</sup> Thus, whether approved by resolution in Parliament or not, as long as the national executive acts in the scope of its full powers in terms of art 7 VCLT<sup>47</sup> and other signatory states can rely on the national executive being authorised to do so, the international treaty in question will bind South Africa at international level and consequently incur international responsibilities towards other signatory states to fulfil the objects of the treaty.<sup>48</sup> Where the national executive does not do so, it may be found in breach of international laws. The endorsement in FC s 231(2) that '[a]n international treaty binds the Republic only after it has been approved' can neither prevent a breach nor serve as a justification for the state's failure for discharging its international responsibilities.<sup>49</sup> A violation of FC s 231(2) by the national executive would only be subject to internal domestic procedures and remedies. The effect would extend no further than that.<sup>50</sup>

Again: It follows that an approval by resolution in Parliament has no binding effect at international level. To produce that result, only an official formal act by the national executive expressing consent is required.

### C The Confusion: Merging of Approval in Parliament and Ratification by the Executive

The different results in *Glenister* – as opposed to the correct reading offered with regard to both the treaty-making power and the binding effect of an approval by resolution in Parliament at international level – are caused by a rather simple

<sup>46</sup> Art 27 is a codification of the general rule of international law 'that a state cannot plead a rule of or a gap in its own municipal law as a defence to a claim based on international law'; Malanczuk (note 20 above) at 64. The rule was confirmed in *Free Zones Case* by the PCIJ, series A/B, no 46, 167: 'It is certain that France cannot rely on her own legislation to limit the scope of her international obligations'; see I. Weber 'Free Zones of Upper Savoy and Gex Case' (1995) *EPIL II* 483 et seq; also in *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* PCIJ (4 February 1932) Advisory Opinion, series A/B, no 44, 24.

<sup>47</sup> In more detail to the full powers of executive and statesman in art 7 VCLT, see eg Shaw (note 22 above) at 908. Any act relating to the making of a treaty by a person not authorised as required will be without any legal effect, unless the state involved afterwards confirms the act (see art 8 VCLT).

<sup>48</sup> But see *Glenister* (note 3 above) at para 95: 'Legislative action is required before an international agreement can bind the Republic.' Ibid at para 180: 'An agreement that the executive has concluded does not without more bind the Republic. For that to happen, the agreement must be approved by resolution in both the National Assembly and the National Council of Provinces.'

<sup>49</sup> Dugard (note 1 above) at 57. Dugard suggests that the prevention of being bound by an international treaty before an approval by resolution in Parliament is in fact the intention of sub-s (2). He further states that '[s]ection 231(2) is intended to establish that an international agreement binds South Africa on the international level only after it has been approved by both houses of parliament.'

<sup>50</sup> For this reason, (internal) domestic remedies were suggested by some scholars to exist in *Harkson*, where the President of South Africa unilaterally committed to extradite. See Strydom & Hopkins in Woolman & Bishop (eds) *Constitutional Law of South Africa* (note 36 above) at 30–10, fn 1. For more on this behaviour (unilateral binding commitments) as unconstitutional, see J Dugard & G Abraham 'Public International Law' (2000) *Annual Survey of South African Law* 114.

semantic confusion. The use of the wording ‘ratified by resolution’,<sup>51</sup> on the one hand, and of ‘approved by resolution’,<sup>52</sup> on the other, for the same action in Parliament (giving parliamentary consent to the ratification), indicates the incorrect merging of two distinct procedural acts necessary for the proper ratification (or accession) of an international treaty in South Africa. The first act concerns the act of the appropriate organ of state, which in South Africa is the *approval by resolution* in Parliament. It has no binding effect at international level.<sup>53</sup> The second act engages the international procedure that brings the treaty into force by a formal exchange or deposit of the instruments of ratification as defined in art 2(1) of the VCLT. In South Africa, the *ratification by the national executive* binds South Africa towards other signatory states.<sup>54</sup>

In *Glenister*, the international treaty in question, the Corruption Convention was ratified by the national executive.<sup>55</sup> It thus binds South Africa at the international level towards other signatory states. Irrespective of parliamentary approval, South Africa must fulfil the treaty, honour its provisions, and execute it in good faith.

### D Why is this Distinction Important?

I assume that the endorsement ‘binds the Republic’ in FC s 231(2) confers a meaning to an approval by resolution in Parliament beyond the fulfilment of an internal constitutional requirement for the ratification process.

Assuming further, as one must do, that the drafters of FC s 231(2) were aware of the previously described sequences of legal effects, and did not discount these effects nor want to include legally ineffective wording,<sup>56</sup> the endorsement ‘binds the Republic’ cannot be understood as binding South Africa at the international level. The official formal act by the national executive expressing consent to be bound by the international treaty in question has this result. That proposition holds true whether the executive consent to be bound is approved by resolution in Parliament or not. However, the endorsement ‘binds the Republic’ needs to

<sup>51</sup> *Glenister* (note 3 above) at para 92: ‘An international agreement that has been *ratified by resolution* of Parliament is binding on South Africa on the international plane. ... An international agreement that has been *ratified by Parliament* under section 231(2), however, does not become part of our law until and unless it is incorporated into our law by national legislation.’ See also para 96 ‘the *ratification* of an international agreement *by a resolution of Parliament*’. Strydom and Hopkins are similarly confused: ‘Parliament then *ratifies them [treaties] by means of resolution*.’ (Strydom & Hopkins in Woolman & Bishop (eds) *Constitutional Law of South Africa* (note 36 above) at 30–9). See also Dugard (note 1 above) 53–54 (With regard to s 231(2) in the Interim Constitution, he writes ‘were to be *ratified by Parliament*’ although the section in fact reads ‘Parliament shall ... be competent to *agree to the ratification* of or accession to an international agreement’. Similarly with regard s 231(3) in the Interim Constitution, he writes ‘treaties *ratified by resolution of the two houses of Parliament*’ although the section in fact reads ‘[w]here Parliament *agrees to the ratification* of or accession to an international agreement’ (all my emphasis)).

<sup>52</sup> *Glenister* (note 3 above) at para 89: ‘To produce that result, it requires, second, the *approval by resolution* of Parliament’ (my emphasis).

<sup>53</sup> In detail above under (II.B).

<sup>54</sup> I have covered this argument in detail in II.A above.

<sup>55</sup> The Court was not able to establish whether Parliament had approved the Convention, see above under (I) and (note 7 above).

<sup>56</sup> But see Dugard (note 1 above) at 57. Dugard claims that the intention of FC s 231(2) is ‘to establish that an international agreement binds South Africa on the international level only after it has been approved by both houses of Parliament’.

have some significance *at the domestic level* if it is to be meaningful and not legally ineffective. I examine this proposition below.

### III DOMESTIC LEVEL

#### **A Is there a Duty to Ratify an Approved International Treaty?**

A duty for the national executive to secure ratification of an approved treaty by resolution in Parliament would not *necessarily* interfere with the separation of powers doctrine. After all, it is the role of the national executive to enforce the law as written by the legislature and interpreted by the judicial system.

Nevertheless, pursuant to FC s 231(3), should no ratification be required, an international treaty ‘binds the Republic’ upon the mere signature of an organ of the national executive without the need for parliamentary approval. Since no ratification is necessary, and assuming that the same wording in one section has the same meaning in the other, as a matter of logic, one cannot read the phrase ‘binds the Republic’ in sub-s (2) as imposing a duty upon the national executive to ratify an approved treaty.

#### **B Does Endorsement Imply Incorporation of an Approved International Treaty into Domestic Law?**

The simple answer is no. The endorsement ‘binds the Republic’ cannot, without more, have the effect of inferring implied incorporation of an international treaty into domestic law merely because Parliament has approved it.

Before 1994, South Africa followed a similar approach to that of the United Kingdom.<sup>57</sup> Treaties were negotiated, signed, ratified and acceded to by the national executive without requiring parliamentary approval.<sup>58</sup> In order to avoid the conferral of wide law-making powers on the national executive, and to secure parliamentary participation in the treaty-making process, international treaties, in most instances, did not become part of South African domestic law without some act of legislative transformation.<sup>59</sup>

In most of the democratic states ‘outside the Commonwealth, the legislature, or part of the legislature, participates in the process of ratification, so that ratification becomes a legislative act, and the treaty becomes effective in international law and municipal law simultaneously’.<sup>60</sup> This approach was followed by South Africa in the Interim Constitution (IC).<sup>61</sup> According to IC s 231(3), an international treaty became part of South African law where Parliament agreed to its ratification, ‘provided Parliament expressly so provides’. Therefore, Parliament was not

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<sup>57</sup> In the UK, no approval is necessary, but incorporation into domestic law is required. See Malanczuk (note 20 above) at 65.

<sup>58</sup> Section 6(3)(e) of the Republic of South Africa Constitution Act 110 of 1983: ‘The State President shall, subject to the provisions of this Act, have the power to enter into and ratify international conventions, treaties and agreements.’ Regarding the need for legislation to transform a treaty into South African law pre-1994 in more detail, see Dugard (note 1 above) at 48, 53.

<sup>59</sup> See more detailed Dugard (note 1 above) at 48, especially fn 42.

<sup>60</sup> Malanczuk (note 20 above) at 66 referring to the US as an example.

<sup>61</sup> Act 200 of 1993.

required to incorporate an approved international treaty via legislative enactment for it to become part of South African law. The purpose of IC s 231 was to facilitate the incorporation of international treaties into domestic law<sup>62</sup> and ‘to bring international law and domestic law in harmony with each other’.<sup>63</sup>

The Final Constitution departed therefrom. FC s 231(4) explicitly states that only those international treaties enacted into law by national legislation become part of South African law.<sup>64</sup> Thus, the drafters of the Final Constitution returned to the dualist pre-1994 position regarding the incorporation of treaties.<sup>65</sup> Yet the Final Constitution kept the requirement of parliamentary participation in the form of an approval during the ratification process. As a result, two forms of parliamentary control are now required before an international treaty becomes law in South Africa. Consequently, approval of an international treaty is not sufficient to imply incorporation into domestic law. If an international treaty alone is insufficient to imply incorporation into domestic law, it cannot have binding effect for domestic courts to enforce South Africa’s international obligations. In other words, even if the *Glenister* Court would have been able to establish parliamentary approval of the Corruption Convention,<sup>66</sup> this approval alone would not imply incorporation into South African law.<sup>67</sup>

### C Does a Duty Exist to Incorporate an Approved International Treaty into Domestic Law?

Some might argue that the endorsement ‘binds the Republic’ imposes a duty on the legislative to incorporate the approved treaty into domestic law. Does it?

According to FC s 231, the domestication of international treaties follows the dualistic approach. As has been shown above, in South Africa, the first step is the commitment by the national executive at the international level to fulfil the

<sup>62</sup> See Dugard (note 1 above) at 53.

<sup>63</sup> R Keightley ‘Public International Law and the Final Constitution’ (1996) 12 *South African Journal on Human Rights* 405, 412.

<sup>64</sup> See, confirmed, *Azapo v President of the Republic of South Africa* [1996] ZACC 16, 1996 (4) SA 671 (CC) at 688, 1996 (8) BCLR 1015 (CC) para 28: ‘International conventions and treaties do not become part of the municipal law of our country, [and are not] enforceable at the instance of private individuals in our courts, until and unless they are incorporated into municipal law by legislative enactment.’ See also *Progress Office Machines v SARS* [2007] ZASCA 118, 2008 (2) SA 13 (SCA) at para 6. According to John Dugard, three principal methods exist. Dugard (note 1 above) 55.

<sup>65</sup> Before 1994 treaties were negotiated, signed, ratified and acceded to by the national executive. There was no internal procedural constitutional requirement for the ratification of treaties. Only those treaties incorporated by Act of Parliament became part of South African law; see s 6(3)(e) of the Republic of South Africa Constitution Act 110 of 1983. The former socialist/communist countries followed a strict dualistic approach and required a specific national legislative act before international treaty obligations could be implemented and had to be respected by national authorities. See, eg, art 24 of the 1978 USSR Law of the Procedure for the Conclusion, Execution and Denunciation of International Treaties (1978) 17 *ILM* 1115. With regard to the constitutional reforms and changes regarding this strict approach, see Malanczuk (note 20 above) 68. The UK, India and Canada recognise direct domestic effect without legislative enactment. See Malanczuk (note 20 above) 66 and MW Janis *An Introduction to International Law* (1993) 96.

<sup>66</sup> See Section I above, and, in particular, note 7 above.

<sup>67</sup> The proposition was confirmed in *Glenister*. *Glenister* (note 3 above) at para 195.

international treaty, in due form, and if required, after Parliament's approval.<sup>68</sup> The second step is an Act of Parliament to incorporate the international treaty into South African law.<sup>69</sup>

The rationale for parliamentary participation in this process of domestication originates from the separation of powers doctrine: 'If treaties could become part of domestic law without any participation or endorsement from the legislature, then wide law-making powers would be conferred on the executive.'<sup>70</sup> Once the treaty is approved, Parliament has, in fact, participated in a domestic law-making process.<sup>71</sup> But one cannot, from the fact of such occasional participation, contend that Parliament possesses a duty to incorporate an approved treaty into domestic law.

FC s 231(4) makes it quite apparent that the Constitution does not obligate Parliament to incorporate approved and ratified international treaties into domestic law. Parliament must decide whether to incorporate a treaty and how to adopt appropriate domestic measures to comply with South Africa's international obligations. Even when a general duty obtains for states to bring domestic law into conformity with international obligations at the international level,<sup>72</sup> international law leaves the method of achieving this result to the domestic organs of a given state.<sup>73</sup> South Africa is free to decide how to translate its international obligations into South African law and to determine their legal status domestically. Other permissible mechanisms may be used to fulfil its international obligations. Incorporation by Parliament of the relevant international treaty is but one instrument. The endorsement 'binds the Republic', therefore, cannot infer a duty for the legislature to incorporate the approved treaty into domestic law.

In practice, international treaties are approved and ratified but not incorporated into domestic law unless domestic implementation is essential for compliance with South Africa's international obligations.<sup>74</sup> This current custom means that South Africa often becomes party to major human rights treaties without incorporating them into domestic law.<sup>75</sup> The consequence, it must be made clear, is that it is impossible for individuals to rely on the obligations found in the provisions in those treaties. This practice, John Dugard has written, 'represents an abandonment on the idealism of 1993 [as reflected in the Interim Constitution] that sought to bring international law and domestic law into harmony with each other.'<sup>76</sup>

<sup>68</sup> See FC s 231(1), (2) and (3).

<sup>69</sup> See FC s 231(4).

<sup>70</sup> Strydom & Hopkins (note 36 above) at 30–9.

<sup>71</sup> For detail on the lengthy and comprehensive process of Parliament's decision to approve or to reject a treaty, see Meyersfeld (note 6 above).

<sup>72</sup> Customary international law and art 26 VCLT provide that treaties in force are binding upon the parties to them and must be performed by them in good faith.

<sup>73</sup> Malanczuk (note 20 above) at 64.

<sup>74</sup> D van Wyk et al *Rights and Constitutionalism: The New South African Legal Order* (1994) 192. Even the UN Charter has not been incorporated into domestic South African law.

<sup>75</sup> For example, the ICCPR was ratified by South Africa in 1998, but has not yet been incorporated into domestic law. E de Wet 'South Africa' in D Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (2011) 567, 578.

<sup>76</sup> Dugard (note 1 above) at 54, referring to Keightley (note 63 above) at 412.

## D What Duty Do the Courts Have to Use an Approved International Treaty as a Tool for Constitutional Interpretation?

Another argument that might be notionally available is that the endorsement ‘binds the Republic’ would infer a duty to use an approved international treaty as a tool for interpretation. Two sections in the Final Constitution are designed to ensure that South African law is interpreted so as to comply with international law: FC s 39(1)(b) and FC s 233.<sup>77</sup>

FC s 39(1)(b) obligates the courts to take international law into account when interpreting the Bill of Rights. According to the Constitutional Court, this obligation ought to be extended to both non-binding and binding international law.<sup>78</sup> Since this obligation embraces international treaties to which South Africa is not party, South African courts are *already* obligated to take approved international treaties into account (even if not ratified by the national executive) when interpreting the Bill of Rights. No meaningful benefit would flow from attempting to stretch FC s 231’s ‘binds the Republic’ in a manner that obliges courts to use approved treaties as a tool for interpretation. The scope of FC s 39(1)(b), properly understood, makes such a reading unnecessary.

FC s 233 obliges our courts to ‘prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’ when interpreting any legislation where a provision of the Bill of Rights is not at issue.

However, according to John Dugard, international treaties to which South Africa is not a party are transactions between others only (*res inter alios acta*) and, in the ambit of this section, ‘may not be considered *qua* treaty, although [they] may be considered as evidence of a customary rule.’<sup>79</sup> This reading of FC s 232 and FC s 233 applies also to an international treaty approved by Parliament, but which the national executive has, for whatever reason, not ratified.<sup>80</sup> Under these circumstances, the endorsement ‘binds the Republic’ *might* add some weight to the contention that the courts must also use international treaties that have

<sup>77</sup> FC s 233 codifies the common-law presumption requiring a court to interpret legislation in compliance with international law. See, eg, *S v Basson* [2004] ZACC 13, 2005 (1) SA 171 (CC) at para 100. See also L du Plessis ‘Interpretation’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2008) Chapter 32; GE Devenish *Interpretation of Statutes* (1992) 212.

<sup>78</sup> See *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 35: ‘In the context of section [39(1)(b)] public international law would include non-binding as well as binding law.’ With respect to non-human-rights treaties, see, eg, *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C) at 985C–D and *Prince v President, Cape Law Society* [2002] ZACC 1, 2002 (2) SA 794 (CC) at 824, 837, 851, 858–9. Somewhat confusing in this regard is the statement by Yacoob J in *Government of the Republic of South Africa & Others v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) considering the use of international law for the right to housing in FC s 26: ‘The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.’ This is inaccurate. Even a binding international treaty is not directly applicable and serves merely as a tool for interpretation in form of either a consideration (s 39(1)(b)) or a preference to an interpretation consistent with international law (s 233) unless incorporated into South African law, see III.B.

<sup>79</sup> Dugard (note 1 above) at 63 referring to *S v Petane* 1988 (3) SA 51 (C).

<sup>80</sup> See II.B.



been approved, but not ratified, to arrive at a preferred interpretation. While this reading would in fact confer legal meaning to the endorsement, the scope of its application would be rather small indeed.

### **E Is there a Duty to Protect and Fulfil International Obligations in the Domestic Sphere when Intrinsic to the Constitution?**

The majority of the Court's judgment presents a formula for the integration of international obligations into domestic law. Accordingly, approval in Parliament can – in addition to being 'directed at the Republic's legal obligations under international law'<sup>81</sup> – have domestic constitutional effect.<sup>82</sup> That is, international obligations entered into through treaty have to be fulfilled by the state in the domestic sphere when 'intrinsic to the Constitution itself'.<sup>83</sup>

The majority reaches this conclusion in two steps. The first step is to hold that the argued<sup>84</sup> international obligation established 'a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices'<sup>85</sup> and 'to create an anti-corruption unit that has the necessary independence'. According to the majority, this obligation is indeed intrinsic to the Constitution itself, 'and [the Constitution] draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere'.<sup>86</sup> The obligation would appear well on its way to becoming a constitutionally imposed requirement.

Identifying the heart of the Constitution constitutes the second step. The *Glenister* Court holds that FC ss 7(2) and 8(1) impose a positive obligation on the state and its organs to take reasonable and effective steps to respect, protect, promote and fulfil constitutional rights.<sup>87</sup> To *interpret* s 7(2) of the Constitution in order to determine what such reasonable and effective measures are, the majority then deploys FC s 39(1)(b) and orientates that determination towards the dictates of international law.<sup>88</sup>

Now, the use of FC s 39(1)(b) to *interpret* s 7(2) and to clarify its meaning is plausible. After all, the Court is obligated to consider international law 'when interpreting the Bill of Rights'. The Bill of Rights consists of all of Chapter 2 of the Constitution. FC s 7 is the first provision in chapter 2 and thus technically falls within the interpretive scope of FC s 39(1)(b).

But should it?

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<sup>81</sup> *Glenister* (note 3 above) at para 181.

<sup>82</sup> *Ibid* at para 182: 'An international agreement approved by Parliament becomes binding on the Republic. But that does not mean that it has no domestic constitutional effect. The Constitution itself provides that an agreement so approved "binds the Republic". That ... has significant impact in delineating the state's obligations in protecting and fulfilling the rights in the Bill of Rights.'

<sup>83</sup> *Ibid* at para 195. See also *Glenister* (note 3 above) at para 189.

<sup>84</sup> Whether there is in fact such an international obligation for South Africa or not, lies outside the scope of this article.

<sup>85</sup> *Glenister* (note 3 above) at para 175.

<sup>86</sup> *Ibid* at para 189.

<sup>87</sup> *Ibid* at paras 189–190.

<sup>88</sup> *Ibid* at para 192.

No harm is inflicted upon the language of s 7(2) where it is used as an operational provision to clarify the *substantive rights* in the Bill of Rights (FC ss 9–35).<sup>89</sup> It is not to be read as a substantive constitutional right in itself.

The *Glenister* Court's interpretation of FC s 7(2) does something entirely different. It ignores the fact that the state's obligation to take reasonable and effective measures is directed at the 'respect, protection, promotion and fulfilment' of 'the rights in the Bill of Rights'.<sup>90</sup> In determining the relevant constitutional right, the majority refers to numerous principles in various parts of the Constitution to which the absence of corruption is inherent, such as principles of governmental accountability, transparency, budgetary accountability, responsiveness and openness.<sup>91</sup> Even though these principles could indeed amount to a constitutional commitment undertaken by the state to establish an independent and efficient anti-corruption mechanism, none of them are a *substantive right* in the Bill of Rights as required by FC s 7(2).<sup>92</sup>

Thus, even if an obligation to create an anti-corruption unit that has the necessary independence is 'intrinsic to the Constitution itself',<sup>93</sup> to rely on s 7(2) for its fulfilment is inconsistent with the express wording of the Constitution as it stands. Properly interpreted, therefore, the international obligation in question admits of no domestic effect by deploying FC s 39(1)(b).

