The Struggle for the Rule of Law in South Africa

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The blight of apartheid was partly its horrendous discrimination, but also its lawlessness. South Africa was lawless in the bluntest sense, as its rulers maintained their power with the help of death squads and torturers. But it was also lawless, or at least unlawful, in a broader and more pervasive way: the rule of law did not hold in South Africa. Apartheid, as was often said, ruled *by* law, and quite elaborately so, but the law that applied to black people in South Africa was not a law of limits but of powers.

Nevertheless, perhaps because South Africa aspired to membership in the Western rule of law world, and because the legal system for whites *was* in large part a rule of law modeled on British principles, the struggle against South Africa's lawlessness was waged in part in South Africa's courts, where anti-apartheid lawyers could invoke South Africa's notional liberties to sometimes undercut its actual injustices. Apartheid was not defeated in the courts but in the world of politics, mass mobilization, military force and international sanctions – but the events in the courts were a part of this story.

Moreover, the heritage of law proved to be a path to agreement in the negotiations. South Africa's old Parliament formally voted itself out of existence and the new order into being (although the terms of its departure had been negotiated by the ANC and the other contesting parties outside Parliament's walls). The interim constitution adopted by that Parliament contained constitutional principles by which the new Constitutional Court would judge the validity of the final constitution to be written after the first democratic elections. And the various parties, perhaps somewhat to their own surprise, endorsed a substantial set of enforceable constitutional rights in the interim constitution, and expanded that set to embrace socioeconomic rights in the final document.

The overthrow of apartheid was, then, not only an abolition of many deep, discriminatory injustices but also the establishment of the rule of law in the new, post-apartheid country. The constitution says as much; its first section declares that among the founding values of the nation is "[s]upremacy of the constitution and the rule of law."[2]

But it turns out that the battle to establish the rule of law wasn't over. South African democracy is now 20 years old, and it should not surprise us that this system, like other democracies around the world, is far from perfect. Nor do I want to overstate the gravity of the challenges the nation faces; every country faces problems, and perhaps most countries' politicians seem unequal to the tasks before them. South Africa faces a huge task in righting the economic inequalities between blacks and whites left over from its past, and I cannot say what the best policy for approaching this problem may be. But South Africa now faces, in addition to profound social policy challenges, another problem: the danger that the people will not rule, because the political system meant to empower them has been sapped by corruption and arbitrariness. The result has been that today South Africa's courts find

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[2] Constitution of the Republic of South Africa [hereinafter "SA Constitution"], Act 108 of 1996, s. 1(c).

themselves increasingly called upon to preserve the rule of law without the support of the government as a whole.

In this paper I will begin, in Part I, by sketching the course of events that brought the courts – and in particular, the Constitutional Court – to this role, a role I do not think the drafters of the constitution expected, and the reaction the courts have encountered from the state. Then, in Part II, I will step back from the story to ask *why* the Constitutional Court has responded this way, a question that will require us to look not only at legal doctrine but also to a wider range of influences that may be part of the judges' thinking. Finally, in the Conclusion, I will ask what the prospects for the success of the Court's effort may be.

I. Unity and Division

The beginning:

The constitution is emphatic about its own supremacy. This is not a matter of rhetoric; establishing a constitution that could not be disregarded by Parliament, as in the Westminster model of government that South Africa took over from the British, was a central element of the transition from apartheid. So the constitution declares that:

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[3]

Moreover, the extensive Bill of Rights (Chapter 2 of the constitution), begins with the mandate that "[t]he state must respect, protect, promote and fulfill the rights in the Bill of Rights,"[4] and goes on to spell out that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."[5]

These supreme provisions are laid out in detail. The South African constitution's Bill of Rights has 33 sections, most with multiple subparts, and runs (in a pamphlet edition) 19 pages. By way of comparison, the U.S. constitution's Bill of Rights (the first 10 amendments) runs about a page and a half in one reprint.[6] The full South African constitution includes 243 sections and 133 pages – not including seven supplementary "Schedules" which cover another 49 pages. The entire U.S. constitution, including two centuries' worth of amendments, runs 17 pages in the same reprint.[7]

The constitution is also emphatic about the role of courts. It tells us that:

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[3] SA Constitution, s. 2.
[4] *Id.*, s. 7(2).
[5] *Id.*, s. 8(1).
[6] Erwin Chemerinsky, Constitutional Law – Principles and Policies 1278-79 (3rd ed. 2006). This book's pages are larger than those in the pamphlet edition of the South African constitution, but there's no doubt that South Africa's bill of rights, and its constitution as a whole, are vastly more elaborated than the provisions of the constitution of the United States.
[7] *Id.* at 1269-85.

