The Limits of Moral Reasoning in Constitutional Law: A Pragmatic Case For Judicial Modesty when Reviewing Parliamentary Rules and Procedures

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Abstract *Since the introduction of the Constitution in 1996, there have been a number of interesting constitutional court decisions reviewing Parliamentary actions which raise important questions about the contemporary separation of powers and the role of the judiciary in a constitutional democracy.*

In two recent judgements, Ambrosini and Mazibuko, the court invalidated Parliamentary rules as being inconsistent with the Constitution, holding in the former that member's have an enforceable right to introduce private member's bills, and in the latter, to schedule and debate motions of no confidence in the President in reasonable period of time. The insertion of the language of rights and moral considerations authorizes judicial intervention in cases with significant political implications. T

In the United Kingdom, such questions are considered not to be justiciable The approach of the South African constitutional court, exemplifies a contemporary post formalist, thinking about the separation of powers which rejects recourse to conceptual distinctions between law and politics and the apriori insulation of certain subject matter(e.g. 'parliamentary privilege') from judicial review.

The constitutional court's decision to subject disputes arising within Parliament between political parties with respect to the content and application of Parliamentary rules and procedures to judicial supervision, cannot however be justified within the 'traditional paradigm of constitutionalism', which is concerned with the judicial enforcement of constraints on the exercise of governmental power and the judicial invalidation of legislation inconsistent with human rights

This paper examines asks the court's assumption of a 'platonic' role in supervising parliamentary rule-making, and critically assesses the courts moral reasoning.

In the spirit of legal pragmatism it asks several questions with regard to the possible consequences of judicial intervention.Is there a risk of 'over enforcement 'which damages the court's standing in the constitutional system, through 'judicialization'? Does judicial intervention potentially have a disabling effect on legislatures and relieve members of Parliament of their responsibility to interpret and uphold the constitution? Is there a negative impact on other constitutionally relevant values like the separation of powers and self-government? Positive answers to these questions suggests a case for judicial restraint or deference.

Or contrariwise, can a good case be made that in a newly established democracy in which the culture of constitutionalism is still in the process of being embedded, zones of legal unaccountability should not be allowed and that judicial review should be always be available as a final check on 'bad politics.'?

As our presidents, political parties and legislators become more corrupt and frivolous, we turn to the judiciary as the only political institution for which we can still feel something like awe. This awe is not reverence for the Euclid-like immutability of law. It is respect for the ability of decent men and women to sit down around tables, argue things out and arrive at a reasonable consensus.(Richard Rorty)[1]

Democrats, no doubt, do not like to be reminded of democracies failings. (Sir John laws)[2]

Politics is not a function of the fact that it is useful to assemble, nor that assemblies are held for the sake of good management of common business. It is a function of the fact that the wrong exists, an injustice that needs to be addressed. But the political wrong associated with… the people is not a wrong like any other…. It cannot be assimilated to the sort of juridical wrong that a court of law can address on the basis of laws or regulations. The irreconcilability of the parties antedates any specific dispute.(Jacques Ranciere)[3]

The court is not and cannot be a site political struggle. It can do nothing to resolve differences within that process. We are a site for the vindication of rights and the enforcement of the constitution…. Conduct of democratically elected legislatures may be discourteous, this does not necessarily render their actions unconstitutional… The constitutional court… should not be seen as a panacea… If voters perceive that their democratically elected politicians are disrespecting them … then the politicians

[1] Richard Rorty *Philosophy and Social* Hope, Penguin Books, 1999 p.112
[2] Sir John laws(P.72)
[3] Jacues Ranciere *On the Shores of Politics,*Verso.London,p.97

should be held accountable by the voters. Courts deal with bad law; voters must deal with bad politics.(Justice Skweyiya)[4]

Parliament is not an ice cream truck (Dumisane Hlope)[5]

Introduction: Philosophy and Politics

We derive from the Athenians both our passion for, as well as our fear of and therefore our distrust of democratic politics. We celebrate the triumph from time to time of the Democrats over the Oligarchs in ancient Greece But the trial of Socrates before an Athenian Assembly, and his execution on charges of opposing the prevailing orthodoxy offends our contemporary sense of Justice as much as it did Plato's.(Stone,1988) As a result, he became disillusioned with politics and sought to define Justice in his *Republic* in purely philosophical terms[.Plato, The Republic,1992.] His pupil, Aristotle thought he was wrong to collapse all virtues into Justice. Politics is a *practical discipline* aimed at addressing the needs of citizens. As such it has its own virtues and goals. In *Politics* he explains that man realizes he's potential through the *polis* and that the purpose of the *politeia* or 'constitution' is to find the 'proper balance between all the various legitimate forces that operated on a state' (Alan Ryan,2012.p.34).Platonic philosophers on the contrary, confronting 'abysses of horror or ruin',(Jacquis Ranciere,2007.p.1.) the 'great beast of the populace, the democratic assembly..' ((Rancier.p.1) think that the constitution should embody an ideal statement of impartial Justice, which is independent of politics, or at least provide ethical foundations for a different kind of politics.

It seems to me that contemporary constitutionalism, is a contested and contradictory synthesis of platonic and Aristotelian sensibilities, broadly expressed in the complex relationship between 'law' and 'politics'. This tension permeates the Constitutional Courts decisions in *Ambrosini* and *Mazibuko* subjecting parliamentary rule-making to judicial assessment in terms of a rather novel reading of the

[4] *Merafong Demarcation Board*paras307 308
[5] is a political analyst. Sunday Independent

constitutions normative standards. This paper examines the court's moral argument for intervention critically and makes a pragmatic case for judicial self restraint in this particular area of public law, rather than a general case in support 'passive virtues.'[Gerard Gunther,1964)] In expressing scepticism about platonic guardianship with respect to parliamentary rule-making, I draw on the work of JAG Griffith,(1950) Martin Loughlin(2003) and Jeremy Waldron(1999) all of whom emphasize, the centrality of conflict and disagreement and therefore of 'politics' The point however of bringing a sense of the distinctiveness of 'politics 'back into focus in public law, and particularly constitutional law is not to restore conceptual distinctions between 'law' and 'politics ' for the purpose of immunizing 'politics 'from judicial review, but rather to maintain that subject matter, specificity and context remain important in identifying and assessing the consequences that are relevant in exercising the judicial function. If It may still be an open question whether or not, in the presence of a limitations clause, consequences are relevant in rights adjudication, I will argue that such considerations cannot be ignored when parliamentary rule-making is subject to judicial supervision in the light of the courts moral reading of the constitution.

Law, morality and Politics

Modern constitutional democracy recasts the tension between platonic philosophy and politics in confronting the familiar problem of reconciling the standpoint of the collectivity with the standpoint of individual. It attempts to do so through a theory of *constitutionalism* which identifies a set of external and internal *constraints* on the exercise of political power All exercises of public power are required to be justified with reference to a set of universal and fundamental normative standards or principles, and individuals are recognized as having certain moral claims which trump the purely utilitarian calculus and aggregated majoritarian preference. Whether however, the competing claims of the collectivity and the individual should be resolved through the judicial enforcement of rights against the democratic process, or balanced and resolved *within it* remains a point of sharp

contention. So the modern theory of a constitutional *democracy*, also conceives of constraint as 'internal' to the democratic process, and so as voluntary and self chosen.