For FC s 39(1)(b) to do the work the *Glenister* Court has in mind, it would be obliged to identify in some detail the provisions in the Bill of Rights deleteriously effected by the absence of an independent and effective corruption unit. This additional work the *Glenister* Court does not do.

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<sup>89</sup> On the relationship between FC s 7 and other provisions in the Bill of Rights, and the Constitution as a whole, see T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 10; J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13; S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS 2007) Chapter 34; S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 262–269.

<sup>90</sup> My emphasis.

<sup>91</sup> *Glenister* (note 3 above) at para 176: 'Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of state contract for goods and services. It is equally clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law. In turn the national prosecuting authority bears the authority and indeed the duty to prosecute crime, including corruption and allied corrupt practices.'

<sup>92</sup> But see Meyersfeld (note 6 above) (Meyersfeld argues for a right to have a government oppose corruption which is 'the same as a right to a transparent and accountable government').

<sup>93</sup> Note 11 above.

## **F Other Domestic Effect of an Approval in Parliament: Good Faith Obligation**

As stated earlier, the endorsement ‘binds the Republic’ in FC s 231(2) must be interpreted to confer a meaning beyond the fulfilment of an internal constitutional requirement for the ratification process. Apart from the Court’s potential obligation (with extremely limited scope of application) to engage approved but unratified international treaties when interpreting national legislation in terms of FC s 233,<sup>94</sup> the endorsement has no effect on the Court’s interpretive obligations.

The endorsement ‘binds the Republic’ imparts domestic effect to a parliamentary approval in two other ways.

First, based on the rationale of art 18 of the VCLT, it confers a duty of the South African government and its organs to act in good faith domestically and to refrain from acts which would defeat the object and purpose of an international treaty until the legislative branch has made its intention clear as how to fulfil South Africa’s international obligation.<sup>95</sup> (I assume, for purposes of argument, that the national executive has expressed its will to be bound by the international treaty and the entry into force is not unduly delayed.)

Second, the approval of an international treaty should be seen as a positive parliamentary affirmation to the citizens of South Africa that Parliament, subject to the provisions of the Constitution, will *act* in accordance with the approved treaty when exercising legislative power.

This understanding would contribute to the previously stated aim to bring international law and South African domestic law into harmony with one another. It is compatible with the separation of powers doctrine, facilitates the principles of governmental accountability, transparency, responsiveness and openness, and acknowledges the obligatory nature of international treaties (when ratified) to perform the treaty obligations in good faith (art 26 VCLT<sup>96</sup>). Moreover, it would not interfere with Parliament’s discretion as to how best to give domestic effect to South Africa’s international obligations. It would merely demand, by some means, that it does so.

## **IV IMPLICATIONS FOR THE REASONING IN GLENISTER**

How do both the majority judgment and the minority opinion in *Glenister* fare after we have drawn these various and sundry conclusions about the appropriate role of international law in our constitutional framework? Not well. Not at all well.

Not well at all.

Recall that the judgment concerned the constitutional validity of the National Prosecuting Authority Act 56 of 2008 (NPAA Act) and the South African Police Service Amendment Act 57 of 2008 (SAPSA Act).<sup>97</sup>

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<sup>94</sup> See above III.D.

<sup>95</sup> See, generally, Shelton (note 75 above).

<sup>96</sup> Art 26 VCLT goes back to the customary international law principle that agreements are binding (*pacta sunt servanda*).

<sup>97</sup> *Glenister* (note 3 above) at introduction.

The minority found these two legislative enactments to be compatible with the Constitution, in particular with FC ss 179 and 205(3). First, the minority found that an approval by resolution in Parliament binds South Africa only on the international plane.<sup>98</sup> Second, it opined that even if the Corruption Convention had been incorporated into South African domestic law, it could have not been incorporated in a manner that creates constitutional rights and/or obligations.<sup>99</sup> The minority concluded that no constitutional obligation to establish an independent anti-corruption unit exists.<sup>100</sup> Although it confirmed that, as an interpretative tool, the Convention engages the requirements of the Constitution,<sup>101</sup> it does not apply FC s 233. That would have been the surest route to reading FC ss 179 and 205(3) in a manner consistent with the Corruption Convention obligations.

The majority judgment found the impugned laws incompatible with the Constitution because they violated international obligations that were ‘intrinsic to the Constitution itself’.<sup>102</sup> It presented a formula for the integration of international obligations into domestic law by use of FC ss 7(2) and 39(1)(b).

The analysis above suggests the following fundamental infirmities with the minority opinion and the majority judgment. The minority’s argument that an approval by resolution in Parliament binds South Africa *only* on the international plane is incorrect for two reasons. First, as shown above, an approval does not bind South Africa at international level at all. Second, an approval must therefore have some domestic effect, as suggested above, in form of a good faith obligation. The majority errs in relying upon s 7(2) to give domestic constitutional effect to the Corruption Convention. An obligation that is ‘intrinsic to the Constitution’ does not equate to a justiciable *substantive right* in the Bill of Rights.<sup>103</sup>

An appropriate understanding of the role of international law in our constitutional framework could have been established by the *Glenister* Court in one of the following two ways:

First, the impugned laws could have been held inconsistent with FC s 205(3), read with FC s 179, of the Constitution, which provides that the objective of the national police service shall be ‘to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law’. Surely this set of ends would embrace the prevention, combat and investigation of corruption.<sup>104</sup>

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<sup>98</sup> Note 10 above.

<sup>99</sup> *Glenister* (note 3 above) at para 102: ‘Firstly, insofar as provisions in the [Corruption Convention] give rise to rights and obligations under domestic law, these rights and obligations flow from, and are limited by, the extent to which the domestic legislation incorporating the agreement includes those provisions. [Second.] [t]he incorporation of an international agreement does not transform the rights and obligations embodied in the international agreement into constitutional rights and obligations. It only transforms them into statutory rights and obligations that are enforceable in our law under the national legislation incorporating the agreement.’

<sup>100</sup> *Ibid* at para 113.

<sup>101</sup> *Ibid* at paras 96, 115.

<sup>102</sup> *Ibid* at para 195. *Ibid* at para 189.

<sup>103</sup> See III.E.

<sup>104</sup> See *Glenister* (note 3 above) at para 111.

When interpreting any legislation where the substantive provisions of the Bill of Rights are not at issue, FC s 233 must be applied. Thus, in order to determine whether FC s 205(3) of the Constitution requires creating an independent anti-corruption unit outside the SAPS, the Court is obligated to ‘prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’. In other words, should more than one interpretation of FC s 205(3) be available, the one consistent with international law *has to be preferred*, not merely ‘considered’,<sup>105</sup> (as the more lax requirements of any interpretation of the Bill of Rights under FC s 39(1)(b) would demand).<sup>106</sup> As noted earlier, this article does not aim to evaluate the exact contours of South Africa’s international obligations as imposed by the Corruption Convention. Let’s assume that it does indeed call for an independent corruption service; then the Bill of Rights need never have entered the picture.

What FC s 233 demands is that where *lacunae* exist in the express wording of the Constitution, they ought to be interpreted in a manner that ensures the consistency of national legislation with international legal standards. Had the majority properly understood the purpose of FC s 233, a rather straightforward interpretation of the Corruption Convention would have yielded the desired result.

A second preferred basis for a finding of constitutional inconsistency turns on a correct understanding of FC s 231(2). Given that Parliament has approved the Corruption Convention, and therefore that it does have effect at the domestic level, and provided that the Corruption Convention does impose an obligation to establish an independent anti-corruption service, the impugned laws could be found inconsistent, on the one hand with the positive statement by Parliament to *act* in accordance with the approved agreement when exercising legislative power, and on the other with the obligation, derived from FC 231(2), to act in good faith domestically and to refrain from acts that would defeat the object and purpose of the Corruption Convention.

## V CONCLUSION

The reasoning employed in the two judgments in *Glenister* provides us with an opportunity to identify a number of apparent points of confusion about when and how South Africa is bound by an international treaty and to reflect on the meaning of FC s 231(2).

First, international treaty-making in South Africa falls exclusively within the competence of the national executive. This competence encompasses the ratification of international treaties and is not shared with Parliament.

Second, an approval by resolution in Parliament as required in FC s 231(2) does not bind South Africa at the international level. It speaks merely to how

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<sup>105</sup> For more on what it means to ‘consider’ international law, see Tuovinen (note 8 above).

<sup>106</sup> In *Glenister* (note 3 above) at para 115 the Court confirms that ‘[t]he [Corruption] Convention may be used as an interpretive aide in understanding the nature and scope of the constitutional obligation to effectively combat corruption and organised crime’. Despite the use of the wording *may* instead of *has to*, the Court seems to have FC s 39(1)(b), but not FC s 233, in mind.

South Africa effects ratification internally. To produce that result, only an official formal act by the national executive expressing consent is required.

Given this article's reading of FC s 231(2), the final question is what form of domestic effect does an approval of an international treaty obligation have. This article has identified three possibilities. First, it could impose an obligation on the court called upon to interpret national legislation in terms of FC s 233 to include international treaties that are approved, but not ratified, in its interpretation.<sup>107</sup> Second, it could impose a duty upon the South African government and its organs to act in good faith domestically and to refrain from acts which would defeat the object and purpose of the international treaty.<sup>108</sup> Third, parliamentary approval could be interpreted as a positive statement that Parliament will act in accordance with the approved treaty when exercising legislative power.

So with respect to the question of the domestic effect of both an international obligation and parliamentary approval, a treaty that has been signed, approved, ratified and incorporated provides straightforward answers. An unincorporated treaty poses rather more nuanced questions about the role of international law under the Constitution: More nuanced, but not without meaningful and dispositive answers. Indeed, as the flaws in the *Glenister* majority judgment and the minority opinion reflect, these answers may be of greater import.

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<sup>107</sup> See III.D.

<sup>108</sup> See III.F.



# What to Do with International Law? Three Flaws in *Glenister*

Juha Tuovinen\*

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## I INTRODUCTION

In *Glenister v President of the Republic of South Africa & Others (Helen Suzman Foundation as Amicus Curiae)*, the Constitutional Court was faced with questions of great legal and political moment.<sup>1</sup> As we shall see, the answers to these questions turned largely on the meaning of a single word: ‘consider’.<sup>2</sup>

At issue was the constitutionality of the controversial disbandment of the Directorate of Special Operations (known as the ‘DSO’ or, more popularly, as ‘the Scorpions’) and their replacement with the Directorate for Priority Crime Investigation (the ‘DPCI’ or ‘the Hawks’). The problem, that split the Court five to four, was the weight to be given to ‘consider’ in FC s 39(1)(b).<sup>3</sup> The text states that when interpreting the Bill of Rights – and applying it to any law or conduct – a court ‘must consider international law’. Much of the disagreement between the majority and minority can be attributed to their different ways of understanding this requirement.

The purpose of this comment is to reflect upon the arguments made and conclusions reached in *Glenister* and to answer three discrete, if related, questions:

- (i) What is meant by ‘must consider international law’?
- (ii) What kind of arguments can and must be made in terms of international law when adjudicating Bill of Rights disputes? and
- (iii) Did the *Glenister* Court use international law in a satisfactory manner?

## A Relevant Background

In many respects, *Glenister* presents a relatively ordinary instance of the use of international law in the interpretation of a provision of the Bill of Rights. Two Acts – the National Prosecuting Authority Act 56 of 2008, and the South African Police Service Amendment Act 57 of 2008 – had the effect of disbanding the DSO and establishing the DPCI. The applicant levelled a number of challenges against

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<sup>1</sup> *Glenister v President of the Republic of South Africa and Others (with the Helen Suzman Foundation as amicus curiae)* [2011] ZACC 6, 2011 (3) SA 347 (CC) (‘*Glenister*’).

<sup>2</sup> On the significance of *Glenister* and other similar cases in both the political and constitutional law domain see S Choudhry “‘He had a mandate’ The South African Constitutional Court and the African National Congress in a Dominant Party Democracy” (2009) 2 *Constitutional Court Review* 1.

<sup>3</sup> Constitution of the Republic of South Africa, 1996 (‘Final Constitution’ or ‘FC’).

the constitutionality of the promulgated laws and the institutions dismantled or created.

The majority judgment held that s 7(2) of the Constitution ('FC'), read in conjunction with provisions on the status of international law in municipal law (FC s 231) and the constitutional obligations of the security services (FC s 205), imposed a positive obligation on the state and its organs 'to provide appropriate protection to everyone through laws and structures designed to afford such protection'<sup>4</sup> and that the steps taken to realise this obligation must be reasonable (and not merely rational).<sup>5</sup> In particular, the *Glenister* Court found that international law requires that states create an independent anti-corruption unit and that FC s 7(2), read with FC s 205 and FC s 231, supports its conclusion that the state's FC 7(2) obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights' is filled out and buttressed by South Africa's international law duties as filtered through the Constitution.<sup>6</sup> It considered a number of factors in reaching this conclusion: the structural and operational independence of the police and prosecutorial authority,<sup>7</sup> as well as the public perception thereof.<sup>8</sup> The majority held that the DPCI fell short in two primary regards: the lack of security of tenure and remuneration of the head of the unit, and the overweening degree of political control. It consequently declared the impugned legislation unconstitutional.<sup>9</sup>

The minority in *Glenister* agreed with the majority that FC s 7(2) imposes a duty on the state to take positive measures to promote the rights in the Bill of Rights. However, it reasoned that the obligation to prevent and to combat corruption must first and foremost be understood in terms of FC s 205.<sup>10</sup> Subsections 205(2) and 205(3), read together, require the state to 'establish the powers and functions of the police service' in order to 'enable the police service to discharge its responsibilities effectively'.<sup>11</sup> These two desiderata require that the police service be free from undue influence – at least to some degree.<sup>12</sup> In the minority's view, international law should then be used to interpret these obligations alone, and not to give independent content to FC s 7(2).<sup>13</sup> Read in light of something more akin to a rationality standard, the minority in *Glenister* concluded that the DPCI was, in fact, sufficiently independent.

<sup>4</sup> *Glenister* (note 1 above) at para 189.

<sup>5</sup> *Ibid* at para 86, following *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20, 2005 (2) SA 359 (CC).

<sup>6</sup> See MD Stubbs 'Three Level Games: Thoughts on *Glenister*, *SCAW* and International Law' (2012) 4 *Constitutional Court Review* 137 (Offers an analysis of the difficulties that a decision such as *Glenister* potentially creates for the state in the conduct of its international relations. My analysis of *Glenister* focuses primarily on the Court's interpretation of FC s 39(1)(b)).

<sup>7</sup> *Ibid* at paras 206–207.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid* at para 251.

<sup>10</sup> *Ibid* at para 115.

<sup>11</sup> *Ibid* at para 111. For more on FC s 205, which I do not discuss here, see S Woolman 'Security Services' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 3, 2011) Chapter 23B.

<sup>12</sup> *Ibid* at para 116.

<sup>13</sup> *Ibid* at para 115.

## B Three Flaws

The reasoning in both the majority and minority judgments in *Glenister* gives rise to three intimately connected questions about the relationship of the Bill of Rights and international law. The first query speaks to the different types of authority international law can possess within a constitutional scheme.

Traditionally the relationship between international and domestic law has been captured in debates about monist and dualist approaches to international law.<sup>14</sup> However, a more nuanced contemporary approach offers international law a more *graduated authority*. This new relationship arises from the manner in which international law is used to interpret domestic provisions of constitutions and statutes. The *Glenister* Court, whilst upholding this distinction rhetorically, conflates it with other distinctions. That's the first flaw in *Glenister*.

The second flaw and the third flaw flow directly from this first methodological error.

The second flaw in *Glenister* reflects a lack of engagement with the particular characteristics of international law. The idea of graduated authority carries with it the implication that the authority of an international law instrument is evaluated, in part at least, against the particular characteristics of that instrument.<sup>15</sup> In sum, not all international law is the same. It is produced differently, according to different processes. Some processes are more transparent and democratic than others. Different types of international law also embody different values and address questions of differing degrees of import. Instead of openly addressing these differences, the *Glenister* Court adopted such an expansive notion of international law that it now embraces documents to which South Africa is not a signatory and is not bound. In *Glenister*, the majority collapsed binding law and non-binding 'soft' law. In reaching its conclusion, it treated an Organization for Economic Cooperation and Development (OECD) report as binding international law for the purposes of South African constitutional analysis. This over-inclusiveness itself is not the biggest problem. This comment concerns itself with a tendency to ignore the important differences between the different types of international law and the consequences those differences ought to have for the interpretation of domestic law.

The third flaw turns on the manner in which international law is used to interpret FC s 7(2). The Constitution, like many other post-World War II constitutions, institutionalises a shift in judicial reasoning away from formal reasons to substantive reasons. This shift means that when interpreting the Constitution, courts must engage various political, philosophical, social, economic and scientific foundations that give a particular provision content. In *Glenister*, international law appears to displace the substantive reasons that might

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<sup>14</sup> J Dugard *International Law: A South African Perspective* (3rd Edition, 2010). See also K Hopkins and H Strydom 'International Law' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2008) Chapter 30.

<sup>15</sup> See M Kumm 'Democratic Self-Governance Meets International Law: The Rules of Engagement' in S Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 256–293.

be derived from substantive provisions of the Bill Rights and, at best, accord them a secondary role in the interpretation of FC s 7(2).

## II FLAW 1: THE NATURE OF THE AUTHORITY OF INTERNATIONAL LAW

The first flaw relates to the different roles that international law can play in the constitutional scheme. Both judgments struggle with the difference between international law as formally valid law within the domestic system, on the one hand, and its having to be ‘considered’ in the interpretation of the Bill of Rights, on the other. In *Glenister*, although the Court correctly differentiated between these two types of relationships at a doctrinal level, both judgments appear to misunderstand the *kind* of authority that international law may carry in constitutional interpretation.

The starting point is to differentiate between two different kinds of authority that international law may carry *within* a domestic legal system. The first, more traditional, relationship between international and national law, centers on the question of when international law forms binding law within a state. This relationship between domestic and international law has been captured by the distinction between monistic systems and dualistic systems.<sup>16</sup> A monistic system sees international and domestic (including constitutional) law as part of one system. In such a system, it is possible for a claimant, for example, to base a claim on international law in a domestic court.<sup>17</sup> In a dualistic system, international law does not form part of the domestic law of a country unless and until it is made to be so by an enactment of the domestic legislature. The South African legal system is generally dualistic in its approach to international law.<sup>18</sup> FC s 231 provides for a range of measures in terms of which treaties become domestic law. Importantly, treaties that have not been incorporated in terms of FC s 231 are not applicable within South Africa’s municipal legal system. Some exceptions to this strict duality exist. For example, FC s 231 gives international custom priority over common law (but again, not over Acts of Parliament).

Such provisions tell us when international law becomes binding in a domestic system and when it falls outside it. However, there is another sense in which international law may manifest in internal legal disputes in South Africa. FC s 39(1)(b) requires that any court adjudicating a constitutional dispute ‘must consider international law’. This requirement clearly imposes a fundamentally different kind of obligation than that contemplated in two sections which regulate the incorporation of international law into the domestic system. This distinction is probably what the *Makwanyane* Court had in mind when it concluded that ‘international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue’<sup>19</sup> and that ‘[i]nternational

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<sup>16</sup> Ibid.

<sup>17</sup> The Netherlands operates under a monistic system.

<sup>18</sup> Constitutional requirements must be satisfied before law that binds the state on the international plane becomes domestically binding. These requirements are found at FC ss 231–233. (On such requirements, in general, see J Dugard *International Law a South African Perspective* (3rd Edition, 2010)).

<sup>19</sup> *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC) at para 34.

agreements and customary international law accordingly *provide a framework* within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments ... may *provide guidance* as to the correct interpretation of particular provisions of [the Bill of Rights]<sup>20</sup>. International law, then, serves as a source of inspiration. It provides an insight into the ‘transnational constitutional reality which helps determine the [meaning of the Constitution]’,<sup>21</sup> as well as arguments for and against possible interpretations of various provisions found within the Bill of Rights. In this sense, international law is much like foreign law: it provides a sounding board for ideas that may or may not prove dispositive of a dispute.<sup>22</sup>

Thus, under FC s 39(1)(b), the authority that international law carries is fundamentally different from the authority of formally binding law. Unlike the strict binary form of enforceability contemplated in FC s 231 and FC s 232, the requirement that international law must be considered creates a situation in which international law is given what has been referred to as ‘graduated authority’.<sup>23</sup> The role played by international law in constitutional adjudication in this graduated sense cannot be captured by the binding/non-binding dichotomy. Instead, the authority of international law is simultaneously *more* and *less* than that of treaties incorporated through FC s 231 or that of customary law in terms of FC s 232. It is *less* because it is not binding. The authority of international law is not absolute in terms of FC s 29(2) in the sense that it can always be overridden by other relevant considerations. However, it can also amount to *more* than incorporated treaties by potentially shaping the content of constitutional rights and duties. In *Glenister*, the Court correctly recognised that, in terms of the interpretative provisions, incorporated international law would indeed amount to less than a constitutional provision, because it could only ever have the authority of ordinary statutory law.<sup>24</sup>

In *Glenister*, both the majority and the minority judgments confuse and conflate the distinction between persuasive authority and the binding/non-binding dichotomy found within a dualistic system.<sup>25</sup> Both judgments correctly distinguish between giving international law formal authority and merely using it as an interpretative guide.<sup>26</sup> Both judgments unfortunately go awry when they attempt to put international law into action.