> The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.[8]

To underline the point, the next subsection instructs that "[n]o person or organ of state may interfere with the functioning of the courts."[9] On the contrary, "[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."[10]

From the first case the Constitutional Court heard, its commitment to a vigorous interpretation of the constitution was apparent. That first case was *S v Makwanyane*, and the issue it dealt with was the constitutionality of the death penalty.[11] Many, quite possibly most, people in South Africa – white and black – believe the death penalty is a legitimate punishment, and the constitution, though it protects the right to life,[12] the right to human dignity,[13] and many other rights relevant to punishment, simply does not say that the death penalty is forbidden. The Constitutional Court unanimously held, however, that the death penalty was unconstitutional, and that decision has remained firmly the law of the land ever since. Arthur Chaskalson, the first President of the Court and later South Africa's Chief Justice, wrote for the Court that it had a duty to render decisions in the face of contrary public opinion:

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 [interim] constitution.[14]

But this decision, as impressive as it was, did not involve the Court in a confrontation with the political branches of the country. In fact, the government's counsel informed the court that the government itself considered the death penalty unconstitutional.[15] This case, then, was important not as a confrontation between the court and the politicians but rather as the forthright demonstration of the Court's intention to remove from South African law the many provisions, left over from the old order, that violated the new nation's principles. In this effort, the Court was fundamentally engaged in

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[8] SA Constitution, s. 165(2).
[9] *Id.*, s. 165(3).
[10] *Id.*, s. 165(4).
[11] S v Makwanyane and Another, 1995(3) SA 391 (CC).
[12] SA Constitution, s. 11.
[13] *Id.*, s. 10.
[14] *Makwanyane*, ¶ 88.
[15] *Id.*, ¶ 11. I perhaps should add that I assisted in the preparation of an American legal memorandum that was submitted to the Constitutional Court in support of holding the death penalty unconstitutional.

the same work as the political branches, and I think should best be seen as allied with, rather than opposed to, the executive and Parliament.

But the drafters of the constitution undoubtedly recognized that inter-branch conflicts would arise, and in fact one arose quite soon, in 1995. The case was *Executive Council of the Western Cape Legislature v. President of the Republic of South Africa*.[16] Here the issue was whether a proclamation issued by President Nelson Mandela, dealing with the process of establishing election districts in the Western Cape province, was outside his constitutional authority – and the Constitutional Court held, by a vote of 9 – 2, that it was. Mandela accepted the decision without hesitation, and in a speech a year later commemorating the Sharpeville massacre he said that "[w]e owe thanks to the Constitutional Court which has proved a true and fearless custodian of our constitutional commitments."[17] Albie Sachs, a member of the Court at the time, remembers Mandela's reaction vividly:

> It was very inconvenient because parliament was in recess then. They had to summon over 400 members of parliament to rush the matter through and he went on television and he said, "When I issued those proclamations I did so on legal advice. I now accept that that legal advice was incorrect and I as president of the country must be the first to show respect for the constitution as interpreted by the Constitutional Court." For me that moment – that day was as important as the day when we all stood in line and voted. When we voted, that was to establish that South Africa was a democracy, but when Nelson Mandela accepted the decision of our court, and did so with so much grace, that was the day when we became a constitutional democracy in which everybody would be bound by the terms of our constitution.[18]

At that moment, though the Constitutional Court had declared an action of President Mandela's unconstitutional, they were not adversaries. Really, anything else would have been quite surprising, for the Constitutional Court itself was created by the post-apartheid constitutions precisely to rework South African law. Its members included many outstanding lawyers who had worked against apartheid, as lawyers or judges, inside the country or in exile, over the previous decades. The Court was independent of the government, but the two branches shared the commitment to remaking, transforming, the country.