Trust and distrust in constitutional law are reflected in competing 'embodied' and 'disembodied' conceptions of constitutional order, which can coexist and overlap in a single jurisdiction. The 'embodied' conception emphasizes the 'liberties of the ancients' and the protection of human rights through the democratic processes of representative bodies and political mechanisms of accountability like Ministerial Responsibility and Parliamentary oversight. Regular elections provide a mechanism of self correction and checks on the abuse of power The Westminister Parliament, notwithstanding its membership of the European Union and its adoption of the Human Rights Act in 1998, providing for limited form of judicial review. continues to exemplify this 'political' conception of constitutionalism. This form of constitutionalism foregrounds the principle of self-government. and is sceptical of the reliance on 'Kantian' or natural law type arguments as a source of constraint on democratic politics .J.A.G. Griffith for instance, wrote this in his revealingly titled article, *'The Political Constitution'*(1979):'I do not disbelieve in generalized, *a priori* principles. I have them filling my pockets and coming out of my ears. But they cannot be guidelines for legislative or, administrative activity, because such principles in their application to particular situations are the very questions which divide not unify opinion… We are back in the conflicts where we began. And politics is what happens in the continuance or resolution of those conflicts…. Law is one means, one process by which those conflicts are continued or temporarily resolved. No more than that.'(p.20). Thus politics permeates the law which is characterized by conflict and disagreement. And since, in Jeremy Waldron's view, there is persistent and serious disagreement 'among us as to what rights we have and what justice consists in', it is inappropriate to entrust final decisions in this regard to unelected judges.(P.77) This sceptical perspective on judicial review of moral questions was also shared by, Justice Learned Hand, regarded as having been one of the most distinguished judges in the United States, who famously observed that he would not like to be governed by 'Platonic Guardians' of political morality.(Holmes Lectures.Harvard.1958)

This ‘embodied’ conception of constitutional democracy is challenged by the Dworkinian critique that when human rights are antecedently at risk, the political process cannot be trusted to result in outcomes which are Just. The late Ronald Dworkin who was Justice Hands law clerk, developed and defended a moral reading of the US constitution in various books, and in *Taking Rights Seriously*(1977) he turned to a philosophical critique of utilitarianism in an effort to explain why rights may be required as trumps: ‘In any community in which prejudice against a particular minority is strong, then the personal preferences on which utilitarian argument must fix will be saturated with that prejudice; it follows that in such a community no utilitarian argument purporting to justify a disadvantage to that minority can be fair.’(pp.236-7) it should be noticed that here, the argument is a contingent one and therefore not necessarily universally applicable Sir John laws, an English judge, has made a similar point:’… citizens... fundamental rights… *may be risk in any given set of political circ*umstances… The point is that rights should be off-limits for our elected representatives. These are not matters on which… the authority of the ballot box any authority at all. It is a premise of elected government .that these principles be observed by whoever is elected’.(p.90) So at least where democratic processes cannot be trusted to respect the moral claims of individuals, such claim should be treated as justiciable legal rights, which are insulated from and independent of the vagaries of majoritarian politics. As Justice Roberts stated in *West Virginia Board of Education*: ‘The purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, place them beyond the reach of majorities and officials and establish them as legal principles to be applied by courts.’ Rights orientated moral reasoning then always has the purpose and effect of restricting, displacing and ‘transcending’ ‘politics.’

I am persuaded by the argument that *where contextually required*, the moral claims of individuals, including their socio-economic claims should be constitutionalized, and thereby placed beyond the reach of ‘temporary’ electoral majorities To this extent I regard, the project of constitutionalism in South Africa in a positive light. But how ‘thick’ with moral and political values, which it is the exclusive responsibility of the judiciary to identify and apply, is the version of constitutionalism that

we have embraced. This question is not one that is simply settled by the text and the principle of constitutional supremacy Justice laws takes a broad view of contemporary constitutionalism in the United Kingdom: '…good judicial decisions', he says are 'themselves fuelled by ideals which are not morally neutral, but which represent *ethical principles about how the state should be run* and in that sense may be said to be political principles.'(My italics)(P.74) He continues: 'We now possess a jurisdiction in which every public body is in principle subject to the supervision of the court as regards every decision it makes.'(P.75) Therefore, in principle no subject matter may be regarded as 'non-justiciable' on the basis of its political content, and all political decisions, insofar as a distinction can still legitimately be drawn between 'law 'and' politics 'is subject to judicial supervision on the basis of political morality exclusively determined by the judiciary .Justice Laws makes this argument in a jurisdiction which has not adopted a fully enforceable Bill of Rights.

The *text* of the South African constitution(Fn) lends itself to a moral reading as 'value drenched',(Moseneke,2002,p.315) at least where' fundamental rights and freedoms' are concerned(Chaskalson,1989,p.293) since they are cast in abstract language[fn. Dworkin's distinction between concepts and conceptions]. But the Constitutional Court has recently expanded the moral reading to include matters of Parliamentary law and procedure which in comparable jurisdictions are regarded as either as non-justiciable on the basis of formalistic bright line rules or conceptual reasoning, or occasions for judicial restraint. Both the High Court and the Constitutional Court however have resorted to abstract theories of democracy ,like 'deliberative democracy' associated with the writings of(Habermas(1996)) and(Amy Gutmann,1996) and introduced a discourse of rights into its evaluation of Parliamentary rules and procedures, where the deontological case for the protection of individual rights against majoritarian decision-making is absent, in order to justify intervention.

When the moral content of constitutional law is defined this broadly, many of the disputed 'second order' questions that we might have thought have been laid to rest, concerning, the proper role of

the judiciary in a constitutional democracy, and whether and why there are occasions for judicial modesty resurface. As Daniel Farber and Suzanna Sherry (2002,p.138)have recently observed in their critique of Ronald Dworkin's version of foundationalism: 'It is true that our society largely assigns the final decision on issues of constitutional law to the courts. *But this assignment of power is acceptable in part because our legal culture defines constitutional law more narrowly then Dworkin, so as not to fully encompass the task of defining liberal democracy.* The fundamental nature of liberal democracies is an issue for the polity as a whole, not just the courts. If, like Dworkin we wish to define constitutional law more sweepingly than the conventional practice, we must recognize that the task of defining constitutional rights in this broader sense has not been wholly left to the courts…. Dworkin has *no general theory about how the power to decide constitutional issues should be allocated*, and so he cannot reject established practice of leaving some issues, which he considers constitutional nature, at least in part to other branches of government.'[My italics]

The 'established practice 'Farber and Sherry refer to, in making a case, for caution on the part of the judiciary, when having recourse to abstract moral reasoning in constitutional adjudication, is that of the United States, but in an important respect their critique is even more relevant to this discussion of Ambrosini and Mazibuko, since the South African judiciary has adopted a moral reading of the South African constitution which is even 'thicker' than that proposed by Dworkin as providing normative standards for the assessment of the constitutional validity of *parliamentary rules and procedures which are applicable only within Parliament and not generally.* Neither the 'rights argument' nor the 'rule of law argument', which together provide the justification for judicial review, can provide explanatory underpinnings for the court's reasoning in Ambrosini and Mazibuko.

In the analysis of these two cases that follows I will attempt to make a pragmatic case for the exercise of judicial self-restraint in reviewing matters internal to Parliament'. But first, I want to address some 'deeper' 'first order' questions about the relationship between political and moral

philosophy and the nature of public law which I believe is at the root of this enquiry and informs my responses to the second order questions I have identified as the specific focus of this paper.

Realism and Moralism in Philosophy and Public Law

What if any, are the limits of moral reasoning in constitutional law and more generally, in public law, at least where judicial review of parliamentary rule-making is concerned? Bernard Williams, through his posthumously published collection of essays entitled, *In The Beginning Was The Deed*(2005) critiques 'moralism' 'by which he means a philosophical trend, associated with the work of Dworkin, Rawls,and Habermas, which does not distinguish between moral and political philosophy, and attempts to derive abstract, ahistorical, apolitical and therefore impartial and universally applicable principles of justice. Williams postulates instead echoing Wittgenstein, that questions about how a society's political arrangements should be structured are always historical, contextual and dependent on deep social practices that constitute its 'forms of life.'[p.xiv] Williams relied on the 'relativism of distance' to argue that liberal conceptions of justice cannot apply to past civilizations To the extent however that his critique of moralism, resonates with post-modern and pragmatist critiques of moral universalism, Williams's scepticism also raises critical questions about attempts to finally inscribe through *constitutional law* particular conceptions of Justice as impartial principles in the presence of disagreement and therefore of politics.