<sup>20</sup> Ibid at para 35.

<sup>21</sup> L du Plessis ‘Interpretation’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2008, OS, 2nd edition) at 32–172.

<sup>22</sup> Indeed, the Court and commentators often consider international law together with foreign law in this context. Lourens du Plessis notes this manner of engagement by collapsing the two different bodies of law under the subtitle ‘Comparative Interpretation (or Transnational Contextualization)’. Ibid.

<sup>23</sup> Kumm (note 15 above) 291–293.

<sup>24</sup> *Glenister* (note 1 above) at paras 95–104.

<sup>25</sup> See J Tuovinen ‘The Role of International Law in Constitutional Adjudication’ 2013 *South African Law Journal* (Show how the Court conflates the two uses of international law elsewhere.)

<sup>26</sup> See *Glenister* (note 1 above) at paras 93 and 108, where the Court held that ‘treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic’, and that a ‘distinction must be drawn between using international law as an interpretive aid, on the one hand, and relying on international law as a source of rights and obligations, on the other’.

The main problem with the majority judgment is that it is very difficult to discern how international law impacts on the interpretation of FC s 7(2). Although the judgment often refers to the role of international law, its references are almost exclusively mere assertions of the importance of international law in constitutional interpretation. The majority states that the fact that an international agreement has been approved in terms of FC s 231(2) means it is binding within South Africa. This status, in turn, ‘has significant impact in delineating the state’s obligations in protecting and fulfilling the rights in the Bill of Rights’.<sup>27</sup> The effect of such an approval for the majority is that the ‘Constitution appropriates the obligation [which already binds South Africa in international law] for itself, and draws it deeply into its heart, by requiring the state to fulfill it in the domestic sphere.’<sup>28</sup> The majority explains that the key to understanding the role of international law lies in the requirement in FC s 7(2) to ‘protect, promote, respect and fulfill’ the rights in the Bill of Rights’. However, as to how the status of a given form of international law determines the meaning of a provision of the Bill of Rights, the majority merely states that ‘in the present case [it] is clear, and direct’ and that ‘that question must be answered in part by considering international law’.<sup>29</sup> Two paragraphs later, the majority again baldly states that the international law obligation to create an independent anti-corruption unit is of the ‘foremost interpretive significance’.<sup>30</sup> But why and how it does not say.

The *Glenister* Court does not clarify *why* international law matters, or how it enables a court to determine the outcome of a case. They simply repeatedly assert international law’s importance. Ultimately, the impact of the international law is found in one sentence of a rather convoluted paragraph:

That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) requires. Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 231(2) provides that an international agreement that Parliament ratifies ‘binds the Republic’ is of prime significance. *It makes it unreasonable for the state, in fulfilling its obligations under section 7(2), to create an anti-corruption entity that lacks sufficient independence.*<sup>31</sup>

The phrase, ‘it makes it’, is ambiguous at best. It leaves the exact impact of international law in any given matter unclear. Moreover, an important conceptual shift occurs here: from international law is no longer just ‘considered’. It *affects reasonableness analysis*. Unfortunately, this important significant shift is shrouded in colloquial and imprecise language. The language employed suggests that international law in the Bill of Rights may have a determinative character that goes beyond being merely persuasive. This impression arises from an apparent shift in this paragraph away from interpreting the obligation in FC s 7(2) (what

<sup>27</sup> Ibid at para 182.

<sup>28</sup> Ibid at para 189.

<sup>29</sup> Ibid at para 192.

<sup>30</sup> Ibid at para 194.

<sup>31</sup> Ibid. (Emphasis added).



the majority claims to be doing), to using international law to determine whether that obligation has been breached. If the international law standard is not satisfied, then FC s 7(2) has been unjustifiably limited because the steps taken to give effect to FC s 7(2) must be viewed as unreasonable. The content of international law has been transformed into the criteria by which compliance with FC s 7(2) is determined. This construction of ‘consider’ comes awfully close to making international law – of any form employed by a court – formally binding.

Notwithstanding the above, the majority argued that the effect of its reasoning did not amount to an incorporation of international law. Its reasons are utterly unpersuasive. They amount to little more than asserting that the Court is not incorporating international law but merely following interpretive injunctions.<sup>32</sup> They claim, for example, that the obligation at issue was not ‘an extraneous obligation, derived from international law and imported as an alien element into our Constitution: it is sourced from our legislation and from our domesticated international obligations and is therefore an intrinsic part of the Constitution itself and the rights and duties it creates.’<sup>33</sup> The *Glenister* majority further contends that:

[I]t is possible to determine the content of the obligation section 7(2) imposes on the state without taking international law into account. But section 39(1)(b) makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision, as the main judgment suggests, to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic’s external obligations under international law, and their domestic legal impact.<sup>34</sup>

The Court then seemingly goes a step further when it states that ‘[t]here is, thus, *no escape* from the manifest constitutional injunction to integrate, in a way that the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty.’<sup>35</sup> Again, nothing in these assertions elucidates the role international law plays in constitutional reasoning. The fundamental flaw in the majority’s reasoning would appear to be confusion about the kind of authority that international law should have when a court interprets the Bill of Rights.

Although it draws opposite conclusions, the minority opinion seems to suffer from the same confusion. Ngcobo CJ contends that:

It does not follow from the fact that corruption can have a deleterious impact on the enjoyment of certain rights that the conventions addressing corruption and organised crime create a constitutional obligation on the state, through the operation of section 7(2),

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<sup>32</sup> See *Glenister* (note 1 above) at para 195 (The majority holds as follows: ‘This is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions. The conclusion that the Constitution requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself.’)

<sup>33</sup> *Ibid* at para 197.

<sup>34</sup> *Ibid* at para 201.

<sup>35</sup> *Ibid* at para 202.

to establish an independent anti-corruption unit in the mirror image of those envisioned in the conventions.<sup>36</sup>

The Chief Justice then goes on to state that:

To read the obligation to consider international law as creating, in conjunction with the obligation to protect the rights in the Bill of Rights, a constitutional obligation to establish an independent anti-corruption unit, as the amicus invites us to do, inevitably would result in incorporating the provisions of the Convention into our Constitution by the back door. This would, in effect, amount to giving the Convention a status equal to the provisions of the Constitution...<sup>37</sup>

Ngcobo CJ is certainly correct when he says FC s 39(1)(b) does not require the incorporation of international treaties. However, he is wrong to the extent that he claims that the inclusion of such an obligation via the Constitution would amount to incorporating the treaties by the backdoor. Taken to its logical conclusion, this line of argument implies that, through constitutional litigation, we would witness an unwarranted incorporation of particular international legal instruments: international instruments rejected by South Africa, or unincorporated as required in terms of FC s 231 and FC s 232. That proposition is absurd. The compliance with the interpretive injunction in FC s 39(1)(b) cannot depend on whether the content of a constitutional obligation in the end matches the content of a like international law obligation. To so fear the reach of FC s 39(1)(b), as the Chief Justice appears to do, would be tantamount to making FC s 231 and FC s 232 redundant.

Again: the error in the minority's reasoning is it equates the imperative of considering international law with a requirement that a constitutional duty or right must map on to the duties and rights found in international law.

Of course, that FC s 39(1)(b) does not require incorporation – not even close – does not, however, mean that a court would be prohibited from effectively doing so in a given matter. The Constitution in FC s 39(1)(b) says absolutely nothing about whether any given cohort of international law norms must be adopted or not. In terms of FC s 39(1)(b), a court is always free to reject a particular interpretation of a provision of the Bill of Rights, whether it is based on international law or not, if that interpretation does not 'fit' within established constitutional precedent or is otherwise deemed inconsistent with demands of South Africa's basic law. International law poses no discernable threat to constitutional supremacy: it simply has a discernable role to play within our constitutional scheme.

Besides conflating formal binding authority with graduated authority, the *Glenister* majority and minority opinions reveal an unease with according a clear and proper place for international law in constitutional interpretation. At the heart of this confusion lies an unwillingness to engage with the normative nature of international law.

How to characterise the normative pull of a body of law that does not bind parties or states or courts legally? One can imagine different answers to this

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<sup>36</sup> Ibid at para 110.

<sup>37</sup> Ibid at para 112.

question.<sup>38</sup> For example, that international law provides a ‘framework to understand the Bill of Rights’, as the *Makwanyane* put it, may be one answer.<sup>39</sup> The idea that international law creates a presumption in favour of one interpretation over another interpretation may be another, slightly different one.<sup>40</sup> But to merely say, repeatedly, that international law is important does no work. This insufficiency is the first of *Glenister’s* flaws in its engagement with international law.

### III FLAW II: REASONING BASED ON A BROAD APPROACH TO INTERNATIONAL LAW

The second flaw stems from the Constitutional Court’s very generous and inclusive approach to what it understands to be international law.<sup>41</sup> The problem is a flattening of international law, policy and commentary. *Glenister*, for example, tends to treat all international legal interventions as if they had the same heft. They should not. The *Glenister* Court both effaces critical differences in international law and places a dubious emphasis upon certain features and functions.

The Court’s tendency to treat all international law as alike, can be traced all the way back to *Makwanyane*. The *Makwanyane* Court noted that international law encompassed both binding and non-binding international law.<sup>42</sup> The Court went further and found that *travaux préparatoires* also fell within the ambit of international law, at least to the extent to which they could be used to interpret international law.<sup>43</sup> That decision, although it has been criticised as misrepresenting the academic authority upon which it relied,<sup>44</sup> continues to be the backbone of the South African Constitutional Court’s all-inclusive approach to international law.

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<sup>38</sup> Foreign law suffers from similar misconceptions. See S Choudhry ‘Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation’ 74 *Indiana Law Journal* (1999) 819.

<sup>39</sup> *Makwanyane* (note 19 above) at para 35.

<sup>40</sup> The question of the existence of such a presumption within the context of the Bill of Rights is intriguing. The text of FC s 39(1)(b), by requiring that international law be considered, stops short of creating a presumption. Nor, however, does it explicitly preclude it. There are a number of arguments that can be made in favour of the existence of such a presumption. First, it might be arguable that international law creates a presumption to be followed ‘simply by virtue of it being the law of the international community’. See M Kumm (note 15 above) 262. International law consists of an agreed upon framework for deciding questions and those answers should be given at least prima facie weight when deciding questions of constitutional importance. Interestingly, the chapter on international law in the Constitution contains a provision, FC s 233, that seems to create such a presumption in favour of following international law, which in itself may make the case for applying international law somewhat stronger. Yet, in *Glenister*, the Court seems to relegate the importance of FC s 233 to second class status and merely uses that section to support its argument. In *Azanian Peoples Organisation (AZAPO) and Others v President and Others*, the Court also stated that ‘International law ... [is] ... relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law’ ([1996] ZACC 16, 1996 (4) SA 671 (CC) at para 26). Whether such a presumption exists under the Constitution is, then, open to question and often, like in *Glenister*, it is a question to which reference is seldom made.

<sup>41</sup> Du Plessis (note 21 above) 32–176 to 32–178.

<sup>42</sup> *Makwanyane* (note 19 above) at para 35.

<sup>43</sup> *Ibid* at para 16, especially fn 23.

<sup>44</sup> Du Plessis (note 21 above) at 32–175.

Despite this generous approach, the Court has said little about the weight carried by different instruments of international law. An exception, referred to as ‘an important qualification’ by one commentator,<sup>45</sup> came in *Grootboom*. The *Grootboom* Court held that ‘[t]he relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary’.<sup>46</sup> Thus, despite its recognition of the potentially different valences of international law in the South African municipal context, the Court has not sought to elucidate the principles according to which the weight of distinct forms of international law must be measured.

*Glenister* illustrates the dangers of combining an inclusive approach to international law with an unprincipled approach as to the weight of its component parts. In interpreting the requirements of the various anti-corruption treaties, the court relied on a report by the OECD. The OECD Report is a comparative study of a number of countries and the different mechanisms that they have employed to battle corruption. Some of the conclusions of the report are then included in *Glenister’s* valid domestic interpretations of the anti-corruption treaties.<sup>47</sup> *Glenister* states that the Report ‘is not in itself binding in international law, but can be used to interpret and give content’ to the Conventions.<sup>48</sup> The *Glenister* Court then supports this proposition with a footnote that contains a number of domestic and international law arguments.<sup>49</sup> The primary argument in that footnote is based on the Vienna Convention on the Law of Treaties, 1969 (VCLT). It relies on VCLT article 31(3)(b): the ‘subsequent practice’ of states ‘shall be taken into account’ when interpreting a treaty. The Court then proceeded to note that although South Africa has not ratified the VCLT, that treaty is used in ‘formulating’ the practice of the state, and it backed this statement with a reference to an academic article.<sup>50</sup>

The first problem with the majority’s footnote is a straightforward point about international law. The point is that the term ‘subsequent practice’, in international law, has a relatively circumscribed meaning. As regards the OECD Report, there are several reasons why it may not satisfy the requisite criteria. Subsequent practice refers to a ‘practice that clearly establishes the understanding of all parties’ with respect to the interpretation of a treaty provision.<sup>51</sup> Such a practice has to be ‘concordant, consistent and common’.<sup>52</sup> The OECD Report, however, merely reflects academic research into how certain states have combated corruption and evaluates the factors that led to success or failure.<sup>53</sup> Although this kind of report might contain evidence of the kind of practices that would satisfy the VCLT’s

<sup>45</sup> Ibid at 32–178.

<sup>46</sup> *Government of SA v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC) at para 26.

<sup>47</sup> *Glenister* (note 1 above) at paras 187–189.

<sup>48</sup> Ibid at para 187.

<sup>49</sup> Ibid at fn 43.

<sup>50</sup> A Schlemmer ‘Die Grondwetlike Hof en die Ooreenkoms ter Vestiging van die Wêreldhandelsorganisasie’ (2010) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 749.

<sup>51</sup> See, eg, I Brownlie *Principles of International Law* (1998) 635.

<sup>52</sup> *Advisory Opinion on the Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Reports 226.

<sup>53</sup> See Executive Summary of the OECD Report (YEAR) 9 - 16.

requirements for relevant ‘subsequent practice’, it would, at the very least, have been incumbent upon the *Glenister* Court to engage that question in more depth.

The second problem in the *Glenister* Court’s analysis of graduated authority relates to the way in which the majority brought the VCLT, and specifically article 31, into the decision. The majority judgment states that ‘[a]lthough South Africa has neither signed nor ratified this Convention, commentators observe that South Africa employs the Convention in formulating its practice regarding treaties’.<sup>54</sup> Before turning to an analysis of this statement, it should be noted that article 31 is part of customary international law.<sup>55</sup> As such, it would have been binding on South Africa in the same way as the VCLT, and the question of ‘subsequent practice’ would arguably not arise.<sup>56</sup> Even if it did, however, the *Glenister* Court’s interpretation of the term ‘subsequent practice’ gives rise to further difficulties. The first of them is that the court seems to rely on a descriptive account of its practice in order to give the observation normative force. This, of course, is the wrong way around. Even if a court uses the VCLT in its approach to international law, it would have to use it in a way that is justifiable in law if its use is to have some normative force. In other words, the practice must actually *be practised* in order for it to become binding. The second difficulty is that, when the *Glenister* Court was busy constructing the argument supporting the outcome, it had already decided that international law should be interpreted in line with the VCLT. It did so in *Makwanyane*.<sup>57</sup> That being so, the Court could have simply relied on its own precedent for its semi-novel approach.

On their own, these difficulties are minor cavils. Taken together, however, they add to one’s concern about the weakness of the *Glenister* Court’s arguments as to the relevance of the OECD Report. What the majority judgment lacked was a careful and deliberate engagement with what it was that the OECD Report actually said, and with the question as to whether or not its recommendations – premature as international law – ought to be followed by South Africa.

An ever-increasing body of literature exists on the normative aspects of engaging international law in domestic adjudication. Mattias Kumm, for example, has identified four principles which may form a basis for evaluating the legitimacy of a rule of international law. These are, first, *presumption* in favour of the application of international law, secondly, questions of *jurisdiction*, thirdly, *procedural legitimacy* and fourthly, principles related to *outcomes*.<sup>58</sup>

The first leg of Kumm’s analysis is self-explanatory. The second question concerns jurisdiction: it asks whether a particular question is best answered in

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<sup>54</sup> *Glenister* (note 1 above) at fn 43.

<sup>55</sup> See, eg, *Arbitral Award of 31 July 1989* ICJ Reports 1991 at para 48.

<sup>56</sup> Although the internal effect of treaties and customary law is different, pursuant to FC ss 231 and 232, both can become binding in domestic law. That’s what concerns us here.

<sup>57</sup> *Makwanyane* (note 19 above) at para 16. This point has been criticised by Lourens du Plessis as importing an international law obligation into the domestic system without justification. L du Plessis (note 21 above) at 32-174 – 32-170. I find it preferable to view international law as one system, where the interpretations and rules of interpretation are viewed as inseparable from the individual provisions themselves.

<sup>58</sup> I discuss the idea of international law forming a presumption in favour of a particular interpretation over another very briefly at note 40 above.

international fora or a domestic tribunal (or elsewhere). The third enquiry entails an assessment of whether the international law in question was produced in a procedurally legitimate manner. This inquiry raises issues of accountability and of transparency in the international law-making process. The final question engages the legitimacy of the outcome of a particular interpretation, and it asks whether human rights will indeed be respected if it is followed.

Each one of Kumm's principles is relevant to the determination of the weight to be given to a rule of body of international law when interpreting the Constitution. In *Glenister*, however, the Court does not ask such questions. If it had, it would have been forced to deal with the OECD Report's express recognition, for example, that domestic constitutional arrangements must be respected and that an independent unit must be created in a manner that *fits* the demands of local conditions.<sup>59</sup> Clearly, the OECD Report's recognition of different domestic arrangements should bracket any course of action followed. Even if the OECD Report *does* contain recommendations, it should not displace a principled engagement with its conclusion. It would seem – without going into the matter in depth – that most of these principles could have been satisfied in *Glenister*. If anything, however, that makes it more disconcerting that the Court chose to highlight the formal criteria of the OECD Report over other criteria regarding the legitimacy of international law and the degree of legitimacy to be accorded the report.

The one place where the court *does* hint at the importance of considering the weight of international law occurs when it emphasises that the conventions in question had been ratified. The *Glenister* Court states that '[i]n reaching this conclusion [ie that the Constitution requires the creation of an independent anti-corruption unit], the fact that section 231(2) provides that an international agreement that Parliament ratifies – binds the Republic is of prime significance'.<sup>60</sup> Here, the *Glenister* Court acknowledged that the treaties have been ratified, and that in terms of FC s 231 they bind the Republic. This recognition augurs well. While the formally binding effect of this provision is limited to the international sphere,<sup>61</sup> its ratification by Parliament constitutes an important consideration when evaluating the weight to be given to an international treaty. That the *Glenister* Court did not run with a principled approach with respect to the rest of the international law it engaged reflects a lost opportunity.

In sum, the second flaw in *Glenister* Court illustrates the dangers of an overly inclusive understanding of international law coupled with an underdeveloped approach to evaluating the normative weight a law, a treaty or a report should be accorded. In *Glenister*, the absence of a rubric or hierarchy led the Court to rely on the treaties and the OECD Report in an untoward manner.

That's not to say that the OECD Report could not play an important role in the interpretation of FC s 7(2). It can. What *Glenister* illustrates, rather, is the need

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<sup>59</sup> *Glenister* (note 1 above) at para 188.

<sup>60</sup> *Ibid* at para 194.

<sup>61</sup> *Ibid*.



for a sound normative jurisprudential framework that accommodates the broad variety of international instruments that must be ‘considered’ under FC s 39(1)(b).

#### IV FLAW III: THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND OTHER REASONS

The third problem is rooted in the *Glenister* Court’s preference for deciding the meaning of FC s 7(2) (almost) entirely on the basis of international law. It should have engaged other provisions in the Bill of Rights, specifically, and in the Constitution, more generally. (It did, of course, do so – but only in the most cursory fashion.) In this section, the comment explores the meaning of the injunction to ‘consider’ international law and suggests those elements that are necessary for reaching a conclusion about the desirability or otherwise of following an international-law norm or report in a given constitutional law dispute.

To be clear, this question answered here recognises that the Constitution requires legal analysis based on substantive grounds. South African courts review the constitutionality of actions, pieces of legislation, the common law and customary against relevant and publicly acceptable understandings of the basic law, and more general views about South African constitutional jurisprudence.<sup>62</sup>

A broad literature exists on the nature of that engagement and how far courts need to go in establishing sophisticated theories about the content of a right (or rights) upon which resolution of a constitutional matter rests. The comment can hardly revisit those debates here. What matters is that the Constitution itself requires some degree of engagement with general understandings of the meaning of a right – by now determined by the Court itself – and other forms of reasoning that informs our often contested views about the content of our basic law. (Else why litigate a constitutional matter?)

In *Glenister*, international law (broadly construed) *takes the place* of an engagement with substantive rights. The Court, having reached its conclusion that international law made it ‘unreasonable’<sup>63</sup> to create an anti-corruption unit that is not independent, turned to the question of whether any rights in the Bill of Rights had been infringed. The *Glenister* Court states that the ‘architecture of the Constitution’<sup>64</sup> and the erosion of a number of rights – equality, dignity, security of the person and a variety of socio-economic rights – would have triggered FC s 7(2) as well. They do not take this proposition any further.<sup>65</sup> In truth, all of the real interpretative work in determining the content of FC s 7(2) took place through the Court’s consideration of international law. Other considerations – the rights to be promoted and protected by FC s 7(2) – play an oddly subsidiary role.