It is in his rendering of a realist 'concept of the political' that I find Williams most instructive, since it seems to me that the logic of moralism leads to a disappearance of a sense of the distinctiveness of the political in law. Williams was sharply critical of the exaggerated moralism of American political and legal theory which leads he argued, to a Manichaean distinction between 'moral high-mindedness and the pork barrel. 'Moralism' Williams continues, views conflictual political thought in society in terms of rival moral elaborations of a text[p.12]', but this misconstrues the nature of the antagonism between political opponents.[p.12] An important reason 'for thinking in terms of the political is that a political decision-the conclusion of a political deliberation which brings all sorts of

considerations, considerations of principle along with others, to one focus of decision-is that such a decision does not in itself announce that the other party was morally wrong or, indeed wrong at all. What it immediately announces is that *they have lost.'*[p.13] There is more than an echo here, of Carl Schmitt's *The Concept of the Political*. Schmitt insisted on drawing a distinction between ethics and politics and located the distinctiveness of politics in the antagonism between 'friends and enemies', which means at least the centrality of those who are with you and those against whom you struggle.' (Carl Schmitt ,p.xv) The intellectual traditions of the Marxixt left, which has had some influence on Critical Race and Feminist legal theory also emphasize the reality of political antagonism and conflict in societies characterized by 'deep the social cleavages' and 'pervasive axes of dominance in exploitation. (Nancy Fraser1991,p. 262, Babbio 19960)

I think we should separate Schmitt's rejection of liberalism, and his right wing politics in reflecting on whether his ideas can contribute to our understanding of the relationships between morality, law and politics. In this paper, I wish to restrict this borrowing to a consideration of the narrow question of judicial review of parliamentary rule-making, and not to make a general case against a moral reading of the constitution and judicial protection of individual rights.

Public law and Parliamentary law

In *The Idea of Public Law*, Loughlin also draws on Schmitt in articulating he is conception of what is distinctive about public law. This distinctiveness is derived from the specificity of its object, which is 'the activity of governing through the institution of the state'.(Allison,2005,p.345) Several ideas that he develops his book have a bearing on the subject I am addressing. First he rejects attempts to understand public law 'by devising some ideal construct of law'(p.345) Instead he emphasizes its prudential character as a method of mediating conflict. For him, politics refers to a set of practices *within a state and therefore within public law,* preoccupied with conflict not a consensus.(p.345) He emphasizes the 'brokenness of politics,' the 'contest for authority', the 'inevitability of clashes', and the 'multiplicity of moral maps'(p.345)

This raises the question: what conception of the 'political 'informs our constitutional jurisprudence relating to Parliamentary law and procedure? Is politics to be can be distrusted and disparaged in the light of 'high-mindedness.' If parliamentary law and procedures is to be subjected to judicially determined ethical standards not immediately and directly traceable to the *languege* of the constitutional text, and also not easily justified by current understandings of the rationale for constitutional constraints on majoritarian politics[the individual rights argument] should we not critically examine the 'moral map' relied upon by the constitutional court?

Parliamentary law and procedure, I argue, should be conceived of as a distinct area of public law. This distinctiveness is derived from the specificity of its object which is the *regulation of the political contest and disagreement between political parties inside representative bodies,* as distinct from say, the law which regulates economic transactions,[competition, contract and company law] or family relationships, or indeed other areas of public law, like administrative law, which regulates the relationship between the state administration and individuals. Since Parliamentary law and procedure is formulated' in the 'circumstances of politics' (Waldron,1999 p.101) and is the 'in between of politics'(Waldron p.76, quoting Hannah Arendt))political parties which have substantive disagreements, are also likely to disagree over rules and procedure.

Parliamentary rules and procedures furthermore, apply only 'inside Parliament', conferring upon members immunities not enjoyed by the general public, are not 'generally applicable' and do have the same consequences for breaches[criminal sanctions or civil liability]. In this sense, Parliamentary law is exceptional and specific, and does not share the formal characteristics of laws of general application. So it follows I would argue, that particular questions might arise when a court exercises powers of judicial review in relation to this particular subject matter, just as for instance specific questions of polycentricity might arise in socio-economic rights adjudication, as distinct say from a question involving the assessment of the issue whether the executive decision is in breach of the principle of legality, or a 'first-generation' individual right protected by the Bill of Rights.

This conception of the distinctiveness of Parliamentary law, which foregrounds the political, is at odds with the way in which the constitutional court reasoned in *Mazibuko* .Justice Moseneke said that since that motions of confidence in the President, were 'a vital tool to advance our democratic hygiene'(para43), and a constitutional right or entitlement(para 47), the scheduling of such motions could not simply be a matter of 'political horse trading'(para53) or 'bargaining and negotiating among the political parties.'(para58) So here again, we see that that the logic of moralism is to displace 'logrolling politics in the name of 'high-mindedness'. One might read here kind of Rawlsian sensibility: that since parliamentarians cannot be trusted to deliberate impartially, the constitutional court as the forum of 'principle', reasoning behind a 'veil of ignorance 'should decide what rules are fair, and therefore required by the constitution.

My reason for returning to a basic question about how the political is conceptualized in public law, is not in order to immunize in advance of any specific dispute, all questions 'internal' to Parliament from judicial review but rather, to ask what considerations arising from the *specificity* of Parliamentary law may be relevant, to the exercise of the court's undoubted powers of review. Aileen Kavanagh has identified as one of the more important challenges facing courts, a determination of the question of the proper limits of their constitutional role:'…. the question of judicial restraint forces us to grapple with larger theoretical questions concerning the constitutional separation of powers between the three branches of government. It prompts us to to consider what courts should do and, crucially, what they should *not* do. Moreover ,it challenges us to think deeply about the nature of judicial reasoning and whether it's appropriate for judges to take into account the consequences of their decisions…'(.P.2)

Before I examine these questions in their specific constitutional setting, I will briefly discuss what might be called the 'traditional paradigm', of Parliamentary law, its governing concepts, and rationales for judicial restraint, in order to identify what may be of general relevance across jurisdictions.

TheTraditional Paradigm: Courts and legislatures

The parliamentary law of the United Kingdom has exercised a strong influence on many Parliamentary jurisdictions, including those with very different constitutional arrangements and in which Parliament legislation is required to meet human rights standards. Accordingly, It's basic structures, fundamental concepts and underlying rationales are worth exploring. The two axes of the parliamentary law in the United Kingdom are provided by the separation of powers principle and the concept of the non-justiciability of matters' internal' to Parliament.[see Stockdale v Hansard]

In *DuPont Steel*, Lord Diplock, made clear that the relationship between the courts and Parliament is defined by the principle of the separation of powers:'… It cannot be too strongly emphasized that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws; the judiciary interprets them'[fn] This fundamental principle also frames the judiciary's approach to the exercise of its powers of review with respect to matters 'internal to Parliament.' While the Human Rights Act of 1998, has conferred new powers on the courts in the UK and thereby to some degree altered the balance between courts and Parliament, requiring a more flexible conception of the separation of powers, the second axis- the non-justiciability of Parliamentary proceedings principle-which is derived from article 9 of the Bill of Rights of 1869, remains substantially undisturbed. Article 9 reads: 'freedom of speech *and debates or proceedings* in Parliament ought not to be impeached or questioned in any court or place out of Parliament.' In *Pepper v Hart*[1993 Lord Browne Wilkinson said that this was a provision of the 'highest constitutional importance'. While this doctrine of non-justiciability, which excludes judicial review by 'formalistic reasoning' in advance of any dispute has increasingly lost influence among legal scholars as well as in the courts in the United Kingdom with respect to executive decisions,[fn] following the enactment of the Human Rights Act, with regard to the review of matters 'internal' to Parliament, it has retained its importance since Parliament is sovereign [fn] What is an 'internal matter', is of course subject to judicial interpretation but includes at least, debate, Parliament's rule-making

power, speakers rulings, and punishments for contempt. An important consequence follows. Parliament is the sole judge of the lawfulness of its proceedings, can always depart from its own procedures, and is protected against attempts from the outside to 'interfere' in its proceedings (Erskine and May.90) Parliament's privileges then are held against all outside bodies including the Executive and the Courts.

The two fundamental axis of parliamentary law, at a first blush reading of the leading case in Canada, on the relationship between the courts and the legislature *New Brunswick Broadcasting Company v Nova Scotia(Speaker of the House of Assembly)[1993]* appear to have survived the introduction of a justiciable Bill of Rights. The dispute arose out of the decision of the Speaker to disallow filming of proceedings of the House of Assembly by the media with its own camera's. The application was based on section 2(b) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of expression, including of the press. The court held, with one dissent that the Charter did not apply to members of the House of Assembly in exercising their privileges as members and therefore that the refusal of access to the media to record and relay the proceedings of the House to the public was not reviewable. Chief Justice lamer emphasized the separation of Powers (p.354) and that the privileges and immunities enjoyed by members of the house are 'inherent' and not dependent on legislation.(p.364). On what he said was a 'purposive' reading of section 2(b), but in fact was a rather strained, technical construction of the word 'legislature', he came to the conclusion that the *Charter* did not apply to the exercise of parliamentary privileges by members of the House of Assembly Justice McLachlan, came to the same conclusion on the basis of different reasoning. He said that the law of parliamentary privilege , is 'necessary to modern Canadian democracy',(p.387) Although not expressly provided for in the Constitution, parliamentary privilege was nevertheless a fundamental part of the constitution, and therefore could not be abrogated by another fundamental part of the constitution in the form of the Charter of Rights. He added a separation of powers consideration:'.. Our Democratic government consists of several branches…Traditionally, each branch of government has enjoyed autonomy as to how it conduct its

affairs. The Charter has changed the balance of power between the legislative branch and the executive on the one hand and the Courts on the other hand, by requiring that all laws and government action must conform to the fundamental principles laid down in the Charter…. To this extent, the Charter has impinged on the supreme authority of the legislative branches. What we are asked to do in this case is to go further, much further. We are asked to say that the Charter not only removed from the legislative bodies the right to pass whatever laws they might choose to adopt, but that it removed the long-standing constitutional right of Parliament and the legislative assembly to exclude strangers, subjecting the determination of the Speaker of what is disruptive of the operation of the Assembly to the superior review of the courts. I see nothing in the Charter that would mandate or justify taking that the reallocation of powers which it effected to this extreme.'(p.389) What is notable about the reasoning of both judges, is their determination to preserve the separation of powers between the branches after the introduction of the *Charter* and to demonstrate due deference to the decisions of a co-equal branch. Even judge Sopinka, who found that the Charter was applicable, nevertheless upheld the court's conclusions on the basis of 'light touch', rational basis review.(p.398) In sharp contrast, we will see later in this paper that the South African constitutional court, admittedly interpreting a different constitutional text, and one that enshrines the principle of constitutional supremacy has not hesitated to subject parliamentary rules and procedures to what appears to be a standard of constitutional review, which is both 'strict' and uncertain *in the absence of any claimed violation of the Bill of Rights*.

Formalism, Moralism And Justiciability

An approach to judicial review of parliamentary rules and procedures, which I have provisionally characterized as 'formalistic ',in the sense that it relies on bright line rules, and a functional interpretation of the separation of powers, is not without its advantages. Such an approach in this context, probably reduces litigation costs, the risk of judicial error, is easier to administer by lower courts, conducive to certainty, avoids 'entanglements' in political disputes between political

adversaries, and arguably preserves the courts effectiveness in areas requiring judicial intervention like the protection of individual rights.

There are however formidable textual and interpretive obstacles to the incorporation of a non-justiciability doctrine into South African constitutional law. The Supremacy Clause establishes the legal supremacy of the constitution and declares *law and conduct* inconsistent with it invalid. (section 2)

The constitution also contains a comprehensive and judicially enforceable Bill of Rights which is applicable to *all law*, and to the Legislature, the Executive, the Judiciary and all organs of state.(section 8)

The Constitutional Courts reliance on moral reasoning in attributing meaning to the constitutional text through 'purposivism' is now firmly embedded in our constitutional jurisprudence .Such reasoning is opposed to the idea of 'judicial no-go areas '. Justice Barak(2001) for instance, a judge of the Israeli Supreme Court, with a rather strong inclination towards natural law,' hedgehog' type arguments in constitutional adjudication, has spoken of his 'weariness' with respect to non-justiciability arguments, whether based on normative or considerations of institutional competence: 'I have emphasized that it is the role of the judge to give effect to democracy by ruling in accordance with democratic values and foundational principles… Every norm…lives and breaths in this normative world replete with values and principles. These values create a "normative umbrella…"(fn.p.41) He continues in these emphatic terms:'… in my opinion, every dispute is normatively justiciable. Every legal problem has criteria for its resolution. There is "no legal vacuum". According to my outlook, law fills the whole world. There is no sphere containing no law and no legal criteria. Every human act is encompassed in the world of law. Every act can be "imprisoned" within the framework of the law. Even actions of a clearly political nature-such as waging war-can be examined with legal criteria, as evidenced by the laws of war in International law. The mere fact that an issue is" political"-that is, holding political ramifications and predominant

political elements-does not mean that it cannot be resolved by a court. Everything can be resolved by a Court, in the sense that law can take a view as to its legality. Of course, an activity's political nature may occasionally create a legal norm that, by the content of the norm, gives broad discretion to the political authority to as it wishes.'(p.98)

Notwithstanding the apparent qualification contained in the last sentence , this kind of Judicial moralism unbound, though not without its advantages in particular areas of judicial decision-making, precludes non-justiciability approaches to judicial review as well as consideration of prudential questions which may well be relevant to the exercise of the judicial function in particular contexts. So it is arguable for instance, that where individual rights are concerned, 'due deference' is not the right concept to describe the courts functions in reviewing laws of general application (Masterman2011p.116)but may well be appropriate when a court is balancing adverse effects with bureaucratic efficiency, in evaluating administrative decisions, In terms of the Provisions of the Administrative Justice Act.(Hoexter)

The traditional Paradigm And the Case for Judicial Restraint

My argument is that, that when a court is reviewing parliamentary rules and procedures, moral arguments are much less persuasive, more open to dispute and the consequences of judicial review more unpredictable. There is therefore a case to be made for the exercise of what I call textual, normative and institutional restraint.

In making this in this argument, I will rely on some of the considerations which underpin the 'traditional paradigm', which I provisionally characterized as formalistic in that at least in the UK, there appears to be an absolute bar to judicial intervention .On closer consideration ,this provisional analysis of the' traditional paradigm' requires some qualification Firstly, the courts in modern jurisdictions don't simply rely on bright line rules as a substitute for reasoned decision-making. They *explain* their decisions, and the reasons for the exercise of restraint-what they call 'the tradition of

curial deference'. In *New Brunswick*, for instance, The Chief Justice reasoned that the exercise of intrusive of powers of review could have negative *consequence*s for inter-branch comity, the independence of the judiciary and the autonomy of the legislature (p.359). Justice McLauchlin explains that the exercise of powers to review the decision of the Speaker would impair, the 'dignity and efficiency' of the legislature (p.383) and be 'disruptive of its internal functioning. .. quite apart from the constitutional question of what right the courts have to interfere in the internal process of another branch of government... The ruling of the assembly would not be final. The assembly would find itself caught up in legal proceedings and appeals about what is disruptive and what is not disruptive This in itself might impair the proper functioning of the chamber'(p.388). In a subsequent case before the Federal Court of Appeal, *Canada(House of Commons) v Vaid*[fn], Justice Binnie, on similarly pragmatic grounds, said that the *rulings of the Speaker* with respect to the proper limits of freedom of speech in the house, should be regarded as not being reviewable: 'These are truly matters 'internal to the house' to be resolved by its own procedures. Quite apart from the potential interference by outsiders in the direction of the house, such external intervention will inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and that cannot be unacceptable…'(para20)