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<sup>62</sup> See E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal of Human Rights* 31; A Cockrell ‘Rainbow Jurisprudence’ (1996) 12 *South African Journal of Human Rights* 1; S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 *South African Law Journal* 762.

<sup>63</sup> *Glenister* (note 1 above) at para 194.

<sup>64</sup> *Ibid* at para 199.

<sup>65</sup> *Ibid* at para 200.

International law, properly understood, and the legal reasoning that takes place during normal rights analysis are to be considered as part and parcel of the same process. Substantive reasons should be offered for the weight international law is given, just as we expect courts to give content to constitutional rights. So understood, those arguments that arise from international law may legitimately form part of a court's ordinary process of reasoning. In *Grootboom*, the Court, when faced with the still vexed question of a minimum core for socio-economic rights – a position already adopted at international law – considered the desirability of leaving this question for the courts to decide.<sup>66</sup> Ultimately, the *Grootboom* Court rejected the international law on point. It concluded that it lacked both the necessary information for the determination of a minimum core and that a minimum core was not necessary for the determination of the case.<sup>67</sup> In *Glenister*, no such engagement between substantive provisions of the Bill of Rights and international law takes place. Instead the *Glenister* Court states that the substantive provisions that it mentions (and upon which substantive arguments could have been built regarding the corrosion of the architecture of the Constitution) serve merely as Emperor's clothing. The Court's decision was reached, in any event, without them.<sup>68</sup>

If all of the reasons, emanating from international law and the substantive provisions of the Bill of Rights, point to the same conclusion, then the way in which the majority lays out its argument probably does not do much real harm. However, as a matter of principle, and for international law to play its role properly in the future, the kind of approach adopted in *Grootboom* with respect to the evaluation of international law seems more desirable than the way in which the Court handled international law and substantive provisions of the Bill of Rights in *Glenister*.

## V CONCLUSION

As I noted at the outset, each one of the flaws identified above turns on the question of the meaning of FC s 39(1)(b)'s injunction that a court must 'consider' international law. While I have considered the three dimensions of this concern discretely, for the purposes of clarity, they are naturally interwoven. If the Court proffered greater clarity about the normative basis for considering international law, then it would be easier to determine the different factors that go into rights analysis and how international law relates to substantive provisions in the Bill of Rights and other provisions in the Constitution.

FC s 39(1)(b) indicates an 'openness and receptiveness to the norms and values of the international community'<sup>69</sup> and that the Constitution is 'embedded in a transnational constitutional reality'.<sup>70</sup> However, the provision simultaneously concerns itself with ensuring that the Bill of Rights is interpreted in line with

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<sup>66</sup> *Grootboom* (note 46 above) at paras 29–30.

<sup>67</sup> *Ibid* at para 33.

<sup>68</sup> *Glenister* (note 1 above) at para 199.

<sup>69</sup> S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 101.

<sup>70</sup> L du Plessis (note 21 above) at 32–172.

existing precedent or accepted understandings about the meaning of particular provisions of the Bill of Rights. FC s 39(1)(b) should *enhance* the reasons given in constitutional adjudication, not merely nod to international law, or in the alternative, supplant accepted understandings of South Africa's basic law. In *Glenister*, the Court engages international law – but does so in a convoluted and unstructured manner. They fall short of what ought to be the appropriate standard. Finally, the international law considered is never ever given a chance to fill out our understanding of our own Constitution. I hope that I have, in the preceding pages, suggested parameters which would lend structure to future use of international law in constitutional matters.



## Comments





# The Risk of Taking Risky Decisions: *Democratic Alliance v President of the Republic of South Africa*

Karthy Govender\*

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## I INTRODUCTION

In *Democratic Alliance v President of the Republic of South Africa* ('Simelane' or '*Democratic Alliance CC*'),<sup>1</sup> the Constitutional Court ('CC'), under the new stewardship of Chief Justice Mogoeng Mogoeng,<sup>2</sup> was asked to conclude that the President knowingly acted irrationally in making a major constitutional appointment. Yacoob ADCJ, writing for a unanimous Court, found that the decision to appoint Mr Menzi Simelane as National Director of Public Prosecutions (NDPP) was irrational and had to be set aside. This decision, made under a recently appointed head of the Court, assuages previously held concerns that a differently constituted CC carried the risk of being more deferential to the executive in the application of the principle of legality. The judgment formulates a test for establishing irrationality (part of the doctrine of legality), and comprehensively explains why and how the President and the executive erred so grievously in making this particular appointment. Beyond refining the doctrine of rationality, the judgment is likely to have a much broader impact. The judgment reaffirms and extends accepted constitutional constraints on the exercise of executive power.

The political practice of palming off controversial issues to commissions of enquiry, not acting on their findings, and then allowing the recommendations to sit idle in the belief that they have no consequence, will now have to be reappraised. The findings of the Ginwala Commission of Enquiry ('Ginwala Commission') were the centrepiece of the reasoning of both the Supreme Court of Appeal ('SCA') and the CC.<sup>3</sup> The government's disdain for the Ginwala Commission – because it was not a court of law and its deliberations were therefore of little significance – can be contrasted with the copious references made in both the

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<sup>1</sup> *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24, 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 (CC) ('*Democratic Alliance CC*' or '*Simelane*').

<sup>2</sup> The Chief Justice's appointment had attracted unprecedented criticism and concern, and this 'political' case was viewed by some as a test of his judicial independence.

<sup>3</sup> Some attention, though rather limited, was paid to the fact that the Department of Justice and Constitutional Development received qualified audits from the Auditor-General during Mr Simelane's tenure as director-general, a General Council of the Bar probe into his fitness as an advocate (occasioned by the findings of the Ginwala Commission) and criticism of the manner in which the Competition Commission went about its business during Mr Simelane's tenure.

SCA and CC judgments to the Commission's proceedings and to its findings. The Ginwala Commission, which was appointed by President Mbeki to determine the weighty matter of whether Mr Vusi Pikoli was suitable to hold the office of NDPP, directly called the integrity of Mr Simelane into question in its final report.<sup>4</sup> The Commission's views regarding Mr Simelane's capacity to discharge his duties ought to have been considered and interrogated by the President when considering whether or not to appoint Mr Simelane as NDPP. Finally, Chapter 9 Institutions – the SAHRC, the Public Protector and Auditor-General – that are empowered to investigate and to report on matters within their respective mandates may benefit from the seriousness which the SCA and CC afforded the Ginwala Commission's conclusions.<sup>5</sup>

The *Simelane* judgments buttress the conclusion that although the findings of Chapter 9 Institutions are not to be treated with the same deference as a court of law, they do have demonstrable consequences. (For example, findings by the Public Protector surrounding Nkandla misappropriations, by the Special Investigations Unit regarding systemic police corruption, and the Auditor-General with respect to systemic pathologies in municipal and provincial expropriation should be expected to form the factual predicate of formal court proceedings.) If these Institutions or Commissions issue reports with adverse findings with respect to state officials or against a particular government department, sufficient to draw a conclusion that they acted contrary to the Constitution or against specific statutory provisions, then these reports ought to become material to litigation on related subject matter and the more general capacity of an official or department to discharge other constitutional responsibilities and obligations. The learning of *Simelane* is that disdain, dismissal and disregard is no longer an option.

Those seeking Mr Simelane's appointment obviously calculated that the benefits, either political or otherwise, of having him in the position outweighed the disadvantages that would flow from a successful court challenge to his appointment. They miscalculated. In so doing, they assisted in the creation of precedent that clearly cabins the President's powers of appointment.

## II THE POLITICAL CONTEXT

The National Prosecuting Authority (NPA) is a body in a credibility crisis. The brief précis of *Simelane* above tells us why.

The NDPP, in addition to possessing the requisite legal qualifications, must be a fit and proper person having regard to his or her integrity, experience and conscientiousness.<sup>6</sup> This statutory standard gives effect to FC s 179(4). (FC s 179(4) requires that national legislation be enacted to ensure that the prosecuting authority exercise its functions without fear, favour or prejudice.) Navsa JA, writing for the SCA in *Simelane*, concluded that all of the institutions listed in

<sup>4</sup> *Democratic Alliance CC* (note 1) at paras 50 and 51.

<sup>5</sup> For instance, s 184(2) of the Constitution empowers the SAHRC to investigate and to report on the observance of human rights. These general powers are amplified by the Human Rights Commission Act 54 of 1994. The Act grants SAHRC the power to subpoena, and to hear witnesses and submit reports.

<sup>6</sup> Section 9(1)(b) National Prosecuting Authority Act 32 of 1998 (NPA Act).

Chapter 8 of the Constitution – ie, courts, the Judicial Service Commission (JSC) and the NPA, must operate independently of political pressure in order to serve our constitutional democratic order and to preserve the rule of law.<sup>7</sup> Accordingly, the professionals operating within the NPA must necessarily be people of the utmost integrity.<sup>8</sup> Navsa JA, turning to the *mise-en-scène*, warns the parties before the court (and beyond) against the dangers of using prosecutions to settle political scores.<sup>9</sup>

This line of reasoning accords with decisions from foreign courts which emphasise that the decision to institute or to stop a prosecution should be made by persons fully independent from the political pressures of the government.<sup>10</sup> It also appears, and it is natural that it does, that much depends on the character of the person occupying the highest office in the prosecution authority.<sup>11</sup> The High Court expressed similar views in *Pikoli*: prosecutorial independence embraces not just the formality, but also ‘liv[ing] out in practice the requirements of prosecutorial independence’.<sup>12</sup> The findings of the CC in *Simelane* endorse this sentiment.

Neither President Mbeki nor President Zuma has advanced the cause of NPA independence. With the benefit of both hindsight and the findings of the Ginwala Commission, we can now say that both the decision by President Mbeki to suspend Mr Pikoli and thus prevent him from functioning in terms of his prosecutorial mandate, an act that lacked adequate justification, and the decision by President Zuma to appoint Mr Simelane to replace Mr Pikoli, without interrogating the concerns raised about Mr Simelane’s integrity, were irrational and unconstitutional.<sup>13</sup>

As a more general matter, it is significant that the institutions listed in Chapter 8 are the courts, the JSC and the NPA. The Bangalore Principles of Judicial Conduct – independence, impartiality, integrity, propriety, equality, competence

<sup>7</sup> *Democratic Alliance v President of the Republic of South Africa* [2011] ZASCA 241, 2012 (1) SA 417 (SCA), 2012 (3) BCLR 291 (SCA) (*Democratic Alliance SCA*) at para 70.

<sup>8</sup> *Ibid* at para 72.

<sup>9</sup> *Ibid* at para 80.

<sup>10</sup> *Ibid* at paras 85–88.

<sup>11</sup> *Ibid* at paras 79 and 83.

<sup>12</sup> *Pikoli v President of the Republic of South Africa* [2009] ZAGPPHC 99, 2010 (1) SA 400, 406 (GNP).

<sup>13</sup> It is perhaps not entirely coincidental that Mr Pikoli and Mr Simelane had very different views on the independence of the NPA from the executive. Mr Pikoli was clear that the then Minister of Justice and Constitutional Development (Minister), Ms Bridget Mabandla, was not entitled to give him instructions on how to deal with the erstwhile and embattled Commissioner of South African Police Service, Mr Jackie Selebi, who was later (in 2010) found guilty of corruption (specifically, for taking bribes from drug dealers). The Minister had instructed Mr Pikoli not to proceed with the arrest of Mr Selebi until she had satisfied herself that it was in the public interest to do so. Mr Pikoli, however, continued with the arrest. The CC was unequivocal, vindicating Mr Pikoli in the process: The letter sent by Minister Mabandla (incidentally drafted on her behalf by Mr Simelane) directing the NDPP not to proceed against Jackie Selebi until she was satisfied that such a course was in the best interest of the public, amounted to improper interference with, as well as hindrance of, the NDPP. *Democratic Alliance CC* (note 1 above) at para 56. Thus the woes of Mr Pikoli started when he insisted on acting in accordance with his constitutional responsibilities, contrary to the demands of the Minister, her director-general and, it appears, President Mbeki. Mr Simelane, by way of contrast, took the acquiescent view that the NPA was ultimately accountable to the Department of Justice and Constitutional Development.

and diligence – are undeniably indispensable attributes of a competent judiciary in a constitutional democracy. The question that we need to interrogate, however, is whether the same standard should be applicable to the NPA or whether a lesser standard is acceptable.

Requiring a government to act in accordance with the principle of legality and the rule of law in a democracy premised on constitutional supremacy is an axiomatic part of South African jurisprudence. The now accepted standard is that (a) the state can exercise no power and perform no function beyond that conferred by law, (b) its power must not be misconstrued, and (c) its decisions must be rationally related to the purpose for which the power is conferred.<sup>14</sup> Scrutiny on the basis of rationality is generally a non-exacting standard which the various spheres of government and the legislature should easily satisfy. The message is that a democratically elected government acquires its legitimacy from the people and the dictates of the Constitution. *Simelane* shows us that the more questionable the legal pedigree of an executive decision, the greater the risk of it being set aside for failure to meet even the legality doctrine's or rule of law doctrine's rather relaxed desiderata.

### III SIMELANE

The facts in *Simelane* clearly demonstrate the risk taken in this case – risks taken against the backdrop of high political drama involving three different Presidents and the toppling from power of one of them. Mr Simelane, the then Director-General of the Department for Justice and Constitutional Development under President Mbeki, prepared the government's case against Mr Pikoli before the Ginwala Commission. The Ginwala Commission had been set up in October 2007 by President Mbeki after he had suspended Mr Pikoli as NDPP. Its function was to enquire into Mr Pikoli's fitness to hold office. The Ginwala Commission's findings questioned Mr Simelane's honesty and impugned his integrity.<sup>15</sup>

<sup>14</sup> See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC); *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 33; *Affordable Medicines Trust & Others v Minister of Health & Another* [2005] ZACC 3, 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at paras 24, 108 ('The legality principle or the rule of law doctrine apparently encompasses a restriction on the permissible 'vagueness' of statutory authorizations for official action.') See also *Masetlba v President of the Republic of South Africa* [2007] ZACC 20, 2008 (1) SA 566 (CC). See, further, C Hoexter *Administrative Law in South Africa* (2nd edition, 2012) 121; F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution'; S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2006) Chapter 11. Michael Bishop and Alistair Price have recently developed legality or rule of law jurisprudence in sophisticated ways that take their cue from Professor Michelman's work. See Michael Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy on the South African Constitution* 1; Alistair Price 'The Content and Justification of Rationality Review' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy on the South African Constitution* 37. See, in addition, H Botha 'The Legitimacy of Legal Orders (3): Rethinking the Rule of Law' (2001) 64 *THRHR* 523.

<sup>15</sup> Specifically, the Ginwala Commission stated that Mr Simelane had made baseless, spurious and ill-motivated accusations against Mr Pikoli, reflecting *inter alia* the former's 'disregard and lack of appreciation and respect for the import of [a Commission of Enquiry]', cited in *Democratic Alliance SCA* (note 7 above) at para 24.

President Motlanthe succeeded President Mbeki after the latter had been recalled. The succeeding Minister appointed by President Motlanthe, Enver Surty – concerned about the finding relating to Mr Simelane – referred this issue to the Public Service Commission (PSC). The PSC recommended that disciplinary proceedings be instituted against Mr Simelane. However, when President Zuma succeeded President Motlanthe, a new Minister, Mr Jeff Radebe, referred the matter back to the PSC. The referral insisted that the PSC hear representations from Mr Simelane. The PSC refused. Minister Radebe – despite the findings of the Ginwala Commission and PSC, decided not to institute disciplinary proceedings. After Mr Pikoli reached a settlement with the government, Mr Simelane was installed as NDPP.

The issue raised by the Democratic Alliance was whether, given Mr Simelane’s record, President Zuma’s decision to appoint Mr Simelane as NDPP was in accordance with the principle of legality,<sup>16</sup> and s 9(1)(b) of the NPA Act. Both the SCA and the CC unanimously concluded that the President had acted irrationally in appointing Mr Simelane as NDPP, and set the decision aside. (NB: A total of 16 judges concluded that the government had failed to meet the non-exacting standard of rationality required by the rule of law doctrine and the principle of legality.)

Before the SCA, the respondents’ case, as made by the President and the Minister, was that the President had ‘firm views’ on appointing Mr Simelane and that the President followed these ‘firm views’.<sup>17</sup> They considered the Ginwala Commission’s report to be irrelevant, as its central mandate was to investigate whether Mr Pikoli was suitable for office and not whether Mr Simelane lacked the integrity required for the position and whether he should be disqualified from future appointments.<sup>18</sup> By not interrogating the concerns raised about Mr Simelane’s integrity, material errors of fact and law were made by the government in the process leading up to the appointment of Mr Simelane. The SCA concluded: ‘In failing to take the [Ginwala Commission Enquiry] into account, the President took a decision in respect of which he ignored relevant considerations. By doing so he misconstrued his powers and acted irrationally.’<sup>19</sup>

However, the SCA may have shifted far too readily from finding that there were errors in law and fact to concluding that these errors amounted to a breach of the principle of legality. This approach strongly replicated the test for reviewability of *administrative action* established by the Appellate Division in *Wits Nigel*. *Wits Nigel* required only that an applicant show that the President (or other relevant administrator) ‘failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice’.<sup>20</sup> The *Wits Nigel* grounds for review and reversal ran contrary to existing Constitutional Court

<sup>16</sup> It is trite that the decision by the President to appoint the NDPP is an executive act, as the authority is sourced directly from the Constitution. See *Democratic Alliance SCA* (note 7 above) at para 92.

<sup>17</sup> *Democratic Alliance SCA* (note 7 above) at paras 35 and 45.

<sup>18</sup> *Democratic Alliance SCA* (note 7 above) at para 109.

<sup>19</sup> *Democratic Alliance SCA* (note 7 above) at para 112.

<sup>20</sup> *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132, 152 (A).



precedent. The Constitutional Court in *Simelane* reversed the Supreme Court of Appeal's verdict as a matter of law: the power of the President to appoint the NDPP is not regulated by the common-law administrative-law principles of *Wits Nigel*.<sup>21</sup>

The respondents argued before the CC that the SCA had journeyed beyond review for rationality and that it had, in effect, tested the decision of the President against the much more demanding standard of reasonableness.<sup>22</sup> The reasonableness standard is traditionally only applicable to administrative action and is not applicable to, and arguably inappropriate for, the review of executive action. The respondents also criticised the SCA for not taking adequate cognisance of factors pointing to Mr Simelane being a fit and proper person.<sup>23</sup> They contended that the Ginwala Commission was not a court of law and that Mr Simelane should have been given an opportunity to test its findings.<sup>24</sup>

The first issue addressed by the CC was whether the statutory and constitutional requirement that the appointee be a fit and proper person is a necessary precursor to the appointment. If the President failed to consider objective criteria for a determination of whether a candidate was fit and proper prior to making the decision, then, so the argument goes, he would have failed to meet the preconditions for the lawful exercise of the power. In sum, he would be acting in a manner beyond those powers conferred upon him by the Constitution and the enabling Act.<sup>25</sup>

Based on the doctrine of the separation of powers, the respondent further demanded that the President be given a significant amount of latitude in executive decision-making. This line of reasoning is important. It ostensibly supports the respondent's contentions that the President has a degree of subjective discretion in appointing the NDPP.<sup>26</sup> This subtle shift would mean that an appointment would be lawful if the President was of the opinion that Mr Simelane was a fit and proper person. Moreover, the notion that position of the NDPP was largely a political appointment would ensure that similar appointments made by the President would rarely be successfully reviewed by a court of law.

Both arguments were rejected by the CC.

Before dealing with the CC's finding that the appointment of the NDPP is not dependent on the exercise of the President's subjective discretion, it is worth noting that the CC was unwilling to endorse the view suggested by the SCA that rationality review would be the same whether the decision-maker was applying objective or subjective criteria. As Yacoob J remarked: 'Questions as to whether and how the rationality requirement would apply if the criteria were merely subjective are, to my mind, complex.'<sup>27</sup> Cora Hoexter suggests that if the assessment is subjective, the court should understand that the legislature intended

<sup>21</sup> *Democratic Alliance CC* (note 1 above) at para 39.

<sup>22</sup> *Ibid* at para 8.

<sup>23</sup> *Ibid* at para 9.

<sup>24</sup> *Ibid* at para 34.

<sup>25</sup> C Hoexter *Administrative Law in South Africa* (2nd Edition, 2012) 290.

<sup>26</sup> *Democratic Alliance CC* (note 1 above) at para 8.

<sup>27</sup> *Democratic Alliance CC* (note 1 above) at para 14.



to grant the executive greater deference in his decision-making and that such deference also curtails the ambit of rationality review.<sup>28</sup> Political appointments reflect, by definition, subjective discretion. In our constitutional arrangement, a greater measure of deference should be shown by the courts when reviewing decisions where the President is making purely political appointments and choices as opposed to instances where the President is appointing persons to occupy positions that require the incumbent to be as independent as possible from other branches of government. Bishop suggests the most deferential application of the rationality standard would simply require the conduct to do no more than further the purpose for which the power is conferred in some minor way.<sup>29</sup> ‘Mere’ rationality, on this account, will rarely result in interference by the courts.

However, from the perspective of accountable and proper governance, the band of decisions involving the exercise of subjective discretion should be kept as narrow as possible. The CC thus agreed with the SCA that in this matter the President was bound by objective requirements and not by his subjective discretion,<sup>30</sup> and made the concomitant finding that the appointment of the NDPP was not a political appointment.<sup>31</sup> The *Simelane* Court’s analysis demonstrates that very few categories of decision will be deemed to fall within the subjective discretion of the President.

The CC laid down several factors to be considered when determining whether a decision is objective or subjective. The CC also clarified a tricky grey area surrounding ‘value judgments’ – holding that the fact that the decision involves the appraisal of a candidate’s integrity and suitability does not mean that the decision becomes immune from objective scrutiny.<sup>32</sup>

In determining whether a particular executive decision involves the exercise of a subjective or objective discretion, a composite and comprehensive analysis has to be undertaken. Firstly, the Constitution prescribes that the NDPP be appropriately qualified and requires the enabling Act to provide further criteria. It was not left to the President to formulate further criteria for appointment and then determine whether the putative appointee has met them:<sup>33</sup> such oversight was bequeathed to the legislature. An important and positive feature of law-making in South Africa is that open-ended and unfettered discretion is rarely granted and most statutes indicate criteria and objectives that guide the discretion of the decision-maker. The existence of these binding criteria suggests that the decision is objective rather than subjective. Secondly, an important indication that the discretion is not subjective is that the appointee is required either by the Constitution or by the enabling Act to be independent. In *First Certification Judgment*,<sup>34</sup> s 179 of the New

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<sup>28</sup> Hoexter (note 25 above) at 302.

<sup>29</sup> M Bishop ‘Rationality is Dead! Long Live Rationality! Saving Rationality Basis Review’ in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 19.

<sup>30</sup> *Democratic Alliance CC* (note 1 above) at para 20.

<sup>31</sup> *Ibid* at para 26.

<sup>32</sup> *Ibid* at para 23.

<sup>33</sup> *Ibid* at para 21.

<sup>34</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) at para 146.

Text was deemed to provide a constitutional guarantee of independence to the NPA. The CC in *Simelane* held that it would be incongruence for the President to possess a subjective discretion of appointment when the Constitution expressly requires an objective criterion of independence.<sup>35</sup> Thirdly, the procedure for removing an NDPP supports the contention that he or she does not serve at the pleasure of the President. The President is empowered to remove an NDPP only after a commission of enquiry finds that he or she is not a fit and proper person – unless Parliament adopts a different view. A genuinely subjective discretion for removal would mean that different presidents, or even the same president, could employ different criteria for both removal and appointment. The fact that the President cannot remove the NDPP from office at will indicates that her or his powers in this domain are not subjective.<sup>36</sup>

Neither s 9 of the NPA Act nor any other section implies that the President's views are essential to the decision-making process. On the contrary, the NPA Act, in imperative terms, requires the appointee to be a fit and proper person. The analysis in *Simelane* is a far cry from the pre-Constitutional *dictum* of the Cape High Court in *SA Defence and Aid Fund v Minister of Justice*,<sup>37</sup> when the words of the enabling section were determinative of the nature of the discretion. *SA Defence and Aid Fund* suggested the existence of subjective executive discretion through terms of art such as 'in the opinion of' ... or 'if the Minister is satisfied'. The difference in approach reflects the fact that *SA Defence and Aid* was concerned with interpreting and ascertaining the will of Parliament, while *Simelane* is concerned with interpreting the specific statutory and constitutional provisions in a manner which advances the broader objectives of the Constitution. The current approach to determining whether the decision is a subjective or objective one is much more nuanced and substantive, with regard being had to the nature of the decision, the criteria that regulate the exercise of the discretion, the implications of the enabling legislation, the nature of the duties to be performed by the appointee, the necessity for him or her to be independent, and the importance of the appointment for our democracy. Given that the legislature is also bound by the principle of legality,<sup>38</sup> it would appear that appointments to Chapter 9 Institutions such as the Public Protector and the South African Human Rights Commission can also be tested to ensure that the objective jurisdictional facts are met.<sup>39</sup> Appointments to these institutions are made by the President on the recommendation of the National Assembly.<sup>40</sup> All these constitutional appointments require the incumbent to be independent and a fit and proper person if he or she is to be entrusted with the discharge of important constitutional obligations.

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<sup>35</sup> *Democratic Alliance CC* (note 1 above) at para 24.

<sup>36</sup> *Democratic Alliance CC* (note 1 above) at para 25. Furthermore, the Office of the NDPP is fundamental to the proper functioning of a constitutional democracy, as the decision whether or not to prosecute must be apolitical and nonpartisan. *Democratic Alliance* (note 1 above) at para 26.

<sup>37</sup> *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C).

<sup>38</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC).

<sup>39</sup> Section 193 of the Final Constitution ('FC') requires the Public Protector and members of the various commissions to be fit and proper persons to hold the particular office.

<sup>40</sup> FC s 193(4) and (5).

Given the criteria that have to be considered in determining the nature of the appointer's discretion, the category of subjective decisions will probably be highly circumscribed. An example or two of an unencumbered political discretion will suffice. Had the President appointed Mr Simelane as High Commissioner either to Uganda or India in terms of FC s 84(2), very different considerations would have applied. Similar considerations will apply in respect of appointments and dismissals of cabinet ministers. In neither example do requirements for independence or demanding qualifications for the position exist – even if we might wish it were otherwise such appointments are embedded deeply in the accepted political practices of the Office of the President. While no exercise of public power is beyond the remit of the Constitution, and thus judicial review, courts will be disinclined to reverse these political appointments. Indeed, one might argue that strict adherence to the separation of powers doctrine is necessary if members of the Cabinet (or representatives abroad) are to carry out the President's orders or policies.

Despite the existence of objective jurisdictional facts, the CC did not conclude that Mr Simelane had failed to meet the 'fit and proper person' standard for appointment to the office of NDPP.<sup>41</sup> Had such a finding been made, then the matter could have been disposed of on the basis that the President had acted in a manner beyond his powers. However, the CC chose to deal with the matter on the basis that the decision to appoint Mr Simelane was not rationally related to the purpose for which the power was conferred.

The CC was of the view that rationality review is concerned with 'the relationship, connection or link between the means employed to achieve a particular purpose on the one hand and the purpose or end itself'.<sup>42</sup> The *Simelane* Court distinguishes rationality review from the more exacting standard of reasonableness as follows: Reasonableness is concerned with the substance of the decision, while rationality review turns predominantly on the logical connection between means employed and ends sought (and to a lesser degree on the manner in which the exercise of power distorts means and ends).<sup>43</sup>

Professor Hoexter suggests that reasonableness should result in actions that accord with reason or within the limits of reason.<sup>44</sup> This approach suggests that a reasonableness standard will embrace a range of feasible policies (and the laws that enable them). In *Bato Star*, the CC reformulated the tautological standard in s 6(2)(b) of Promotion of Administrative Justice Act, by simply asking whether the decision is one which a reasonable decision-maker could not reach. O'Regan J went on to list the criteria that are relevant in determining whether a decision is reasonable:

The nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the

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<sup>41</sup> *Democratic Alliance CC* (note 1 above) at 90.

<sup>42</sup> *Democratic Alliance CC* (note 1 above) at para 32.

<sup>43</sup> *Democratic Alliance CC* (note 1 above) at para 33.

<sup>44</sup> Hoexter (note 25 above) at 347.

competing interests involved and the impact of the decision on the lives and well-being of those affected.<sup>45</sup>

This assessment has to be made contextually and would often require ‘a reasonable equilibrium’ being struck between the competing considerations that have to be considered by the decision-maker.<sup>46</sup> Professor Hoexter argues that some of the criteria listed such as considering the impact of the decision suggest that if the decision is to be reasonable, then it must also not be disproportionate.<sup>47</sup> She contends that if the decision is ‘unnecessarily disproportionate or onerous in its effects’, it may well be deemed to be unreasonable.<sup>48</sup> Considering the impact would thus require an assessment of the consequences of the decision.

The CC in *Simelane* confirms comments made in *Albutt* that the courts – when reviewing for rationality – may not interfere with the means selected to achieve the objective, simply because they are of the view that more appropriate means could have been selected to achieve the objective.<sup>49</sup> The role of the court when reviewing for rationality is much more circumspect, as it is simply required to determine whether the means selected are rationally related to the objective. This restricted test is adopted to ‘achieve a proper balance between the role of the legislature on the one hand, and the role of the courts on the other’.<sup>50</sup> Bishop points out that the primary objective of rationality review is to prevent arbitrariness and prejudice.<sup>51</sup> The role of the court is not to pronounce on the wisdom of legislative or executive choices.

Price advances a neat analysis to distinguish between reasonableness and rationality.<sup>52</sup> He contends that a decision will only be reasonable if the reasons for the decision outweigh the reasons against the decision. He distinguishes between perfect and correct decisions on the one hand and reasonable or justifiable decisions on the other hand. A perfect or correct decision is beyond the scope of review for reasonableness.

As I understand the analysis, the reasons for taking a particular decision must defeat the reasons for not taking that decision. It does not require the reasons for the chosen option to always defeat the reasons in favour of another viable option. The latter would come perilously close to assessing whether the correct decision is made.

In assessing whether a decision is reasonable, the court will recognise that there are a number of reasonable choices that could be made from within the permitted

<sup>45</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15, 2004 (4) SA 490 (CC) at para 49.

<sup>46</sup> *Ibid.*

<sup>47</sup> Hoexter (note 25 above) at 350.

<sup>48</sup> Hoexter (note 25 above) at 350, referring to *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E).

<sup>49</sup> *Democratic Alliance CC* (note 1 above) at 30.

<sup>50</sup> *Affordable Medicines Trust & Others v Minister of Health & Another* [2005] ZACC 3, 2006 (3) SA 247 (CC) at para 83.

<sup>51</sup> Bishop (note 29 above) at 7.

<sup>52</sup> A Price ‘The Content and Justification of Rationality Review’ in S Woolman and D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 49–51.

range. Price concludes the discussion on the difference between reasonableness and rationality by drawing the following distinction:

Whereas a law or act is reasonable if the reasons for it defeat the reasons against it, that law or act is merely rational if, notwithstanding the reasons against it, there is at least one reason or rationale for it.<sup>53</sup>

This suggestion would ensure that rational decisions display neither arbitrariness nor naked preferences – thus complying with the rule of law and the principle of legality. In contrast, for a decision to be reasonable – as required in PAJA – a higher onus is required on the person taking the administrative decision to show that the decision is justifiable in the circumstances. As PAJA is generally concerned with the exercise of public power or the performance of a public function when implementing legislation as opposed to formulating policy, this higher standard is warranted.

Drawing on precedents such as *Albutt*,<sup>54</sup> which introduced a procedural component into legality review (at least in specific circumstances), the CC in *Simelane* laid down a framework which permits an executive decision to be set aside on the basis that it was irrational for failing to take relevant considerations into account. The CC held that the purpose of the rationality enquiry is ‘whether the means selected are rationally related to the objective sought to be achieved’.<sup>55</sup> In terms of rationality review, the court cannot question whether the means used are the best or most appropriate in the circumstances, and so cannot interfere in this regard. The choice of the means to be used to achieve a constitutional objective still falls within the discretion of the executive. Put somewhat differently, the CC has regularly held that rationality review is a minimum-threshold requirement and any elevation beyond that could have untoward implications for the separation of powers doctrine.

In *Albutt*, the Constitutional Court held that the President, in pursuit of the broader objective of national reconciliation and nation-building, had acted irrationally in not affording victims an opportunity to be heard when considering applications by political offenders to be considered for pardons. Because the decision was taken without affording the victims an opportunity to be heard, the procedure used was found not to be rationally connected to the objectives sought to be achieved.<sup>56</sup> *Albutt* made it unavoidable for the *Simelane* Court to conclude that both the ‘process by which the decision is made and the decision itself must be rational’.<sup>57</sup> Thus it is clearly envisaged that a flawed process may also impact on rationality if the use of the flawed process would not be rationally connected to the objectives to be achieved. However, *Simelane* later refers to executive decisions not being set aside simply because they are procedurally unfair.<sup>58</sup> It would appear that procedural unfairness *per se* is not a ground on which executive action can

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<sup>53</sup> *Ibid* at 49–51.

<sup>54</sup> *Albutt v Centre for the Study of Violence and Reconciliation & Others* [2010] ZACC 4, 2010 (3) SA 293 (CC), 2010 (5) BCLR 391 (CC).

<sup>55</sup> *Democratic Alliance CC* (note 1 above) at para 30, quoting from *Albutt* (note 54 above) at para 51.

<sup>56</sup> *Albutt* (note 54 above) at para 34.

<sup>57</sup> *Democratic Alliance CC* (note 1 above) at para 34.

<sup>58</sup> *Ibid* at para 4.

be set aside. However, if a flawed process is adopted which renders the decision irrational, then the decision may be set aside. This would mean that the focus would be on the process of arriving at the decision and whether the procedural flaws render the decision irrational as opposed to requiring that the decision itself be irrational. In *Simelane*, the CC did not decide that the appointment of Mr Simelane was irrational per se. It found instead that the President's failure to consider relevant information was irrational – a breakdown between means and ends – that the irrationality of the process caused the ultimate decision to be irrational. As stated earlier, the CC did not conclude that Mr Simelane was not a fit and proper person to be appointed as NDPP. If the serious questions around his integrity were fully addressed and found to be inconsequential, then he could have been appointed. The flaws in the process in appointing him were such that the entire process was tainted with irrationality and the merits or otherwise of the ultimate decision did not matter. The CC in *Simelane* thus appears to uncouple process irrationality which renders the decision irrational, from the merits of the decision itself. If, hypothetically, Mr Simelane is reappointed after the procedural issues are attended to, the appointment could still be reviewed on the basis that the merits of the decision are not rationally linked to the purpose laid down in the empowering provision and in the Constitution.

In an attempt to provide an understandable and workable framework, the *Simelane* Court held that the mere fact that cognisance was not taken of the relevant considerations would not be sufficient to set aside the exercise of executive power. The failure to take relevant considerations into account would only be material if, as a consequence, there was no rational connection between the means used and the objectives of the empowering statute. If the failure impacted on the rationality of the entire process, then the decision may be set aside on the basis of irrationality. Thus a three-part test<sup>59</sup> was formulated to determine whether a failure to take relevant factors into account would render the decision irrational and therefore invalid:

1. Were the factors which were ignored relevant?
2. If so, was the failure to consider the material (the method adopted) rationally connected to the purpose for which the power is conferred?
3. If not, did the failure to consider the material concerned have the effect of rendering the entire process irrational?

Thus, the executive decision will remain valid if the decision to ignore relevant factors does not have the effect of tainting the entire process with irrationality.<sup>60</sup> In effect, the CC in *Simelane* added a third leg to the approach adopted by the SCA. To succeed in a review application of this nature, an applicant must demonstrate firstly, that either the process used or the decision itself is not rationally related to the objectives sought to be achieved by the empowering provision, and secondly, that as a consequence of this irrationality, the entire process is tainted with irrationality. Errors of law and fact on their own will not serve to vitiate an

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<sup>59</sup> Ibid at para 39.

<sup>60</sup> Ibid at para 40.



executive decision. However, proof that these errors affected the rationality of the entire process *will* have the effect of invalidating the decision.

The Ginwala Commission directly questioned and expressed concern about the integrity of Mr Simelane, based on issues that emerged during his testimony. The CC found, after an analysis of his testimony at the Commission, that there was sufficient basis for this concern. These ‘brightly flashing lights’<sup>61</sup> suggesting dishonesty should have raised serious concerns in the minds of any person considering the appointment of Mr Simelane to the post of NDPP. The President and the Minister of Justice and Constitutional Development, however, decided to ignore the concerns of the Ginwala Commission about Mr Simelane’s integrity, and appointed him as NDPP. The CC evaluated the reasons given by the Minister for ignoring the findings of the Ginwala Commission and similar recommendations of the Public Service Commission (PSC) and found them to be unpersuasive.<sup>62</sup> The Minister sought to justify the decision not to follow the recommendations of the Ginwala Commission and the PSC by arguing that Mr Simelane was not heard by the PSC and was not given an opportunity to defend himself at an enquiry. This line of argument was found to be unpersuasive. Mr Simelane was in fact heard by the Ginwala Commission. Furthermore, he was unable to defend himself against the allegations because the Minister himself had decided not to proceed with the recommendation that a disciplinary enquiry be held. The assertion that the Ginwala Commission was about Mr Pikoli and not about Mr Simelane was equally unacceptable, as it implied that dishonesty on the part a senior state official at a commission of enquiry could be disregarded if he or she was not the focus of the enquiry. Equally unconvincing was the argument that the Ginwala Commission was not a court of law and hence its findings were of lesser value. The Court was emphatic that the issue was whether Mr Simelane’s integrity was impugned and it did not matter whether a person was being dishonest or devious before a court or a commission of enquiry or to some other legal or quasi-legal fora. The question is whether Mr Simelane was dishonest while giving evidence under oath. The Minister ignored the serious questions raised about Simelane’s integrity and failed to explain why these concerns were ignored. Because of the failure to make the connection between Mr Simelane’s dishonesty under oath in a public inquiry and the requirement of integrity for the position of NDPP, the method or means used (ignoring relevant factors) were not rationally related to the purpose of the power.

The CC in *Simelane* concluded that relevant considerations were not taken into account and this tainted the entire process – the objective of which was to appoint a fit and proper person of experience, integrity and conscientiousness. Concerns about dishonesty should have been fully interrogated before a decision was made. The net effect was that President Zuma’s appointment of Mr Simelane as NDPP was irrational.

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<sup>61</sup> *Democratic Alliance CC* (note 1 above) at para 52.

<sup>62</sup> *Democratic Alliance CC* (note 1 above) at paras 80–85.

The judgment of the SCA in *JSC v Cape Bar Council*, was handed down shortly (almost two months) before the CC decision in *Simelane*.<sup>63</sup> It concerned a challenge to the decision of the JSC not to appoint qualified white applicants as judges, and to leave the positions unfilled. The SCA proceeded from the premise that these decisions were subject to rationality review because the JSC was bound by the principle of legality.<sup>64</sup> It found that JSC was bound to give reasons for its decisions. It would be Orwellian to say that a person has a right to rational decisions, but that no obligation was imposed on the review body to provide reasons.<sup>65</sup> Without reasons, an applicant would be unable to determine whether he or she has been treated rationally. The SCA therefore concluded that since the JSC was under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend a candidate for judicial appointment, it was required to support its decision not to do so with reasons.<sup>66</sup> The SCA further concluded – in circumstances where the undisputed facts lead to an inference that the JSC acted irrationally – that a failure to provide reasons in these circumstances will result in confirmation of the inference. It does appear incongruent to require a body to act rationally and not oblige it to provide reasons. In *Simelane*, the full extent of irrationality became apparent after the government’s reasons for not following the recommendations of the Ginwala Commission and PSC were assessed and found to be unpersuasive. It was only after an appraisal of the reasons that the conclusion could be drawn that the method or means used were not rationally connected to the purpose, and that the entire process was tainted with irrationality. *Simelane* stands for the proposition – apparently also present in *Judicial Service Commission v The Cape Bar Council* – that assessment on the basis of rationality will only be effective if reasons for the decision are provided.

#### IV CONCLUSION

The President appeared steadfastly committed to appointing Mr Simelane as NDPP and sought to find reasons why he was not disqualified from being appointed in terms of the Constitution and the NPA Act. Given the findings made in this case, the Court did not have to determine whether the President had an ulterior purpose in appointing Mr Simelane. As neither President Mbeki nor President Zuma were able legally, on the non-exacting standard of rationality, to justify their decisions to remove Mr Pikoli and to appoint Mr Simelane, respectively, it seems likely that political considerations took precedence over constitutional imperatives in both decisions. The process that ought to have been adopted in appointing the NDPP was to analyse and to appreciate fully the requirements for the job, determine whether the preferred candidate met these requirements, interrogate any concerns that may arise, and only make an appointment if the concerns are appropriately and adequately addressed. Purely political appointments – eg, the appointment of

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<sup>63</sup> *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115, 2013 (1) SA 170 (SCA).

<sup>64</sup> *Ibid* at para 22.

<sup>65</sup> *Ibid* at para 44.

<sup>66</sup> *Ibid* at para 51.

ambassadors – have no place when nominees are required by the Constitution to perform their duties independently.

In a constitutional democracy it is imperative that the executive and the administration learn from the cases that they lose, so that mistakes are made just once and are never repeated. Even though two very poor decisions have been made in quick succession in respect of the NDPP, public confidence can be quickly restored by a credible appointee who performs the function competently and with integrity and impartiality.

It was most undesirable not to have had a permanent successor to Mr Simelane for more than 19 months and to have had an acting NDPP for this period. The term of office of the NDPP is limited to a fixed term of 10 years to ensure security of tenure when making difficult decisions. It seems improbable that the constitutional drafters would have sanctioned this office being occupied by an acting appointee, without the necessary security of tenure, for this period of time. *Simelane*, if taken seriously, may arrest this pattern of poor decision-making. South Africa can ill afford executive behaviour that runs counter to the broader constitutional objectives of accountable and responsive governance.

# There and Back Again: The Long Road to Access to Information in *M&G Media* *v President of the Republic of South Africa*

*Okyerebea Ampofo-Anti\* and Ben Winks\*\**

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The Road goes ever on and on  
Out from the door where it began.  
Now far ahead the Road has gone,  
Let others follow it who can!

Bilbo Baggins<sup>1</sup>

## I INTRODUCTION

This comment chronicles the ongoing uphill journey of a single case – landmark litigation on the right of access to information – through three courts, and back again, over six years. We survey the view from the summit – the proceedings before the Constitutional Court – to consider and critically analyse how the Court’s treatment of the matter has defined the landscape of litigation in factual disputes about whether information held by the state has been justifiably hidden from public sight. We identify four flaws in the Court’s approach. These flaws, we argue, are likely to discourage the public from effectively enforcing their right to know.