The second reason for qualifying the characterization of this jurisprudence as 'formalistic 'is that the immunity that is conferred on Parliament's by the traditional paradigm, is not absolute.(p.364-5). A distinction is drawn between the *existence* of the privilege and *its exercise*. Only the latter, which involves the greatest risk of intrusive disruption into the day-to-day business of the house, and I would argue in its 'politics', is considered not to be reviewable.[fn] With regard to the former it is required that any claimed privilege by the Legislature is demonstrated to be *necessary* for its proper functioning.(p.384)

Thirdly,I would argue that in truth, the standard is in fact a *variable* one since it is dependent on the 'internal' question under consideration- an Assemblies rulemaking or punitive powers for instance,

whether the individual rights of third parties is at stake,[fn.New Brunswick] what consequences may result, from intervention and nonintervention, the extent of a punishment imposed, in the exercise of the legislature's contempt jurisdiction and so forth. Judicial intervention therefore is not precluded apriori but is exercised contextually in the light of relevant considerations.

The same argument can be made with respect to the 'political questions doctrine 'in the constitutional jurisprudence of the United States, which is often misrepresented as a blunt instrument, and equated with non-justiciability. Recall that in *Baker v Carr[fn]* Justice Brennan is considered to have laid down a test for categorical reasoning as follows:': 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 whether out an initial policy determination of a kind clearly for non-judicial discretion; all the impossibility of court undertaking independent resolution without expressing lack of the respect due coordinated 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.'[fn]

Some of these considerations may well be contextually relevant in determining the scope and intensity of the courts scrutiny of a particular decision concerning a particular kind of matter. In fact, this is exactly the kind of nuanced analysis Justice Brennan advocated in deciding that the apportionment of a state legislature was *not* a 'political question' which a court could not review: 'Our cases in this field seem invariably to show *a discriminating analysis* of the particular question posed, in terms of the history of its management by the political branches, or its susceptibility to judicial handling in the light of its nature and posture in the *specific case*, and the *possible consequences* of judicial action.'[My italics][fn] I will attempt to show in the next section of the

paper, that nothing in the text of the constitution, particularly the supremacy clause, prevents the court from engaging in such an analysis.

Delille and the Supremacy Clause{fn}

What difference does the constitutional setting and in particular, the idea of *constitutionalism* as providing a set of external constraints on 'politics 'make to the 'traditional paradigm', concerning judicial review of matters internal to a Representative body? Prior to 1994, parliamentary immunity from intrusive judicial review was ,firmly established in comparable jurisdictions, on the basis of 'principled and practical justification'(Bishop and Laboshakga,p.94) and was also part of South African law.(*Bloem v The State President,1986*) So it might have been expected that our courts would adopt a paradigm which survived the introduction of judicial review and *a Charter of Rights* in Canada. However, In the first constitutionally significant case with respect to this issue, *The Speaker of the National Assembly v Delille*, Chief Justice Mohammed, relying on the Supremacy Clause emphatically rejected the argument that section 57 of the constitution creates 'a constitutional bubble' in the form of an immunity (Bishop and Raboshakga .p 17-94) in the following terms: 'The constitution of the Republic of South Africa… Is supreme… not Parliament. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorized by the Constitution is entitled to the protection of the courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances.'(para. 14)

This bold *Marbury*-like assertion of judicial authority clearly precludes the 'traditional paradigm' in the form of a 'non-justiciability' doctrine. But does it also displace, the more flexible version I identified above, which allows a court to take account of prudential considerations in exercising its undoubted powers of review? I would argue that this is not the case for four reasons. Firstly, as *Sunstein and Vermeule* have argued the principle of constitutional supremacy, does not by itself establish that the courts have the powers of judicial review(2003. p.934) In South Africa, this result is achieved not simply through the Supremacy Clause, which as a purely textual matter does not itself

necessarily incorporate such powers, and must be read together with the application section(section 8) of the Bill of Rights and Chapter Eight on the Courts and Administrative Justice. Secondly it does not settle questions with regard to interpretive method or intensity of review. The text of the South African constitution, even read 'holistically' does not establish that all conduct internal to Parliament, as well as parliamentary rules and procedures are subject to judicial review without qualification. In particular, the text itself does not identify what normative and prudential considerations are relevant when the court reviews conduct internal to, and the rules and procedures of Parliament. S*unstein* and *Vermeule* are right to observe that 'in many domains, the question is posed whether one institution should review the acts of another, and if so, the intensity with which that review should occur. This question arises for example, in the context of constitutional challenges… In all of these areas, it is important to pay close attention to institutional variables. The costs of error and the costs of decision are crucial. It is necessary to examine dynamic effects. There is no sensible acontextual position on the question whether the view of one institution or another, should be intense or deferential, or indeed available at all.'(p.936) So I would argue on this basis that neither the Supremacy Clause, nor the text read 'holistically 'precludes consideration of the reasons for restraint which underpin the more flexible interpretation of what I have called the 'traditional paradigm', when a court reviews the rules and procedures that Parliament has adopted to regulate its internal processes of collective decision-making.

Thirdly, although' boldness' may be the right way to characterize the courts rhetoric, the court was also 'restrained' in that it confined its narrow holding to the facts, in coming to the conclusion that the National Assembly does not have the authority to suspend a member who exercised her constitutionally protected freedom of speech in these circumstances for that period'(paras 29 and 30) The court came to this conclusion on an interpretation of *the language* of sections 57 and 58, without recourse to abstract reasoning and without deciding broader questions with regard to the inapplicability of the Bill of Rights.(para32) Finally the .*De lille, decision* concerned with the National

Assembly's punitive powers, not the questions that arise with respect to the review of parliamentary rules and procedures.

So has the more flexible version of the 'traditional paradigm', as distinct from the 'non-justiciability version' been displaced by the introduction of the new constitution, the principles of constitutionalism, and the institution of judicial review? I do not think that this result follows axiomatically from the text of the constitution or from Chief Justice Mohammed's interpretation of it in the factual circumstances of the *De Lille* case.

One could therefore have expected, as Bishop and Raboshakga have suggested[fn my reading of De Lille is different from theirs] that 'with this strong historical precedent, foreign support and principled and practical justification' that the Constitutional Court would adopt a similar approach.(p.94) and to show significant deference to how Parliament chooses to regulate its processes.'(p.96) But in *Ambrosini* and *Mazibuko,* two cases of more recent vintage, which concerned the review of parliamentary rules, both the 'formalistic' and more flexible versions of the 'traditional paradigm, were discarded. The constitutional court proceeds in a rather 'hedgehog' like fashion, without much regard to what Waldron would call the 'natural' meaning of the language of specific clauses and relies instead on abstract reasoning in coming to a decision to invalidate parliamentary rules .My point is not that interpretivism or literalism, or the idea that judicial decision-making should be based on neutral principles, separating law, morality and politics, should be restored to constitutional respectability. Rather it is to point out that there is in this context a case to be made for an interpretive method that is more attentive to grammar, syntax and ordinary meaning The provisions of the constitution which required interpretation in these two cases, sections 55(1)(b) and 73(2) in *Ambrosini* , and section 55(1)(b) in *Mazibuko* are framed in specific, not abstract language, and therefore do not lend themselves easily to 'Dworkinian-like moral theorization '. This however did not discourage the Herculean disposition of our philosopher judges. Both judgements rely on a discourse of *individual rights*, in a setting, where it cannot do the same

justificatory work in explaining why majoritarian decision-making should be limited, since the vital interests of individuals in autonomy , equality and impartiality are not at stake here. And if these are not 'Kantian', but rather 'Holfededian' rights with corresponding duties, then surely clearer textual support is required, since such rights cannot be supported by the familiar moral arguments on behalf of individuals. Furthermore, the question should also be asked whether or not the court Is not unnecessarily introducing an element of rigidity into parliamentary procedure, which requires flexibility instead, since presumably such 'rights' are absolute and must always be vindicated, whatever the circumstances or competing considerations. I also question whether the courts vision of the National Assembly as an Assembly of rights bearing individuals corresponds to the reality and constitutional practice of a modern democracy based on party government and disciplined parties as collective actors. The National Assembly is in fact organized along party lines to reflect this reality. So the court's theory is at odds with the practices of the constitution.

In addition to the individual rights argument, drawn from a 'liberal paradigm', the court introduces a second 'Habermasonian' line of argument which has similarly anti-majoritarian effect. The concept of 'deliberative democracy', which is also not expressly stated in the text, is introduced as a new source of judicially enforceable norms, and therefore of judicial authority. It may be argued that the idea that the court should have a role in protecting *democracy* is not new. Both John Ely's proceduralist 'representation reinforcement' idea, and Dworkins more substantive 'partnership' conception of democracy have the aim of justifying judicial review of *legislative* executive and administrative action which violates fundamental individual rights. But In *Ambrosini* and *Mazibuko,* the idea of 'democracy as deliberative' is introduced, to justify *judicial review of parliamentary rules* which regulate collective decision-making 'inside' the National Assembly and among its members, and to reach conclusions which could not be reached via a textually disciplined interpretive methodology.[fn the court purports to base its conclusions on textual interpretation]

The court's iconoclasm may be praised as innovative. But that would require a fundamental revision of more familiar conceptions constitutionalism and judicial review. So I think that the courts theory of democracy is worth examining, in the light of the views of its critics, and the fact that the consequences of its incorporation into our constitutional law are uncertain. As *Sunstein* has observed:'… development of large-scale theories by ordinary courts is problematic… In invalidating or changing a single rule, courts may not do what they seek to do .They may produce unfortunate systemic effects , with unanticipated bad consequences that are not visible to them at the time of decision , and that may be impossible for them to correct thereafter .'(Sunstein. 1996. P.45)

So I will ask some 'hedgehog' like questions about the courts theory as well as some 'fox- like' questions about consequences, in making a case for judicial self restraint in exercising its review powers in this particular area of public and constitutional law Underpinning this argument, I suppose is a 'Burksian' intuition that there is a basic constitutional wisdom contained in the traditional paradigm, which should not be discarded. I do not think that the text of the constitution nor its values requires this outcome. I now turn to a discussion of some of salient aspects of these two cases. I will consider both questions of 'fit' [ie fidelity to text, precedent and principle], as well as the courts moral reading[ie its efforts to read text in its best possible light.]

Ambrosini v Sisulu[incomplete]

Mazibuko v Sisulu

The facts

The constitutional question in issue in this case was whether failure to reach agreement with regard to the scheduling of motions of confidence in the President was impeachable as being inconsistent with section 102(2). The protagonists in this case had failed to reach agreement on the scheduling of a motion of confidence in the President in both the Whips Forum and into Programming Committee. The Speaker of the National Assembly was the view that he had no power to schedule such a motion

for debate in the absence of such agreement. Two days before the final sitting of the year, the Leader of the Opposition of the largest minority party in the assembly, brought an urgent application in the High Court Of the Cape Province, seeking an order directing the Speaker to take the steps necessary to ensure that the motion was scheduled for debate and vote before the National Assembly on before 22 November 2012. Justice Davis complained that he had to decide a case of some constitutional importance in a very short period of time and with little assistance since the heads of argument filed by the First Respondent covered matters that were not relevant, and the Second Respondent, failed to file heads of argument. Only the Applicants had filed heads which he considered helpful. Davis J nevertheless held that there was a 'lacunae' in the rules since in their current form, the majority party could prevent the scheduling of a motion which the minority had a *constitutional entitlement* to debate. However, he also held that since a constitutional matter had been raised, he had no jurisdiction to invalidate the rules. When the matter came before the constitutional court on appeal, Justice Moseneke, for the majority, agreed with Justice Davis's reasoning and his conclusions for the most part.

Text:Section102(2)

The Court's decision in this case turned on interpretation of section 102(2) On its face, as it were, this section of the constitution is clear and specific. It simply provides that the President in the Cabinet must resign *if* the National Assembly by a simple majority of its members passes a motion of no confidence in the President. This *constitutional provision*, which renders the existence of an elected government dependent the continued support of the majority of members of the National Assembly, effectively the party of the President is merely an incident of the system of Responsible Government provided for in the Constitution. Whether such a motion is debated and passed will depend on *political events*. As Murray and Stacey point out: '..in parliamentary systems, a vote of no confidence removing the government of the day will usually occur only .if a substantial number of the governing party backbenchers fear the party's electoral prospects under the current

leader.(p.24), or if there is interparty *agreement.* Such contingencies are usually not regulated comprehensively by Constitutions, but rather by flexible rules and *practices*, which are nothing other than the settled expectations of the parties to the political contest as to how such conflicts will be regulated. Nothing *constitutionally* inappropriate, can be thought to have occurred when such a motion is not tabled or passed in parliamentary jurisdictions, since it is the constitutional function of the Assembly in such systems not only to hold the President to account, but to protect the President, and because 'politics is neither morality nor constitutional law'.(Williams 2001 p.101)'. J A.G Griffiths(1950) makes the point from what might be characterized as a' realist point of view' that there is a danger in confusing what the house does in fact and in practice with what it may be believed, it should do:'..the function of Parliament is to examine government proposals, and then to criticize or defend them. The power to criticize is usually more stressed but it must not be forgotten that there is inevitably more support of the government by members than there is opposition. Parliament is not merely a forum for criticism and exposure of government shortcomings; it is also the forum for defence, approval and congratulation of the government.'(p.1115) He continues:' The House…. performs a definite function in the constitution today; the procedure in the house should be suited to that function.'(p.1092)

The constitutional court evidently regards the practices characteristic of parliamentary systems with some disapproval and sought through a moral reading of the spartan languege of section 102(2) to create a different normative framework. It reasoned that the dispute concerning the scheduling of confidence motions relates to a 'constitutional entitlement' (para20)'that has a 'grave bearing on the soundness of our constitutional democracy'([para36), and is a' vital tool to advance our democratic hygiene.'(para43) It agreed with the High Court that moving and debating such emotions is 'manifestly a constitutional right' (para45) of individual members of the Assembly. Therefore, since the constitution 'plainly' 'envisages' Motions of Confidence in the President(para2), and the majority party under the current rules could delay the debate and vote on such emotions, there was a unconstitutional 'lacunae' in the rules. Parliament's rules could not constitutionally deny, frustrate,

unreasonably delay or postpone the exercise of the right' (para47) to table and debate such emotions. Here as always, the effect of declaring a provision, whether relating to substance or procedure, constitutionally 'fundamental' is to displace majoritarian decision-making, which is specifically envisaged in section 53 of the Constitution and which is normatively grounded the principles of political equality.

How does the court reason to reach this result? First, I suggest, it does so by reading the constitution comprehensively' in a code-like manner. What do I mean? It reads the constitution as if it anticipates every possible contingency. So the constitution 'envisages' specific procedures and rules which it is the courts responsibility exercising its powers of review to articulate, and to insulate from 'politics' in the form of 'negotiation and bargaining.' 'It would have been an easy matter', the court reasons 'for the constitution to specify that the scheduling of a motion of no confidence in the President is subject to political negotiations, lobbying, bargaining an agreement between the parties of the Assembly. It does not do so.' So a conclusion is drawn, not from what the constitution says, but from what he does not say. With respect, it would be most surprising to find in the fundamental law of any country, specification of the details of parliamentary procedure, and whether negotiation which is the humdrum of parliamentary politics, is constitutionally authorized or precluded and in what circumstances. This is because, both constitutions and parliamentary rules are, in the useful analysis of Sunstein, always 'incompletely theorized' agreements, simply because the political actors who negotiate constitutions and parliamentary rules reach agreement only by avoiding and deferring matters on which they do not agree. It is hardly surprisingly therefore that there are 'silences' in the constitutional text, and 'lacunae' in the rules.