Before we begin this adventure, we believe it necessary and wise to traverse briefly the map provided to the public for the exercise of the right of access to information. The Promotion of Access to Information Act 2 of 2000 (PAIA) was enacted in terms of s 32(2) of the Constitution (‘Final Constitution’ or ‘FC’), to give effect to the right of access to any information held by the state,<sup>2</sup> and to any information held by another person, which is required for the exercise or

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\* Senior Associate, Webber Wentzel. This co-author is a member of the legal team representing M&G Media Limited in the matter forming the focus of this discussion. She authors her share of this contribution in her personal capacity and is not disclosing any confidential information to which she became privy in her professional capacity.

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<sup>1</sup> JRR Tolkien *The Lord of the Rings: The Return of the King* (1955) Book 6 Chapter 6. Authored by avid Tolkien enthusiasts, this case comment takes its headings and subheadings from the chapters of JRR Tolkien *The Hobbit: There and Back Again* (1937).

<sup>2</sup> FC s 32(1)(a).

protection of any rights.<sup>3</sup> Among other things, PAIA provides mechanisms for persons to request information from both public and private bodies (in Parts 2 and 3 of PAIA, respectively) and for the bodies from whom information is requested to refuse access to information on specified grounds of justification.

Most importantly for present purposes, Part 4 of PAIA provides the public with procedural remedies against unjustified refusals of requests for information. The first chapter of Part 4 provides for the lodging of an internal appeal against the decision of an information officer of a public body.<sup>4</sup> The second chapter provides for an application to court by a person aggrieved by the refusal of her request or the dismissal of an internal appeal.<sup>5</sup> Such an application does not constitute an appeal or a review of the refusal or dismissal. It is a *de novo* assessment by the court of whether valid grounds exist for the refusal of access to the requested record.<sup>6</sup>

An application to court in terms of s 78 of PAIA is governed by two procedural prescripts: one general and one special. The general prescript is set out in s 81 of PAIA. It provides that proceedings under PAIA are civil proceedings.<sup>7</sup> The civil rules of evidence apply, under which the required standard of proof is a preponderance of probabilities.<sup>8</sup> Significantly, s 81(3) of PAIA states that the person refusing a request for information bears the burden of proving that the refusal is justified.<sup>9</sup> The special prescript is set out in s 80 of PAIA. It provides that a court may examine the requested record,<sup>10</sup> may receive representations from any of the parties in private,<sup>11</sup> and may restrict public access to the proceedings.<sup>12</sup>

In *President of the Republic of South Africa & Others v M&G Media Limited*, the Constitutional Court faced, for the first time, the challenge of ascertaining the proper application of Part 4 of PAIA.<sup>13</sup> In particular, it was obliged to determine the appropriate interplay between ss 80 and 81 of PAIA. This problem split the Court – five votes to four. The two judgments differed drastically on two vital questions. First, what quality and quantum of evidence is required from a public body seeking to justify refusing a request for access to information? Second, what should a court do if it has any doubt as to whether the tendered evidence establishes such grounds?

In this comment on *M&G CC*, we first set out its history before it reached the Constitutional Court. Thereafter, we critically analyse the judgment of the

<sup>3</sup> FC s 32(1)(b).

<sup>4</sup> No internal appeal is required in respect of a private body.

<sup>5</sup> See PAIA s 78: sets out the circumstances in which a court application may be made. See PAIA s 82: sets out the relief that may be granted.

<sup>6</sup> This principle was articulated by the Pretoria High Court in *M&G Media Limited and Another v President of the Republic of South Africa & Others* [2010] ZAGPPHC 43 (4 June 2010) (*M&G HC*). The High Court responded to The Presidency's assertion that the proceedings were a form of review. The High Court's position was upheld by the Supreme Court of Appeal and the Constitutional Court.

<sup>7</sup> PAIA s 81(1).

<sup>8</sup> PAIA s 81(2).

<sup>9</sup> PAIA s 81(3).

<sup>10</sup> PAIA s 80(1) and (2).

<sup>11</sup> PAIA s 80(3)(a).

<sup>12</sup> PAIA s 80(3)(b) and (c).

<sup>13</sup> *President of the Republic of South Africa & Others v M&G Media Ltd* [2011] ZACC 32, 2012 (2) SA 50 (CC) (*M&G CC*).

Constitutional Court, as well as its practical implications for access to information. Our analysis focuses on four decisions made by the Court: (i) that The Presidency had presented sufficient evidence to justify its refusal of access to the Report; (ii) that the High Court should have examined the Report before it could responsibly order its release; (iii) that the matter should be remitted to the High Court for such examination to take place; and (iv) that M&G should not be entitled to recover from The Presidency any of its costs incurred in the High Court, the Supreme Court of Appeal and the Constitutional Court.

## II OVER HILL AND UNDER HILL: THE HISTORY OF THE MATTER

In the build-up to the contested 2002 presidential election in Zimbabwe, the then President Thabo Mbeki asked two judges – Justice Sisi Khampepe and Justice Dikgang Moseneke – to visit the country and to prepare a report on legal and constitutional dimensions of the election (‘Report’). They duly did so and provided the Report to the President. Six years later, in response to rising public interest in Zimbabwe’s controversial and violent presidential election in 2008 – which President Mbeki had been mandated to mediate – the publisher of the *Mail & Guardian* weekly newspaper, M&G Media Limited (M&G), lodged a request for access to the Report in terms of s 18 of PAIA.

The request was refused by the Deputy Information Officer in The Presidency, Trevor Fowler. He proffered two grounds for refusal. Firstly, the disclosure of the Report ‘would reveal information supplied in confidence by or on behalf of another state or an international organisation’. Secondly, he stated that the Report was ‘an opinion, advice, report or recommendation obtained or prepared for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law’. The two grounds of refusal relied upon by Fowler are set out in ss 41(1)(b)(i) and 44(1)(a) of PAIA, respectively.

M&G lodged an internal appeal against the refusal under s 74 of PAIA. This internal appeal was dismissed by the Minister in The Presidency, Manto Tshabalala-Msimang. Her stated grounds for dismissing the appeal were identical to the grounds relied upon by Fowler.

M&G then launched an application in the North Gauteng High Court, Pretoria (as it then was) (before Sapire AJ) in terms of s 78 of PAIA. The application was opposed by The Presidency: it persisted in relying on ss 41(1)(b)(i) and 44(1)(a) of PAIA. In its opposing papers The Presidency also sought to raise a new ground of refusal. The Report was ostensibly ‘a record of the Cabinet’ and was, as such, exempt from the application of PAIA.<sup>14</sup> In support of its opposition to the application, The Presidency filed affidavits by Fowler, Tshabalala-Msimang, Frank Chikane, then the Director-General in The Presidency, and Kgalema Motlanthe, the President at the time. The Presidency filed no affidavits by President Mbeki or Justices Khampepe and Moseneke.

<sup>14</sup> PAIA s 12(a) of PAIA.



The first issue noted by the High Court was that none of the individuals who had deposed to affidavits on behalf of The Presidency: (i) had any personal knowledge regarding the appointment of the judges to prepare the Report; (ii) was in any position to attest to the reasons for their appointment or the nature of their mandate; or (iii) had any personal knowledge of what transpired during the course of the judges' visit to Zimbabwe or how and from whom the information contained in the Report was obtained. The High Court found that it was not possible to accept the evidence of the individuals who deposed to affidavits in support of The Presidency regarding facts of which they had no personal knowledge. It also noted that the affidavits did little more than recite the wording of the grounds of refusal relied upon under PAIA and provided no factual evidence to support such reliance.<sup>15</sup>

The High Court held that, in the absence of affidavits from the two judges or individuals from whom the judges received information, no evidence existed to support The Presidency's assertion that the information in the Report had been supplied in confidence by or on behalf of another state or international organisation. The High Court's conclusion was bolstered by the fact that The Presidency had admitted in its own affidavits that the information in the Report was *not* obtained exclusively from the Zimbabwean government.<sup>16</sup>

With respect to the second ground of refusal, the High Court noted that on Fowler's own version, the President only decided to use the Report to formulate policy *after* he had received the Report. The Court held that it could not *logically* be said that the Report was obtained for the purpose of formulating policy.<sup>17</sup> The argument that the Report was a record of the Cabinet and thus immune from the application of PAIA, was also dismissed. The President is not the Cabinet and there was no evidence that the Report was ever even placed before the Cabinet.<sup>18</sup> The High Court concluded that The Presidency had failed to adduce any evidence that justified its refusal of M&G's request and that the application ought to be granted.<sup>19</sup>

The Presidency lodged an appeal with the Supreme Court of Appeal, which was dismissed. In dismissing the appeal, the Supreme Court of Appeal (unanimously per Nugent JA, with Van Heerden, Maya and Cachalia JJA and Bertelsmann AJA) emphasised that our new constitutional order is founded on a culture of justification as opposed to the past culture of authority.<sup>20</sup> Public officials must

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<sup>15</sup> *M&G HC* (note 6 above) at pages 7–8.

<sup>16</sup> *Ibid* at pages 9–10.

<sup>17</sup> *Ibid* at pages 11–12.

<sup>18</sup> *Ibid* at pages 8–9.

<sup>19</sup> *Ibid* at pages 12–13.

<sup>20</sup> This leitmotif of the new constitutional order can be traced to Etienne Mureinik's still vibrant ur-text on grounds for determining the constitutionality of public and private action. E Mureinik "A Bridge to Where": An Introduction to the Interim Constitution' (1994) 10 South African Journal on Human Rights 1.

give adequate reasons for their decisions.<sup>21</sup> Like the High Court, the Supreme Court of Appeal found The Presidency's affidavits to be insufficient to bring the Report within the exemptions relied upon, and held that this was a fatal flaw in The Presidency's case.

The Supreme Court of Appeal noted that, in cases such as this, true disputes of fact will seldom arise because the relevant facts will almost always be in the peculiar knowledge of the public body. In order to guard against the inequality of arms arising from this state of affairs, a court must scrutinise the affidavits presented by the public body with particular care. The Court accepted that information officers will seldom have personal knowledge of the relevant facts and that this challenge can be overcome by relying on the discretion of the court to admit hearsay evidence under s 3 of the Law of Evidence Amendment Act 45 of 1988.<sup>22</sup> However, the Court held that the affidavits filed by The Presidency did not contain any evidence to support the factual assertions made by the deponents and amounted to 'little more than rote recitation of the relevant sections and bald assertions that the report falls within their terms'.<sup>23</sup>

With respect to Chikane's evidence, the Supreme Court of Appeal found that his assertion that certain facts were in his personal knowledge was insufficient in the absence of evidence as to how that knowledge was acquired.<sup>24</sup> The Court also expressed concern that no affidavits had been filed by the only three people who had direct knowledge of the pertinent facts, namely President Mbeki, Justice Moseneke and Justice Khampepe.<sup>25</sup> Given the paucity of meaningful evidence in the affidavits, the Court dismissed each of the grounds of refusal raised by The Presidency and held that The Presidency had not laid a basis for refusing access to the Report.<sup>26</sup>

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<sup>21</sup> *President of the Republic of South Africa & Others v M&G Media Ltd* [2010] ZASCA 177, 2011 (2) SA 1 (SCA)(*M&G SCA*) at paras 10–11. Our rule of law jurisprudence and the legality principle have deeply entrenched this FC s 1(e)-based provision of our basic law. See *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* C [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC). See F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 11. J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13; M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench & the Academy* (2012) 1; A Price 'The Content and Justification of Rationality Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench & the Academy* (2012) 38.

<sup>22</sup> *M&G SCA* (note 21 above) at paras 15–16.

<sup>23</sup> *Ibid* at para 20.

<sup>24</sup> *Ibid* at paras 36–39.

<sup>25</sup> *Ibid* at para 20.

<sup>26</sup> *Ibid* at paras 53–55.

### III ON THE DOORSTEP: THE PROCEEDINGS IN THE CONSTITUTIONAL COURT

The Presidency, predictably, applied for leave to appeal to the Constitutional Court. Leave was granted. The Court provided no specific reasons.<sup>27</sup> The Constitutional Court, after hearing initial argument on the merits of the appeal, then requested further argument.

The narrow majority (Ngcobo CJ, with Froneman J, Mogoeng J, Mthiyane AJ and Yacoob J concurring) upheld the appeal. It held that the evidence presented by The Presidency, considered within the statutory constraints of what it was obliged to provide, was sufficient to establish a basis for refusal. As a result, a court could not responsibly order the release of the Report without first examining it under s 80 of PAIA. The majority reversed the orders of the High Court and the Supreme Court of Appeal (including their costs orders in favour of M&G), and remitted the matter back to the High Court so that it might engage in a proper examination of the Report.

The minority (Cameron J, with Jafta J, Nkabinde J and Van der Westhuizen J concurring) would have dismissed the appeal. It opined that The Presidency had failed to justify its refusal under PAIA, and further failed to provide a plausible basis for its plea that PAIA itself precluded it from providing adequate reasons for its refusal. The minority further contended that secret judicial examination – as had occurred in this matter – should be invoked rarely, and only to amplify access to information.

#### A Riddles in the Dark: The Decision that the Evidence was Sufficient

The first question confronting the Constitutional Court in this matter was whether The Presidency had adduced sufficient evidence to establish valid grounds for refusing to release the Report. In answering this question, Ngcobo CJ began by reiterating that, under our law, ‘the disclosure of information is the rule and exemption from disclosure is the exception’.<sup>28</sup>

Ngcobo CJ explained that, in proceedings under PAIA, a court does not conduct a review of the refusal of access to information but ‘decides the claim of exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits’.<sup>29</sup> The proper approach to evidence in such proceedings was set out as follows:

Section 81 provides that proceedings under PAIA are civil proceedings and the rules of evidence applicable in civil proceedings apply. The burden of establishing that the refusal of access to information is justified under the provisions of PAIA rests on the state or any other party refusing access. ... The evidentiary burden borne by the state pursuant to section 81(3) must be discharged, as in any civil proceedings, on a balance of probabilities.<sup>30</sup>

Requiring the refuser to prove that the refusal was justified, as PAIA does, is understandable. The alternative, requiring the requester to prove that the refusal

<sup>27</sup> *M&G CC* (note 13 above) at para 3.

<sup>28</sup> *Ibid* at para 9.

<sup>29</sup> *Ibid* at para 14.

<sup>30</sup> *Ibid* at paras 13–14.

was unjustified, 'would be manifestly unfair and contrary to the spirit of PAIA read in the light of section 32 of the Constitution.'<sup>31</sup> The refuser has unrestricted access to the contents of the record. The requester has none.

After undertaking a comparative analysis of the position in the United States of America, Canada and Australia, with 'particular caution', in terms of FC s 39(1)(c),<sup>32</sup> Ngcobo CJ concluded as follows:

It is apparent from this comparative analysis of the standards applied by courts in other jurisdictions with legislation comparable to PAIA that the state may discharge its evidentiary burden only when it has shown that the record withheld falls within the exemptions claimed. Exemptions are construed narrowly, and neither the mere ipse dixit of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the state.<sup>33</sup>

Ngcobo CJ then adumbrated the test as to 'whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed'.<sup>34</sup> In this case, applying that test turned not on a question 'of the admissibility of evidence, but of the sufficiency of evidence'. The Presidency's deponents all asserted personal knowledge of the facts that: (a) the two judges received information from representatives of the Zimbabwean government in confidence and (b) the report was commissioned for the purpose of assisting the President in the formulation of policy relating to the situation in Zimbabwe.<sup>35</sup>

In determining whether such assertions were indeed 'sufficient', an 'indication of how the alleged knowledge was acquired is necessary to determine the weight, if any, to be attached'. In this respect, Ngcobo CJ held, importantly, that:

The key question is whether the deponent would, in the ordinary course of his or her duties or as a result of some other capacity described in the affidavit, have had the opportunity to acquire the information or knowledge alleged.<sup>36</sup>

At this critical juncture, the Court narrowly splits. Ngcobo CJ relied on *Barclays National Bank v Love*<sup>37</sup> as authority for the proposition that it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his personal knowledge. He must simply offer some indication that his office or capacity would give him an opportunity to have acquired such personal knowledge.<sup>38</sup>

<sup>31</sup> Ibid at para 15.

<sup>32</sup> Ibid at paras 16–21.

<sup>33</sup> Ibid at para 22.

<sup>34</sup> Ibid at para 25.

<sup>35</sup> Ibid at para 27.

<sup>36</sup> Ibid at para 28.

<sup>37</sup> 1975 (2) SA 514 (D)(*Love*) at 516A–B.

<sup>38</sup> *MeoG CC* (note 13 above) at para 29 (According to Ngcobo CJ: '[T]his approach was affirmed by the Appellate Division in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 424A–D, and is still applied in assessing whether a deponent can reasonably depose to the facts with regard to which he claims to have personal knowledge.')

Ngcobo CJ recognised that this principle should be applied with caution in access to information cases.<sup>39</sup> However, he did not explain how such caution should manifest. Moreover, he offered no guide as to how he had exercised such caution in his treatment of the evidence in this case. Although The Presidency's deponents did not explain how they acquired personal knowledge of the facts allegedly justifying secrecy, Ngcobo CJ appears to have been satisfied that they acquired it in the course of their duties in the Office of The Presidency.

Cameron J, in his minority opinion, applied a stricter standard. Like Ngcobo CJ, Cameron J acknowledged that, in ordinary civil proceedings, a court may sometimes conclude that a witness had personal knowledge of asserted facts even in the absence of an adequate explanation of how she or he acquired them. Cameron J warned, however, 'that these are not ordinary commercial proceedings, but a determination involving the constitutional right of access to government-held information'.<sup>40</sup>

Cameron J found that Fowler and Tshabalala-Msimang, in refusing the request and the appeal against that refusal, did little more than incant 'the provisions of the statute'.<sup>41</sup> Neither of them states that they had any direct personal knowledge about the judges' mission or its terms.<sup>42</sup>

For Cameron J, this last piece of information disposed of The Presidency's reliance on s 41(1)(b)(i) of PAIA (which protects information supplied in confidence by or on behalf of a foreign state), because, apart from Fowler's and Tshabalala-Msimang's rote recitations of that section, no evidence existed to indicate, even in general terms, who had supplied information on behalf of the Zimbabwean government, nor even with whom the judges had met in Zimbabwe.<sup>43</sup> Moreover, although The Presidency had conceded that not all of the information in the Report was supplied in confidence by Zimbabwean state officials, neither Fowler nor Tshabalala-Msimang explained why the confidential portions of the Report could not be severed or redacted, and the non-confidential portions released.<sup>44</sup>

Cameron J found Fowler's and Tshabalala-Msimang's incantations equally inadequate as support of The Presidency's reliance on s 44(1)(a) of PAIA (which protects records prepared for the purpose of policy formulation). Even the evidence of Chikane gave no indication of how or from whence he gained personal knowledge of the matters in issue.<sup>45</sup>

Significantly, Cameron J contended that Chikane's assertion that he had 'personal knowledge' that the report was commissioned for policy-formulation 'is not evidence that it was'.<sup>46</sup> He explained this strict stance as follows:

Mr Chikane does not tell us in which of these ways he acquired personal knowledge. This leaves a court unable to perform its most elementary function, which is to assess

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<sup>39</sup> *M&G CC* (note 13 above) at para 30.

<sup>40</sup> *Ibid* at para 111.

<sup>41</sup> *Ibid* at paras 83, 86 and 89.

<sup>42</sup> *Ibid* at para 97.

<sup>43</sup> *Ibid* at para 103.

<sup>44</sup> *Ibid* at para 104.

<sup>45</sup> *Ibid* at para 100.

<sup>46</sup> *Ibid* at para 106.

the quality, strength and reliability of his knowledge in determining whether the fact to which he deposes is true. The mere assertion that he has personal knowledge gives no help in that duty. It follows that his assertion is without value as evidence of the fact in issue. ... And it is futile to urge, as counsel for The Presidency did, that it is overwhelmingly likely that Mr Chikane, as administrative head of The Presidency, had personal knowledge of the judges' mission. This is because a court cannot find that an event happened just because it is probable that a witness knew it happened. The court must know why and how the witness claims to have personal knowledge of it, so that it can itself assess the probity and reliability of the witness's knowledge of the event.<sup>47</sup>

Accordingly, Cameron J concluded that the Supreme Court of Appeal was correct to hold that The Presidency had not substantiated its case and that the witnesses offered not reasons, but 'perfunctory conclusions'.<sup>48</sup>

Ngcobo CJ firmly disagreed. The Presidency's evidence was deemed sufficient evidence. Although neither Fowler nor Tshabalala-Msimang was personally involved in the events preceding the judges' mission, Ngcobo CJ reasoned that their reliance on the statutory grounds for refusal had to be based on their assessment of the contents of the Report itself. Ngcobo CJ explains the logic of his thinking as follows:

Apart from this, the exemptions claimed are, in my view, *not so inherently improbable or implausible as to be rejected as necessarily untrue*. It is not in dispute that the two judges went to Zimbabwe at the instance of the President. It seems more likely than not that they would have spoken to Zimbabwean state officials in the course of their mission and advised the President as to their findings. Although it does not necessarily follow that their meetings with Zimbabwean officials took place on a confidential basis, or that their reporting back to the President was for the purpose of the formulation of policy, *I do not think these possibilities can necessarily be excluded*.<sup>49</sup>

With respect, Ngcobo CJ has here turned the law on its head. The regime of proof imposed by PAIA is that the *refuser* must prove *on a balance of probabilities* that the refusal was justified. Ngcobo CJ's approach is consistent with the proposition that the *requester* must prove *beyond reasonable doubt* that the refusal was unjustified. (It's a position that the Chief Justice elsewhere denied in his judgment.)