Separation of Powers

The Constitutional Courts approach to the separation of powers, which the court has held is an implied provision of the Constitution,[fn] is also some interest, because again in suggests a certain discomfort with the parliamentary system. It explains the constitutional importance of confidence

motions by invoking the 'checks and balances 'prong of the separation of powers principle: 'The primary purpose of a motion of no confidence is to ensure that the President and the National Executive are accountable to the Assembly made up of the elected representatives. Thus a motion of no confidence plays an important role in giving effect to the checks and balances element of the separation of powers doctrine. One of the vital purposes of enshrining the doctrine of separation of powers is to limit the power of a single individual or institution and to make the branches of government accountable to one another.'(para21)

This at the first sight may seem to be a familiar usage. But it is to be doubted that the 'checks and balances formula', which certainly applies to the constitution of the United States, properly describes the relationship between the Executive and the legislature in parliamentary systems. In 1872, Bagehot wrote this: 'The efficient secret of the English constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers.'(Bagehot.1908.78-9) The South African Constitution resembles the Constitution of the United Kingdom in that it creates a constitutional structure in which the Government forms part of the National Assembly on which it depends for continued support. JA G Griffiths goes further to describe how the relationship actually works in practice, and not how it should work in ideal terms:' The Government must be sure that the policy which it is about to propose is one which will have the support of its own members. The conflict here is not one between Parliament and government; it is between different groups of the same political party as to what the policy of the party shall be. That the result of the disagreement may be made public Parliament only indicates the nature of the power of one particular group… But this is no more conflict between Parliament as a unit and the government then is that the conflict between the Government and the Opposition.(1950.p.1115-1116) This characterization of parliamentary practice, based on empirical observation describes how the process works, on 'both sides of the aisle' . So this question arises: What are the implication of the Courts adoption of constitutional theory which it is at odds with the practice of the Constitution, as well as the understandings of members of the elected branches?

I have questioned the relationship between the Courts constitutional theory and constitutional practice. I also question, whether the Courts explanation of the separation of powers in this case is consistent with its own doctrine and practice. The real separation of powers issue in this case, I would contend was not the separation between the executive and the legislature, but rather the relationship between the judiciary and the legislature, since the question was whether and to what extent parliamentary rules and procedures should be subject to judicial review. This is a question is the court says nothing about.

The Constitutional Court has adopted, a non-formalistic, flexible conception of the separation of powers, which is required by its broader transformative mandate. This conception' anticipates the necessary or unavoidable intrusion of one branch on the terrain of another.'(S v Dodo.para16) when for instance the court enforces socio-economic rights. But what is the justification here for intervention in what is obviously a core function of a co-equal branch, at least according to the theory of the separation of powers. Is it sufficient for the Court to declare a provision 'fundamental' to justify intrusion? It must surely be asked whether the Courts approach to review of parliamentary rules of procedure, invalidated not on the basis of an interpretation of the language of a specific provision but rather by recourse to an iconoclastic moral reading, is compatible with any conception of the separation of powers between the judiciary and the elected branches, however 'flexibly' the doctrine is conceived. This is why I suggest that the court has discarded both the non-justiciability and the separation of powers axes of what I call the 'traditional paradigm' of parliamentary law, though this is not required by the text or the principle of constitutional supremacy.

Deliberative Democracy

Both the High Court and the Constitutional Court invoked this concept repeatedly, without specific reference to the text of the constitution, in coming to the conclusion that section 102(2) creates an

constitutional right to debate motions of confidence within a reasonable period of time following tabling. It is a theoretical conception of democracy which is associated with the work of Habermas[Between Facts and Norms 1996] and Gutmann and Thompson (Democracy and Disagreement.1996) Reduced to its essence, this conception is critical of purely aggregative conceptions of democracy and emphasizes the role of rational discussion in altering spontaneous preferences, particularly where there is moral disagreement, thereby producing more legitimate outcomes. This is not intended as a description of actual political processes in a democracy, nor as a source of judicially enforceable norms. Indeed, Gutmann and Thompson invoke the concept to suggest that conflicts about fundamental values can be resolved inside Democratic processes, provided the conditions for deliberative rationality are satisfied, without of judicial intervention. What I think is of interest in *Ambrosini and Mazibuko*, is that the current South African Constitutional Court invokes this idealized theory of deliberation as a source of judicially enforceable norms. As far as I'm aware, this is without precedent in comparative constitutional law.

The theory, as a theory of' democracy 'has been subjected to what I consider to be a pursuasive critique by Chantal Mouffe(2000) Mouffe, who draws on Carl Schmitt and more contemporary deconstructive theory, stresses the centrality.of us/ them distinctions and therefore of politics and value pluralism. Her critique of the purely rationalistic approaches to democracy is that they 'leave aside a central element which is the crucial role played by 'passions and affects in securing allegiance to democratic values',(p.95) and by 'abstracting individuals from social and power relations, language culture and the whole set of practices that make agency possible'(p.95) elides the very 'conditions of existence of the democratic subject.(p.96) Her alternative 'agonistic' conception emphasizes the 'dimension of antagonism that the pluralism of value entails and its ineradicable character.'(p.99) Herein lies the specificity of 'the political'. The version of democratic theory on the other hand, embraced by the court displaces the political, which has implications for the way public law and constitutional law at conceptualized, as well as for the way democratic citizenship and agency conceived.

But there is narrower question I'm concerned with here in developing my critique of the Mazibuko judgement. Is the correct way for the court, as a matter of constitutional law to assume that it's role is to secure the conditions for the better, more rational argument to prevail in Parliament. In the High Court , Justice Davis assumes that that *debate in the house* on a motion of confidence, where what is at stake is the continued existence of the government, is constitutionally critical because individual members should have the opportunity to persuade each other that they have the better argument: '.. The constitution envisages that this motion should be brought, not only by the majority party but also by the minority party, which seeks to garner support for the motion from members across the floor of the house… This is the very stuff of deliberative democracy.'(para15)

But does parliamentary talk really resemble an 'ideal speech situation 'in which all participants enjoy equal communication rights, and are sincere seekers of the truth, or are they also strategic actors and representatives of their parties and constituents seeking either to defend their government or remove their opponents from their lofty throne? As Jeremy Waldron, one of the few constitutional lawyers with any interest at all in the way legislatures actually function, has observed, explaining why legislatures must have rules and orders, and why their proceedings bear a striking similarity everywhere: 'I believe these formal characteristics are related inherently to the fact that it is the task of modern legislatures to gather together large numbers of people who are not necessarily on casual 'speaking terms' with one another, and participate in legislative deliberation not as individual conversationalists but as representatives. In other words I want to explore what legislative talk has to be like in the context of the account we want to give of the relation between number, structure and diversity…'[p.70] He describes parliamentary rules and procedures as being made 'in the circumstances of politics',emphasizes the centrality and permanence of conflict and disagreement, and the importance of being able to resolve such disagreements by majoritarian voting procedures:'… Legislatures the world over are going to continue to use voting and majority decision as central features of their decision-making process, whatever the Public Choice theorists say.'(p.90)(Tribe and Dorf.1991.p.29)

<u>Moralism versus Pragmatism</u>

My critique of the Constitutional Courts moral argument in Mazibuko to justify departure from the 'traditional paradigm'[and Ambrosini… Will be included in the final version of the paper], emphasizes value pluralism and disagreement in parliamentary contexts, and suggests that practical experience is relevant to the content of constitutional law. I now want to explore, in the spirit of Legal Pragmatism[fn… Do not engage with the broader question of the implications of Philosophical

Pragmatism, and anti-foundationalism in constitutional law. See Farber and Sherry] what *consequences* may flow from the courts adoption of an idealized, moral reading of the constitution, effectively displacing majoritarian decision-making on certain issues(allocation of parliamentary time, scheduling of confidence motions) as a method of resolving disagreements in *parliamentary proceedings*. Objections to consequentialist reasoning in constitutional law where fundamental rights are concerned, cannot be invoked in this context, since as I pointed out previously, the rights vs utility question does not arise here, although the court incorporates a rights orientated rhetoric in its reasoning. Consequences, according to Judge Posner include 'the effect of a doctrine or decision on the predictability of law' on caseloads, on administrability, on the work of other branches of government(such as the legislative branch…)(p.5) Consequences can be both positive and negative. When they are positive, as for instance when it can plausibly be asserted that moral reasoning by judges enhances rights protection, 'judicial activism' should be encouraged. Conversely where they are negative, since risks and costs, outweigh small speculative benefits, as I think they are in this context, 'self restraint' will be the better judicial philosophy. It should be noticed that my argument is not we should return to formalism or literalism, since legal pragmatism like legal moralism is critical of Formalism, though I think that in some contexts, an argument can be made for rule like approaches and textual restraint on consequentialist grounds. So when judges choose between different interpretive methodologies, judges should have regard to consequences that are likely to flow from the approach to the adjudication of disputes that is adopted.

Courts and Legislatures: A Provisional Case for Judicial Self Restraint

Here I want to acknowledge the influence once more of *Sunstein and Vermeule* on my analysis(2002-2003) They emphasize the importance of incorporating considerations of relative institutional competence, as well as effects ,when choosing an of interpretive methodology. Jeff King's work in the United Kingdom on socio-economic rights adjudication, where he adopts an institutional approach to questions of the separation of powers[as an alternative to formalism], has also been an

influential source of ideas and insights potentially relevant in the context of this discussion of judicial review of parliamentary rules and procedures (2012)

It seems to me that it is a rather pronounced feature of South Africa's post apartheid legal culture, that in the upper echelons of the judiciary, and among legal academics, a rather idealized conception of judicial capability, and a correspondingly dismal view of the capacities of other lawmakers has come to prevail. This is a perspective that is not entirely without a basis.(Boraine.2014) The Constitutional Court can claim stunning successes. The abolition of the death penalty, possibly without popular approval, the rollout of antiretroviral treatment, when the political process was failing to respond to a public health crisis, and the protection of same-sex couples, against whom prejudice is deeply rooted in many societies under the equality clause, are progressive achievements which probably would not have occurred without theoretically ambitious Constitutional Court judges prepared to engage in moral reasoning. On the other hand, there appears to be widespread and justified public concern about a growing accountability deficit. This is hardly a time when those like myself who think Parliaments are vitally important in a democratic system, can take a 'sunny view'[fn. the phrase is Posner's] of their functioning. It might well be the case, that such concerns will inevitably influence constitutional reasoning, although if this is so, judges are unlikely to disclose the real reasons for intervention when they are deciding novel cases like *Mazibuko* and *Ambrosini.* But more to the point, it doesn't follow that theoretical ambition on the part of the judiciary is always appropriate, and the judicial intervention always has positive consequences and salutary outcomes. In making this provisional case for judicial modesty when exercising the courts powers of review of parliamentary rules and procedures, I focus on potentially negative costs to the reputation of the judiciary, disabling effects on the legislature, and impacts on inter-branch comity. Of course some of these negative impacts may be speculative, and require empirical investigation.

First, the judiciary. It may be doubtful that the Judiciary, as distinct from individual judges, can always work with abstract theories developed in other disciplines, like philosophy and political

science, to derive legally enforceable norms and to apply them consistently and impartially to parliamentary rules and procedures, which are outside their direct experience and expertise, and where the disputants are not ordinary litigants but political adversaries. In these circumstances, a theoretically ambitious court is more likely to incur Type One errors [ie of overbroad intervention] as opposed to Type II errors [ie nonintervention when intervention is required]

A second reason why Type One errors are likely, arises from the nature of rules. The Constitutional Court may ironically have underestimated this risk, which it does not consider in its reasoning explicitly, because it considers parliamentary rules formalistically, as if future applications, are purely a matter of deductive logic, so that future conflicts and disagreement are unlikely or easily resolvable by an application of the rule. But suppose that the meaning of rules is indeterminate and that future applications of the rule are not presupposed in the rule itself.(kennedy 2008.p142) Conflict over the application of rules in the future, particularly in the 'presence of politics 'is therefore likely, requiring further judicial intervention. So the concern that Judge Davis expressed in the High Court, that there is a' danger in South Africa… of the politicization of the judiciary, drawing the judiciary into every and all political disputes',[para 15] is a real one.

I now turn to deal with 'Thayerin' concerns about possible *disabling effects* of judicial review on legislatures. I'm not concerned with his critique of judicial review of legislation here. But I take his more general point that judicial review 'cannot save people from ruin'(Posner.p.154 Thayer), and that judicial review may have disabling effects on the capacity of the people and their representatives for moral reflection seriously.(Thayer,' The Origins and Scope of the American Doctrine'.1893:Tushnet.1999) I also want to make some more specific claims about possible disabling effects on legislatures of intrusive judicial review of parliamentary rules and procedures.

Let's go back to the question of the nature of rules The Courts reasoning in *Mazibuko s*uggests that replacing political bargaining with constitutional law will produce results more consistent with deliberative democracy. I suggested .that its ambition to replace disagreement with law is

unrealistic. The disabling effect of judicial review on the functioning of Parliament becomes clear, once we abandon formalistic conception of rules and incorporate the insights yielded by Wittgenstein's social practice conception of rules .If rules can only be said to exist when they are repeatedly followed, then parliamentary rules are the product of repetitive practice, not the other way around. It may well be for this reason that so much of parliamentary procedure everywhere is based on practice and is unwritten, full of 'gaps' and 'incompletely theorized' .And if this is so, is not the whole idea of subjecting parliamentary rule-making to external supervision not only hopelessly utopian but potentially disruptive of the way the legislature *works?*

The effects of judicial intervention are also uncertain and unpredictable. If we think about the rules as being part of a *system,* and possibly 'polycentric', can the court be certain what the effect will be of piecemeal, case-by-case intervention? What for instance will the effect be, on the authority of Important Office Bearers of the Legislature like the Speaker and the Chief Whip? What effect will the possibility of judicial intervention have on the incentives of political parties to reach agreement with respect to rules and procedures, which of course it is vital to the functioning or democratic Parliament?

Finally, I come to prudential concerns. What effect is routine intervention of the judiciary with respect the internal processes of another branch, likely to have on the relationship between them? Must courts not be careful to avoid 'going head-to-head ' with the political branches, when the vital interests of individuals and vulnerable or oppressed groups in their dignity, autonomy the and impartiality of the state is not at stake? It seems to me there is a case to be made, for prudential avoidance with a view to the long-term project of establishing and protecting the institution of judicial review of parliamentary legislation.

<u>Conclusion</u>

In this paper I have explored the question of the limits of moral reasoning in public and constitutional law in the light of value pluralism and the 'circumstances of politics'. In particular I have suggested that, it might be important for judges to consider consequences in choosing an interpretive methodology, and when deciding on intervention or nonintervention. My discussion of(Ambrosini) and Mazibuko was aimed at showing that at least when considering challenges to parliamentary rules and procedures by political adversaries, there is a case for textual, normative and institutional modesty in the light of the relative institutional capabilities of constitutional actors, and the negative consequences that could result from intervention, by one body in the rule-making powers of another. Intervention should perhaps be limited to cases where there has been a clear violation of a constitutional right or a specific constitutional provision.

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