Ngcobo CJ also accepted The Presidency's argument that its hands were tied by ss 25(3)(b) and 77(5)(b) of PAIA in meeting its statutory burden,<sup>50</sup> as those provisions require the refuser of a request for access to information, when giving reasons for the refusal, to 'exclude, from such reasons, any reference to the content of the record'. Ngcobo CJ held that the allegation by the state that it was 'hamstrung' by these provisions from presenting further evidence 'does not appear to me to be implausible'.<sup>51</sup> But surely a provision that excludes the necessity of providing any reference to content of the record can only have two possible meanings: (A) the reasons need not identify the actual content, word for word, but only need to provide a general sense of what the record contains;

<sup>47</sup> Ibid at paras 107–109.

<sup>48</sup> Ibid at para 112.

<sup>49</sup> Ibid at para 59 (our emphasis).

<sup>50</sup> Ibid at para 57.

<sup>51</sup> Ibid at para 60.



or (B) the reasons need not reflect any factual predicate that would support the refusal, indeed the reasons need not provide any factual grounds for the refusal at all. Position A seems plausible. Position B is utterly Kafkaesque. While the Court clearly adopted Position B, it seems to want to have it both ways. Consistent with Position A, Ngcobo CJ concluded that PAIA does not require the state to adduce ‘the best evidence to justify refusal’ but only *evidence* that is ‘sufficient’ for the court to conclude, on the probabilities, that the record falls within the exemption claimed.<sup>52</sup> Position A requires some evidence. Position B requires no evidence. The Chief Justice cannot have it both ways.

Cameron J was far less accommodating. He held that, although circumstances may obtain in which the ‘hands tied’ plea could be credibly raised, in this case the plea failed ‘to meet even a baseline standard to warrant further probing’.<sup>53</sup> Moreover, the plausibility of this plea was diminished by ‘the affidavits’ most prominent feature – their formulaic incantation of the statute’s provisions’.<sup>54</sup>

Cameron J also noted the apparent availability of better evidence, and the absence of any explanation of why it was not adduced. He wondered why President Mbeki and the judges had not testified, whether they were asked to do so and, if not, why not.<sup>55</sup> For Cameron J, The Presidency’s failure to answer these questions undermined the plausibility of the ‘hands-tied’ argument. He thus concluded that the state’s hands had not been tied because it could have obtained the evidence from Mbeki, Khampepe or Moseneke.<sup>56</sup> Cameron J explained that his approach was not based on requiring the state to produce the ‘best’ evidence. To the contrary: it required very little. However, the holes in the state’s argument were such that they rendered the ‘hands tied’ argument utterly implausible.<sup>57</sup>

Cameron J’s approach is clearly correct. The sufficiency of evidence in PAIA proceedings cannot be regarded as a binary question of whether or not the deponent has asserted personal knowledge of facts justifying refusal, or has claimed that its hands are tied. The sufficiency of evidence reflects a graded assessment of how reliably the refuser has proved that the refusal was justified. Under PAIA, *the burden of proof rests on the refuser*, and the standard of proof is a balance of probabilities. Accordingly, the refuser must adduce evidence that can be considered reliable enough to satisfy a court that the refusal to grant access to information is justified.

Where such evidence exists (either in the requested record itself or in other documentary or testamentary evidence), and yet the refuser is unable to provide it, the refuser must explain why it is unable to do so. So although the ‘best evidence’ is not necessarily required to discharge the statutory burden of proof, the failure to adduce the ‘best evidence’ is inevitably a factor in considering whether the evidence that has been adduced is ‘sufficient’. A factual assertion may be found to amount to evidence, but that does not automatically mean

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<sup>52</sup> Ibid at paras 25 and 32.

<sup>53</sup> Ibid at para 113.

<sup>54</sup> Ibid at para 114.

<sup>55</sup> Ibid at paras 116–117.

<sup>56</sup> Ibid at para 118.

<sup>57</sup> Ibid at para 120.

that it is reliable, let alone ‘sufficient’ for the purposes of PAIA. Even if the assertions in The Presidency’s affidavits amounted to evidence, as Ngcobo CJ (erroneously) found, the sufficiency of that evidence is necessarily diminished by the fact that The Presidency did not explain how the deponents’ knowledge was acquired, and why the deponents were unable to adduce better documentary or testamentary evidence, not least from President Mbeki and the judges he had sent to Zimbabwe.

In our culture of justification – of which PAIA is a pillar – The Presidency’s case simply cannot be considered sufficient when it offers recitations rather than reasons and more mystery than certainty. Indeed, if one were to conceive of an objective spectrum of sufficiency (or probative reliability), it is hard to imagine how a refuser could be closer to absolute insufficiency than The Presidency in *M&G*.

***B Inside Information: The Decision That the Court Should Have Examined the Report***

After hearing argument on the merits of this matter, the Constitutional Court issued directions to the parties. Citing the Supreme Court of Appeal’s comment that ‘[i]t might be that the Report contains information that was received in confidence, and it might be that it was prepared for a purpose contemplated by section 44, but that has not been established by acceptable evidence’, the Court directed the parties to lodge argument addressing, among other questions, the following:

- (a) the proper approach, in the light of s 80, when a court is faced with uncertainty as to whether a record falls within the exemptions claimed;
- (b) the standard that a court should apply in deciding whether to invoke s 80;
- (c) the relevance of a dispute of fact as to the severability of the record in applying such standard; and
- (d) whether this Court should remit the matter to the High Court for reconsideration in the light of the legal principles that this Court may announce for the first time in this judgment.<sup>58</sup>

The requested arguments would not be the first occasion that the prospect of judicial examination of the Report was raised in these proceedings. In its founding affidavit before the High Court, M&G submitted that the Report ought to be disclosed so that the court could assess for itself whether the state’s grounds of refusal had any merit.<sup>59</sup> In its answering affidavit, The Presidency resisted M&G’s submission that s 80 should be invoked.<sup>60</sup> In reply, M&G noted that:

[E]ven though the Respondents are alive to the possibility of a court perusing the report to verify their allegations and to test the Applicants’ competing allegations..., it is not without significance that they have not tendered the report to this court for such purposes.

<sup>58</sup> Ibid at para 58, fn 62.

<sup>59</sup> Founding affidavit at para 44.3.

<sup>60</sup> Answering affidavit at para 69.

This does not leave the Applicants with much confidence in the Respondents' allegations regarding the prospects of redacting the report.<sup>61</sup>

The High Court, however, declined to exercise its power to examine the Report. Furthermore, it did not provide reasons for this decision. One can infer that the Court believed that the need to review the report did not arise, as 'The Presidency had failed to prove its case. The Supreme Court of Appeal's basis for refusing to exercise such power was far more clear:

Courts earn the trust of the public by conducting their business openly and with reasons for their decisions. I think a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust. There will no doubt be cases where a court might properly make use of those powers but they are no substitute for the public body laying a proper basis for its refusal.<sup>62</sup>

Ngcobo CJ disagreed with the Supreme Court of Appeal. He observed that, despite the fact that applications under s 78 of PAIA are civil proceedings,<sup>63</sup> and are subject to the rules of evidence applicable in civil proceedings,<sup>64</sup> 'proceedings under PAIA differ from ordinary civil proceedings in certain key respects'.<sup>65</sup> By invoking these differences, Ngcobo CJ gave judicial examination of the requested record a central place in the adjudication of access to information disputes:

Courts should therefore approach these disputes mindful of both the disadvantage at which requesters are placed in challenging evidence put forward by the holder of the record, and the restraints placed on the party holding the information in terms of how it may refer to the contents of the record in justifying refusal of access. In the light of these challenges in producing and refuting evidence, courts have been empowered by s 80 to call for additional evidence in the form of the contested record so that they may test the validity of the exemptions claimed.<sup>66</sup>

Ngcobo CJ warned, however, that s 80 of PAIA 'should be used sparingly'.<sup>67</sup> He compared s 80 of PAIA to a similar provision in the United States. In the US, courts have held that it should be applied only 'as a last resort' or 'where absolutely necessary', 'when the affidavits are insufficient for a responsible *de novo* decision'.<sup>68</sup> Crucially, Ngcobo CJ went on to hold as follows:

As a discretionary power afforded to the courts to prevent injustice, the standard for assessing whether a court should properly invoke s 80 in a given case is whether it would be in the interests of justice for it to do so.

It is neither necessary nor desirable to detail all of the circumstances under which a court may conclude that it would be in the interests of justice for it to exercise its discretion and invoke the provisions of s 80. It will generally be in the interests of justice to invoke s 80 where doubt emerges, from the unique limitations parties in access to information

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<sup>61</sup> Replying affidavit at para 29.2.

<sup>62</sup> *M&G SCA* (note 21 above) at para 52.

<sup>63</sup> Section 81(1) of PAIA.

<sup>64</sup> Section 81(2) of PAIA.

<sup>65</sup> *M&G CC* (note 13 above) at para 33.

<sup>66</sup> *Ibid* at para 36.

<sup>67</sup> *Ibid* at para 39.

<sup>68</sup> *Ibid* at para 40.

disputes face in presenting and refuting evidence, as to whether an exemption is rightly claimed.<sup>69</sup>

In addressing the reservations expressed by the Supreme Court of Appeal,<sup>70</sup> Ngcobo CJ remarked that, by applying s 80, ‘the court is neither supplementing the state’s case nor making out a case for the requester’. Rather, the purpose of s 80 of PAIA is ‘to prevent courts from being forced into the role of mere spectators in an adversarial process that, because of the nature of access to information claims, may not produce the factual record necessary for courts to execute their judicial function responsibly’.<sup>71</sup>

Ngcobo CJ explained that the main purpose of s 80 is to enable the court to properly assess the legality of the refusal. The judicial examination in camera should facilitate rather than obstruct access and its existence should deter the state from raising unmeritorious exemptions.<sup>72</sup> For these reasons Ngcobo CJ saw s 80 as ‘vital to the vindication of the right of access to information’.<sup>73</sup>

Seizing on the Supreme Court of Appeal’s comment that ‘it might be’ that valid grounds of refusal are applicable to the Report,<sup>74</sup> Ngcobo CJ held that, in light of this uncertainty, it was in the interests of justice for s 80 to be invoked.<sup>75</sup> This finding drew further support from the prior finding that The Presidency’s evidence was sufficient to discharge its burden of proof. Somewhat ironically, Ngcobo CJ found that the interests of justice favoured a judicial peek also because of ‘the constraints M&G faced in challenging the affidavit evidence put forth by the state, both in relation to state officials’ reading of the report to which M&G did not have access, and in relation to the personal knowledge state officials asserted as to the judges’ mandate’.<sup>76</sup> Moreover, the allegation of non-severability could not be decided without examining the Report: the ‘M&G was placed at a disadvantage in challenging this assertion’.<sup>77</sup>

Yacoob J, who concurred in the judgment of Ngcobo CJ, construed the purpose of the power in s 80 more widely. In his view, courts should always examine the contested document.<sup>78</sup> On the other hand, Froneman J, also concurring in Ngcobo CJ’s judgment, read s 80 more narrowly. He contends that the interests of justice only require judicial examination where (a) either party is constrained in presenting evidence or (b) the issue of severability is in dispute.<sup>79</sup>

On this question, the *M&G* Court split still further. Cameron J (and those who concurred in his judgment) firmly dissented. Cameron J accepted that s 80 of PAIA could be useful to test claims for secrecy but held that it ‘should be invoked with care’.<sup>80</sup> He did not share Ngcobo CJ’s view that s 80 imports an

<sup>69</sup> *Ibid* at paras 45–47.

<sup>70</sup> *M&G SCA* (note 21 above) at para 52.

<sup>71</sup> *M&G CC* (note 13 above) at para 50.

<sup>72</sup> *Ibid* at para 52.

<sup>73</sup> *Ibid* at para 53.

<sup>74</sup> *M&G SCA* (note 21 above) at para 53.

<sup>75</sup> *M&G CC* (note 13 above) at para 55.

<sup>76</sup> *Ibid* at para 64.

<sup>77</sup> *Ibid* at para 66.

<sup>78</sup> *Ibid* at para 74.

<sup>79</sup> *Ibid* at para 77.

<sup>80</sup> *Ibid* at para 124.

inquisitorial character to applications under PAIA. Instead, he reasoned that '[i]f the object of the statute were to create a novel form of proceeding in access disputes, and invest courts with inquisitorial powers for ready use in disputes, its provisions would not have included so plain an imposition of the burden on the holder of information.'<sup>81</sup> Section 80 should not be used as a substitute for requiring government to discharge its burden, nor to avoid an order of disclosure when government has failed to do so.<sup>82</sup> Cameron J posited that s 80 should only be employed 'when government plausibly asserts the hands-tied argument or a ground of exemption, but doubt exists whether the exemption is rightly claimed'.<sup>83</sup>

The rationale for Cameron J's approach is not only that both the burden of proof and resort to judicial examination should be given effect 'within their appropriate fields of application', but also that the judicial peek upends 'two fundamental principles of the administration of justice'.<sup>84</sup> It suspends 'the adversary[ial] nature of the parties' dispute, in which the court is a disinterested arbiter', and shrouds the court's operation in secrecy.<sup>85</sup> Star Chambers have no place in a modern constitutional democracy. Section 80 should thus be of 'rare recourse'. It presents the 'blunt risk ... that the parties' dispute will be decided on the basis of a court's secret conclusions from a secret process'.<sup>86</sup>

We again are in agreement with Cameron J's two-fold argument. We would add a third. Secret judicial examination introduces the practical problem of entangling the parties in a stunted, complicated and costly exercise. It operates to the prejudice of the requester. The requester is explicitly excluded from meaningful participation in the proceedings. Yet he, she or it is required to be available for them at its own expense. This procedural morass is well illustrated by the post-remittal progress of *Me>G* in the High Court.

A harmonious reading of ss 80 and 81 of PAIA requires that the exceptional resort to secret judicial examination need not, and must not, disturb or displace the statutory burden and standard of proof. Section 81 places the burden squarely on the refuser to prove that the refusal is justified, and to do so on a balance of probabilities. To hold, as the majority did, that s 80 can apply when that burden has not been discharged, but where there remains some residual doubt about whether the refusal is justified, renders the application of s 81 at best inefficient and often ineffective, and destroys much of its intended purpose.

To lighten the burden and standard of proof imposed strikes at the very essence of the right of access to information. PAIA was enacted in order to 'foster a culture of transparency and accountability' and 'actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights'.<sup>87</sup> For this reason, in our constitutional order, transparency is the rule and secrecy the exception. Section

<sup>81</sup> *Ibid* at para 125.

<sup>82</sup> *Ibid* at para 126.

<sup>83</sup> *Ibid* at para 127.

<sup>84</sup> *Ibid* at para 126.

<sup>85</sup> *Ibid* at para 128.

<sup>86</sup> *Ibid* at para 129.

<sup>87</sup> Preamble of PAIA.

81's imposition of the burden of proof on the refuser gives practical expression to the fundamental presumption of disclosure. Any disturbance of that burden undercuts the underlying essence of the right. Thus, to alleviate the state's burden to justify its claims to secrecy, as Ngcobo CJ did, even if only by providing a safety net of judicial examination when the state has failed to discharge its burden, does violence to the plain meaning of section 81.

In order to give equal functional life to both s 80 and s 81 of PAIA, the only appropriate balance between them is as follows. Only once the refuser has tendered sufficient evidence to establish, on a balance of probabilities, that the refusal is justified, can the court examine the record to test the truth of that evidence. The proper purpose of s 80 is not to complete the refuser's case. It serves to compare it to the record in question in order to test its probity. The record should not be examined to test the *sufficiency* of the refuser's evidence but rather to test the *reliability* of the evidence.

It does not follow that judicial examination would be invariably necessary once a refuser has discharged its burden under s 81. Judicial examination would remain a discretionary measure. A court could still satisfy itself that a refuser's evidence is reliable by more conventional methods: namely, an assessment of contradictory documents or of witnesses' credibility under cross-examination. The exceptional power to examine the record would only require application where the court cannot otherwise satisfy itself of the reliability of the refuser's evidence.

This position is buttressed by the constitutional imperative of interpreting any legislation to 'promote the spirit, purport and objects of the Bill of Rights'.<sup>88</sup> This imperative informed the reasoning of the Supreme Court of Appeal in *Minister for Provincial and Local Government of the Republic of South Africa v Unrecognised Traditional Leaders of the Limpopo Province*.<sup>89</sup> The Court held that the exemption provisions in PAIA limit the right of access to information and thus 'section 36 of the Constitution requires that the scope of such a provision be restricted only to an extent which is reasonable and justifiable'.<sup>90</sup> We submit that the same set of reasons should apply with equal force to the interpretation of the interplay between s 80 and s 81.

<sup>88</sup> FC s 39(2). The Constitutional Court has always been clear about the fact that courts must prefer an interpretation of legislation that falls within the remit of constitutional norms over those that do not. See, eg, *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* [2000] ZACC 12, 2001 (1) SA 545 (CC) at para 23. Soon after *Me&G CC*, the Court went even further and stated that where there are two interpretations of a provision that are 'constitutionally compliant, one would then have to prefer the interpretation that conforms better with the spirit, purport and objects of the Bill of Rights.' *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto and Another NNO* [2012] ZACC 19, 2012 (6) SA 249 (CC) at para 72.

<sup>89</sup> *Minister for Provincial and Local Government of the Republic of South Africa v Unrecognised Traditional Leaders of the Limpopo Province (Sekbukbuneland)* [2004] ZASCA 93, 2005 (2) SA 110 (SCA), [2005] 1 All SA 559 (SCA).

<sup>90</sup> *Ibid* at para 16.



It is important to emphasise that the standard of proof imposed by PAIA is a balance of probabilities, not the presence of ‘doubt’, as intimated by Ngcobo CJ.<sup>91</sup> This dubious ‘doubt standard’ led Ngcobo CJ to hold that the Supreme Court of Appeal had failed to act ‘responsibly’ when it ordered the release of the Report without first examining it.<sup>92</sup>

The finding that s 80 should be applied whenever a court cannot ‘responsibly’ decide on disclosure, without first examining the requested record, raises questions that promise to be extremely difficult to resolve in practice. Although Ngcobo CJ narrowed the notion of responsibility to the familiar standard of ‘the interests of justice’, this standard hardly offers an objective compass for the application of s 80. The Chief Justice held that it ‘will generally be in the interests of justice to invoke s 80 where there is doubt, emerging from the unique limitations parties in access to information disputes face in presenting and refuting evidence, as to whether an exemption is rightly claimed’<sup>93</sup> – this does, however, remain a value judgment. It is to be determined according to the circumstances of each case, with little guidance as to how much ‘doubt’ justifies a judicial peek. This approach threatens to reduce the standard of proof required of the refuser from a balance of probabilities to the presence of doubt. Moreover, it is inevitable in opposed proceedings (and perhaps even in unopposed proceedings) that some degree of doubt will seep in when a party fails to discharge its burden of proof. Indeed, the pragmatic standard of proof applies in civil proceedings for that very reason.

While Ngcobo CJ held that it ‘is neither necessary nor desirable to detail all of the circumstances under which a court may conclude that it would be in the interests of justice’ to apply s 80,<sup>94</sup> we would respectfully beg to differ. The case currently under discussion amply demonstrates the importance of certainty about when a court should apply s 80. A court’s decision not to do so, on its own assessment of the interests of justice, is vulnerable to reversal on appeal and remittal to the lowest court should an appellate court construe the interests of justice the slightest bit more conservatively. As we explain below, the delay and the cost occasioned by such a turn of events, for all practical purposes risk extinguishing the right of access to information.

As the majority in *Me&G* were obliged to require judicial examination of the record when the refuser failed to prove its case, it is, for future cases, both necessary and desirable to set out the circumstances in which judicial examination is in the interests of justice. In this sense, even the extreme approach of Yacoob J (that it is always in the interests of justice to apply s 80) would be far preferable as a practice, than the opaque approach of Ngcobo CJ. The extreme approach would eliminate the lengthy and costly consequences of an appealable decision by a lower court that a judicial peek is unnecessary.

It was, therefore, hardly irresponsible for the Supreme Court of Appeal to dispose of this matter in the way that it did. It is inimical to the presumptions underpinning PAIA to treat the state with the kind of patience and leniency

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<sup>91</sup> *Me&G CC* (note 13 above) at para 46.

<sup>92</sup> *Ibid* at para 55.

<sup>93</sup> *Ibid* at para 46.

<sup>94</sup> *Ibid* at para 46.

that a court would typically reserve for an indigent or illiterate litigant. Quite the contrary, the state is surely among the most informed, seasoned and well-resourced litigants in the country. It must be presumed to be in a position to acquire and to adduce the best available evidence to justify its claims to secrecy or, at the very least, to explain why it is unable to adduce such evidence. In this light, it cannot be considered irresponsible for a court to hold the state to the evidence it has tendered in support of a refusal. A court cannot be expected either to lower the level of evidence required or to add to the evidence tendered, when the state has failed to discharge its statutory burden of proof.

It is worth recounting, at this point, the remarkable coincidence that, on the very same day as the Constitutional Court delivered judgment in *Me&G*, the Western Cape High Court, Cape Town (per Griesel J) delivered a judgment invoking its power under s 80 of PAIA in *Independent Newspapers v African National Congress*.<sup>95</sup> (The first time a High Court has done so.) It deployed s 80 on the grounds that the refuser's evidence established that the requested record was broader in its contents than the information that the requester was entitled to access, and that it was impossible for the Court to determine appropriate severability without examining the record.<sup>96</sup> The record was duly provided to the Court for secret examination. After reviewing the record in camera, the High Court issued a final order that the record be released. (The order was rendered utterly final by the fact that the full unredacted record was attached to the order itself!).<sup>97</sup> In making this order, the Court remarked that, in light of the Constitutional Court's statement in *Me&G* that s 80 should be used 'sparingly', it 'may have been unduly lenient in favour of the respondents by invoking the provisions of section 80'.<sup>98</sup>

While Ngcobo CJ observed that the very existence of s 80 'should, in itself, deter frivolous claims of exemptions',<sup>99</sup> its potentially deleterious consequences – as reflected in *Me&G* – cannot be overstated. As we have seen, s 80 should certainly not be available as an avoidance mechanism. While s 80 may serve to discourage the unjustified refusal of requests for access to information, s 89 of PAIA immunises officials from criminal and civil liability 'for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty' under PAIA. Section 89, coupled with the pressure that may realistically be brought to bear on public or private officials by their superiors, diminishes the deterrent potency of s 80.

To return finally to *Me&G*: for the same reasons advanced above, the proper application of s 81 results in The Presidency having failed to prove the sufficiency of the evidence presented. It cannot possibly be in the interests of justice to require recourse to s 80 in this matter or any similar dispute.

<sup>95</sup> *Independent Newspapers (Pty) Ltd & Others v African National Congress & Another (1)* [2011] ZAWCHC 436.

<sup>96</sup> *Ibid* at para 27.

<sup>97</sup> *Independent Newspapers (Pty) Ltd & Others v African National Congress & Another (2)* [2012] ZAWCHC 4.

<sup>98</sup> *Ibid* at paras 13–14.

<sup>99</sup> *Me&G CC* (note 13 above) at para 52.

### C Not At Home: The Decision to Remit the Matter to the High Court

The issue of remittal was raised by the Constitutional Court. The Court requested submissions from the parties on whether the matter should be remitted to the High Court if it was found that the courts below ought to have invoked s 80. Everyone demurred.

The Presidency was not in favour of remittal. It argued that the evidence before the Court was sufficient for the case to be decided. The Presidency's Cassius Lubisi had previously also stated under oath, in his affidavit before the Constitutional Court, that there was no need to remit the matter for further evidence.<sup>100</sup> M&G argued that such a remittal was not necessary. The matter, it contended, would result in wasted costs and, in all probability, end up back before the Constitutional Court (this prediction transpired to be true).

In support of its decision to remit the matter to the High Court, Ngcobo CJ invoked s 80(3) of PAIA. Section 80(3) empowers a court that decides to exercise its discretion under s 80 to receive *ex parte* submissions, conduct a hearing in camera and prohibit the publication of information regarding the proceedings. Ngcobo CJ reasoned that various options are available to a court under s 80(3) and that 'further issues may arise during the course of the hearing that may require further attention'.<sup>101</sup> Ngcobo CJ does not state why the High Court would have been better placed to deal with these issues or what harm would arise if the Constitutional Court acted as court of first instance in relation to those issues. All that s 80(3) does is to empower the court with various options when it decides to take a judicial peek. The court is not required to exercise any of the options available to it. It could simply review the disputed record and issue a decision without having recourse to any of the options under s 80(3).

Moreover, the Constitutional Court apparently ignored s 80(1) of PAIA, which provides that 'any court hearing an application, *or an appeal against a decision on that application*, may examine any record'. (PAIA's explicit provision for an appellate court to examine the record itself (ie without remitting the matter to the court *a quo*) implies that there is nothing inherently objectionable about such an exercise being conducted on appeal. At the very least, the Court ought to have provided compelling reasons for its decision to remit the matter to the High Court for judicial examination.

Given that full argument and *all* the available evidence from both parties had been placed before the Constitutional Court, it is difficult to comprehend why the High Court was deemed to be in a better position to read a copy of the Report and decide if it wanted to receive further submissions from one or both parties. Any submissions made by the parties, including *ex parte* submissions by the state, would presumably have had to be legal in nature; to permit additional affidavits in light of the history of the matter would amount to giving the state an opportunity to start its case from scratch and would be unjust in the circumstances.

The Court's decision to remit the matter comes across as yet another deft move to avoid disposing of a matter. That might be undesirable given the underlying

<sup>100</sup> Affidavit of Cassius Lubisi at para 33.

<sup>101</sup> *Ibid* at para 68.

constitutional imperatives at stake.<sup>102</sup> Or it could be viewed as an institutional necessity in a highly charged political matter.<sup>103</sup> However, against the backdrop of the inevitable delay in finalising the matter, as well as the additional costs that have been occasioned by the remittal, it remains hard to justify.

Ngcobo CJ did not seriously consider the submission from M&G that remitting the matter to the High Court would entail wasted costs, but curtly dismissed it as ‘speculation’. This is particularly worrying in light of the Court’s eventual decision on costs, discussed below.

PAIA places an explicit premium on expediting access to information. Among its stated purposes is to enable people ‘to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible’,<sup>104</sup> and ‘generally, to promote transparency, accountability and effective governance of all public and private bodies’.<sup>105</sup>

In *Brümmer v Minister for Social Development (Brümmer)*,<sup>106</sup> the Constitutional Court held in relation to the right of access to information that:

The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency ‘must be fostered by providing the public with *timely*, accessible and accurate information’.<sup>107</sup>

In *Avusa v Qoboshiyane*,<sup>108</sup> one of the first judgments to apply the Constitutional Court’s judgment in *Brümmer*, the Eastern Cape High Court found that a ‘disturbing factor’ in the refuser’s case was ‘the apparent lack of appreciation of the essence of *time*’.<sup>109</sup> Applying the above passage of *Brümmer*, the High Court considered FC s 195(1)(g), which provides that ‘[t]ransparency must be fostered by providing the public with *timely*, accessible and accurate information’ (the Court’s emphasis), and held that ‘this section makes time to be of essence in matters of this nature’.<sup>110</sup> The *Avusa* High Court found that the delays occasioned by the refuser, whose attitude ‘seem[ed] rather paternalistic and appear[ed] to reflect a distrust of the public’, were decisive in determining that the public interest outweighed the prospective harm justifying refusal. It required the release of the record in terms of s 46 of PAIA.<sup>111</sup>

<sup>102</sup> See S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 *South African Law Review* 762; G Penfold & D Milo ‘Media Freedom and the Law of Privacy: *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC)’ (2008) 1 *Constitutional Court Review* 311.

<sup>103</sup> T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013).

<sup>104</sup> S 9(d) of PAIA.

<sup>105</sup> S 9(e) of PAIA.

<sup>106</sup> [2009] ZACC 21, 2009 (6) SA 323 (CC).

<sup>107</sup> *Ibid* at para 62 (our emphasis).

<sup>108</sup> *Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO & Others* [2011] ZAECPEHC, 2012 (1) SA 158 (ECP).

<sup>109</sup> *Ibid* at para 39 (our emphasis).

<sup>110</sup> *Ibid* at para 44.

<sup>111</sup> *Ibid* at paras 46–47.

The speed with which a request for access to information is brought to finality should not be viewed as an inconsequential side issue or a minor irritation – it goes to the core of the public’s ability to hold the state accountable. If information is only provided several years after it was requested, then there’s an obvious risk that the information will no longer be relevant or useful for achieving the purpose for which it was initially requested. A concomitant risk exists that state officials will be inclined to evade accountability simply by refusing access to a record and then dragging the matter through court *ad infinitum* until the issue becomes moot. The judgment does not address the prejudice suffered by M&G as a result of the delay in finalising this case. Its initial request for the Report was submitted in mid-2008. By the time the case was *first* heard in the Constitutional Court three years had elapsed. Under the circumstances, the decision to remit the case did not give effect to the principle that information should be provided in a timely manner. It could, therefore, not be ‘in the interests of justice’ to do so.

Serious concerns have been expressed by the South African Human Rights Commission, the institution charged with overseeing the implementation of PAIA, as well as civil society organisations who utilise PAIA on a regular basis, that the current enforcement mechanism under PAIA is inadequate.<sup>112</sup> The basic complaint raised by these organisations is that litigation is costly and time-consuming and thus acts as a barrier to access to information. Proposals have been made that instead of directing unsuccessful requesters to the courts an information regulator should be created to deal with appeals against refusal of access to information under PAIA.

Against the backdrop of the frustration experienced by the public in attempting to enforce compliance with PAIA through the courts, the decision of the Constitutional Court to remit the case to the High Court with seemingly no regard for the delays that this would cause sets a worrying precedent. The Constitutional Court’s approach with regard to remittal may well stymie and undermine the constitutional right of access to information.

#### **D A Thief in the Night: The Decision to Revoke M&G’s Costs Awards**

As a starting point it must be noted that access to the Report is self-evidently in the public interest. The South African government has been at the forefront of the international community’s attempts to resolve the political and economic problems that have plagued Zimbabwe since the late 1990s. Zimbabwe’s woes have had a direct impact on South Africa with an influx of Zimbabwean

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<sup>112</sup> K Allan and I Currie ‘Enforcing Access to Information and Privacy Rights: Evaluating the Proposals for an information protection regulator for South Africa’ (2007) 23 *South African Law Journal* 570; C Kisoona ‘Ten Years of Access to Information in South Africa: Some Challenges to the Effective Implementation of PAIA’, available on the Open Democracy Advice Centre’s website (<http://www.opendemocracy.org.za/wp-content/uploads/2010/10/Ten-Years-of-Access-to-Information-in-South-Africa-Some-challenges-to-the-effective-implementation-of-PAIA-by-Chantal-Kisoona.pdf>), accessed on 23 January 2014); J Klaaren ‘PAIA through the Courts: Case Law and Important Developments in PAIA Litigation’, available on the Open Democracy Advice Centre’s website (<http://www.opendemocracy.org.za/wp-content/uploads/2010/10/PAIA-Through-the-Courts-Case-Law-and-Important-Developments-in-PAIA-Litigation-by-Jonathan-Klaaren1.pdf>), accessed on 23 January 2014).

nationals seeking economic opportunities or political asylum. The 2002 elections were mired in allegations of violence, intimidation and vote rigging. Yet South Africa's Parliamentary Observer Mission was one of the few oversight entities to declare that the election was legitimate. Against this backdrop, it is clear that the proceedings launched by M&G relate to a matter that is manifestly in the public interest. The proceedings also raised important constitutional issues. As noted by the Supreme Court of Appeal: '[o]pen and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy'.<sup>113</sup>

In both the High Court and the Supreme Court of Appeal, the courts gave costs awards in favour of M&G. These costs orders were reversed by the Constitutional Court and replaced with an order that each party should bear its own costs in the High Court, the Supreme Court of Appeal and the Constitutional Court. Save to state that the order was 'just and equitable', the court provided no reasons for its decision.<sup>114</sup> We are of the view that the Constitutional Court's decision in this regard was incorrect.<sup>115</sup>

It is useful, here, to recount the basic principles applicable to costs orders in constitutional matters. In *Ferreira v Levin*,<sup>116</sup> the Constitutional Court restated the generally acceptable approach to costs awards. The first principle is that a court has a broad discretion with respect to what constitutes an appropriate costs order in a particular case.<sup>117</sup> The second principle, which is subsidiary to the first, is that the successful party should ordinarily be awarded its costs.<sup>118</sup> The Constitutional Court has, on occasion, deviated from the general rule: but it has hardly done away with the rule entirely.<sup>119</sup>

In *Biowatch Trust v Registrar, Genetic Resources, & Others*,<sup>120</sup> the Court set out a comprehensive exposition of the principles applicable to an award of costs in a matter where constitutional issues are raised. Biowatch, an NGO dealing with environmental issues, had lodged a request for access to information from the Registrar of Genetic Resources regarding genetically modified organisms. The request was refused. After the refusal, Biowatch launched a court application which was largely successful. However, the High Court declined to make a costs award in Biowatch's favour on the basis that Biowatch's request for information had been framed in an unnecessarily broad and vague manner. A third party, Monsanto (Pty) Ltd, who joined the proceedings on the basis that it opposed the disclosure of its confidential information to Biowatch, was granted a costs order against Biowatch. The High Court reasoned that if Biowatch had framed its request more clearly, Monsanto would not have had to enter the fray and thereby incur unnecessary costs. Biowatch appealed against the costs orders. It argued

<sup>113</sup> *M&G SCA* (note 21 above) at para 1.

<sup>114</sup> *M&G CC* (note 13 above) at para 71.

<sup>115</sup> On this point, and other cost related matters, see M Bishop 'Costs' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, 2011) Chapter 5.

<sup>116</sup> [1995] ZACC 13, 1996 (2) SA 621 (CC).

<sup>117</sup> *Ibid* at para 3.

<sup>118</sup> *Ibid*.

<sup>119</sup> See *Ferreira* (note 116 above) at para 3 (Court held that the general principles were sufficiently flexible to be adapted to deal with constitutional litigation.)

<sup>120</sup> [2009] ZACC 14, 2009 (6) SA 232 (CC).



that a litigant who raises constitutional issues in the public interest should not be denied its costs or mulcted in costs. The Constitutional Court articulated the following principles in relation to litigation between a private party and the state:

- It is not the identity of the parties that is important, ie whether one party is an NGO or is impecunious, but rather the nature of the issues raised;<sup>121</sup>
- ‘The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice’;
- The general rule is that ‘if the government loses it should pay the costs of the other side, and if the government wins, each party should bear its own costs.’<sup>122</sup>

The foundational principle of the general rules adopted in *Biowatch* is the Court’s statement that the primary consideration is how a costs order will hinder or promote the advancement of constitutional justice. In the case at hand, the costs order made by the court, in our view, obstructs instead of promotes the advancement of justice.

M&G was faced with responses to its initial request and its internal appeal that both the High Court and the Supreme Court of Appeal deemed to be no more than a recitation of the applicable statutory language. No detailed reasons were provided in support of the refusal – reasons that might have led the newspaper to conclude that litigation was not warranted.<sup>123</sup> The award of costs in the High Court was just and equitable not only because M&G was successful. Costs were justified because The Presidency fell short of the standard to be expected of the state when responding to requests for access to information and left the newspaper with little option but to litigate.

The reason why the matter proceeded to the Supreme Court of Appeal was that The Presidency decided to lodge an appeal. Accordingly, the newspaper was effectively dragged further through the courts by the state. The basis of The Presidency’s appeal did not rest on an allegation that the High Court had failed to exercise its discretion to conduct a judicial peek under s 80 of the Act. On the contrary, when the issue of the judicial peek was raised by the courts in oral argument in both the High Court and the Supreme Court of Appeal, counsel for The Presidency apparently urged the court not to exercise its discretion under s 80 in order to call for a copy of the Report.<sup>124</sup> Instead, the state based its appeal on an attempt to defend the wholly inadequate evidence placed before the High Court. The fact that the state urged the courts below to make a decision without taking a judicial peek was conveyed to the Constitutional Court by M&G in its submissions regarding s 80. Unfortunately, the Constitutional Court appears to have placed no weight on this fact (which was not denied by The Presidency). It features nowhere

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<sup>121</sup> Ibid at para 16.

<sup>122</sup> Ibid at para 22.

<sup>123</sup> The Constitutional Court accepted that the state cannot discharge its burden to prove that a piece of information falls within the ambit of a particular exemption by merely reciting the words of the exemption. See *M&G CC* (note 13 above).

<sup>124</sup> This attitude was also reflected in The Presidency’s answering affidavit in the High Court.

in the judgment. This factor should have weighed heavily in favour of maintaining the extant costs orders. The most immediate effect of the Constitutional Court's decision to strip M&G of its costs in these circumstances is that the state was allowed to benefit from the obstructive stance that it adopted in the courts below.

The sole basis on which the Constitutional Court decided to reverse the judgments of the High Court and the Supreme Court of Appeal, and to remit the matter to the High Court, was that those courts should have exercised their power under s 80 but had failed to do so. This failure, however, cannot be attributed to M&G. It can only be attributable to the state – indeed, all three of its co-ordinate branches. As Ngcobo CJ acknowledged, Parliament did not specify the circumstances in which s 80 of PAIA should be invoked. The Presidency, forming the apex of the Executive, actually resisted the invocation of s 80 in both the High Court and the Supreme Court of Appeal. Finally, the Judiciary, both the High Court and the Supreme Court of Appeal, failed to invoke s 80 despite M&G's formal invitations for them to do so. Accordingly, there can be no justification for the decision to deprive M&G of the costs it was awarded in proceedings where it never set a foot wrong, whether procedurally or substantively, and where the only misstep made, on the Constitutional Court's own assessment, was attributable to the Legislature, the Executive and the Judiciary.

What should be borne in mind is that, as impliedly acknowledged in *Biomatch*, a decision that each party should bear its own costs does not have a neutral impact. Given the prohibitively high costs of litigation, requiring a private party, which litigates a public matter against the state, to bear its own costs may not advance constitutionally implicated interests of justice. The relevant circumstances with regard to costs – which the *M&G CC* Court ignored – in this case were as follows:

- (i) the outcome was at best for the state a neutral one because the court upheld the majority of the underlying principles stated by the courts below regarding the state's affidavits – effectively the main respect in which the Constitutional Court differed from the courts below was that it took the view that in light of the insufficient evidence tendered by the state, s 80 should have been invoked;
- (ii) the basis upon which the High Court and Supreme Court of Appeal decisions were set aside was not because the state had vindicated its position but because the *M&G CC* Court decided the case on the basis of an entirely new issue; and
- (iii) the state argued against the judicial peek in the courts below and then changed its tune in the Constitutional Court.

Again: what is most disturbing about the Constitutional Court's decision on the issue of costs is that no reasons are provided for its decision to overturn the previous costs orders. This prospect was not raised by the Court at the hearing of the matter. Moreover, the parties were not invited to make submissions on costs when the Court subsequently invited specific argument on s 80 and the possibility of remittal. It is, accordingly, impossible to assess what, if any, factors were taken into account in reaching the decision on costs. Another issue left unanswered is why the Court, in

light of the decision to remit the case to the High Court, opted to set aside the costs orders of the courts below instead of ordering that these be costs in the cause.

A court faced with litigation in terms of PAIA ought to adopt an approach that enhances access to information rather than an attitude that impedes it. We would argue that the costs orders in the High Court and the Supreme Court of Appeal advanced constitutional justice having regard to the public interest in the subject matter of the record requested, the important constitutional issue raised and the manner in which the state conducted itself. By contrast, the Constitutional Court's decision was a backward step for litigants who seek to hold the state accountable.

#### IV THE RETURN JOURNEY: THE PRESIDENCY'S NEW EVIDENCE

Pursuant to the remittal some six months later, the matter came before Raulinga J in the High Court.<sup>125</sup> Astonishingly, on the very evening before the matter was to be heard, The Presidency submitted a new affidavit by former President Thabo Mbeki in which he alleged that the judges had been dispatched as special envoys and that the purpose of the Report was to assist him with taking decisions regarding events unfolding in Zimbabwe. Brazenly, when the matter was called, The Presidency actually argued that Mbeki's affidavit rendered the judicial peek unnecessary and warranted the dismissal of the M&G application on the papers. M&G strenuously objected. Raulinga J considered himself bound by the Constitutional Court's order to take a judicial peek at the Report and decide the application on that basis, and insisted that the Report be produced. The Presidency thus abandoned their application to adduce Mbeki's affidavit and handed the Report to Raulinga J.

The Presidency, however, subsequently submitted Mbeki's affidavit again and urged that it should influence the Court's reading of the Report. Raulinga J rejected this effort, holding that s 80 did not permit a party 'to sneak new evidence through the back door'.<sup>126</sup> Raulinga J ruled that the new affidavits had to be assessed in terms of the rules applicable to accepting new evidence on appeal. On this basis, the affidavit was deemed inadmissible. The Presidency had offered no convincing reason to justify why it was not tendered in the court a quo.

Having read the report, Raulinga J ordered its release. He rather blisteringly stated that: 'In my view the contents of the report now in my possession resonates with the reasoning in the original High Court case, the SCA decision and the *minority* judgment in the Constitutional Court case.'<sup>127</sup> His ruling makes plain that the state has sought to deprive the public of access to the Report without legitimate grounds. Undeterred by the ruling, The Presidency lodged an application for leave to appeal to the full bench of the High Court. Raulinga J granted leave to appeal but ordered that the matter must proceed directly to the Supreme Court of Appeal. The Supreme Court of Appeal (unanimously per Brand JA, with Navsa, Ponnann and Mbha JJA and Mathopo AJA concurring) dismissed The Presidency's appeal,

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<sup>125</sup> *M&G Media Ltd v President of the Republic of South Africa & Others* [2013] ZAGPPHC 35, 2013 (3) SA 591 (GNP).

<sup>126</sup> *Ibid* at para 35.

<sup>127</sup> *Ibid* at para 36 (our emphasis).

for a second time.<sup>128</sup> Significantly, the Court held that 'The Presidency's effort to introduce Mbeki's affidavit, and thereby obviate the judicial peek for which the matter had been remitted, was an 'abuse of process which cannot be tolerated'.<sup>129</sup>

While the Constitutional Court had accepted The Presidency's excuse that it was 'hamstrung' in its defence, and invoked s 80 to relieve that restriction, the Mbeki affidavit showed that The Presidency had been faking the hamstring all along. The Supreme Court of Appeal held that The Presidency had 'attempted to use the referral back to the High Court for a purpose which was the exact opposite of what the Constitutional Court had in mind',<sup>130</sup> and the Mbeki affidavit was 'a clear attempt to plug the holes in the Presidency's case that were underscored in the previous judgments, particularly the minority judgment of Cameron J'.<sup>131</sup>

At the time of writing, over six years after M&G had requested the Report, and almost three years after Ngcobo CJ had delivered his judgment, The Presidency had applied again for leave to appeal to the Constitutional Court. The journey continues.

'Victory after all I suppose!' he said, feeling his aching head.  
 'Well it seems a very gloomy business.'

Bilbo Baggins<sup>132</sup>

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<sup>128</sup> *President of the Republic of South Africa and Others v M&G Media Limited* [2014] ZASCA 124.

<sup>129</sup> *Ibid* at para 25.

<sup>130</sup> *Ibid*.

<sup>131</sup> *Ibid* at para 30.

<sup>132</sup> J R R Tolkien *The Hobbit: There and Back Again* (1937) Chapter 18.