Both branches also shared an understanding that the constitutional transition had not been easy, and had involved hard choices. Among these, the hardest may have been the decision to authorize amnesty for the killers and torturers of the past if they confessed their

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[16] 1995 (4) SA 877 (CC).
[17] Quoted in Pierre de Vos, *Lest We Forget*, Constitutionally Speaking (Dec. 8, 2011), http://constitutionallyspeaking.co.za/lest-we-forget/.
[18] Albie Sachs, *Nelson Mandela: A Leader and a Friend* (June 4, 2013), *available at* http://www.mott.org/news/news/2013/20130815-Albie-Sachs-UM-Flint-Lecture-Video-and-Transcript (quoting from the transcript at this site).

offenses, a decision upheld by the Constitutional Court.[19] Justice Ismail Mohamed, the first black person to serve as a judge in South Africa, wrote that:

> The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations. It is an act calling for a judgment falling substantially within the domain of those entrusted with lawmaking in the era preceding and during the transition period. The results may well often be imperfect and the pursuit of the act might inherently support the message of Kant that "out of the crooked timber of humanity no straight thing was ever made".[20]

In somewhat similar – though much less dramatic – vein, the Constitutional Court read the interim constitution not to subject laws carried over from the apartheid era to the limits on delegation of legislative authority to executive Ministers that the new constitution might now embody. Justice John Didcott, a fierce opponent of apartheid even as he sat on the bench during the apartheid years, explained why the drafters might have been willing to do so, by pointing out that *all* of the laws carried over had been enacted "by a Parliament that had been elected undemocratically and was not representative of all our people…. It seems scarcely surprising … that, having swallowed the camel of illegitimate origin, those concerned saw no need to strain at the gnat of unbridled delegation."[21]

The clashes over socioeconomic rights:

But this unity did not last. The country's political unity, so amazing and wonderful at the time of the first democratic elections in 1994, was bound to fray, since fundamental issues of redistribution of wealth were at hand. Meanwhile the lures of individual wealth and power insinuated themselves into the new governing party, the African National Congress. A lucrative arms deal in 1999 generated charges of corruption which have neither been resolved nor forgotten to this day. But the first real confrontations between the Court and the government may have been around issues of redistribution, or in constitutional terms, issues of socioeconomic rights.

As is well known, South Africa's constitution contains pathbreaking guarantees of socioeconomic rights. These include rights to housing;[22] to health care, food, water and social security;[23] to education;[24] and to environmental protection.[25] There are also

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19 Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others, 1996 (4) SA 672.
20 *Id.* at ¶ 21.
21 Ynuico Ltd. v. Minister of Trade & Indus. and Others, 1996 (3) SA 989 (CC), at ¶ 7.
22 SA Constitution, s. 26.
23 *Id.*, s. 27.
24 *Id.*, s. 29.

protections for children's rights,[26] and a constitutional guarantee of land restitution for those whose land was taken during the years of white rule.[27] Most of these, however, come with a very important qualifier: that the state's duty is not to provide all of them today but to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right."[28] Exactly how demanding these guarantees would be was a matter that remained to be worked out.

The Constitutional Court's first encounter with these issues, *Soobramoney*, involved a claim by a man with chronic kidney failure to a constitutional right to dialysis, which he could not afford to pay for.[29] The Court rejected Soobramoney's claim, saying that his situation was not an emergency (under the constitution, "[n]o one may be refused emergency medical treatment")[30] and that the hospital authorities had indeed made reasonable judgments, which the court would not second-guess, in allocating their scarce resources. (The hospital provided dialysis to patients with chronic renal failure only if they were eligible for a kidney transplant, and Soobramoney, because of his other illnesses, was not.) There was little sign in this decision that the Court was disposed to set itself against the government in social policy decisionmaking. President Chaskalson wrote, in fact, that:

> These choices involved difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[31]

But in hindsight we know that the Court's conclusion rested not on an unwillingness to challenge the government but on its respect for this particular, harrowing decision.

We know this because the Court subsequently did confront the government in the field of socioeconomic rights. It did so, first, in the case of *Government of the Republic of South Africa v. Grootboom and Others*, [32] a case brought by homeless people in the Cape Town area, who had been evicted "from their informal homes situated on private land earmarked for formal low-cost housing."[33] They took shelter on a sports field, in the winter rains, living in housing made of plastic sheeting.[34] The Court concluded in this case that it was not

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[25] *Id.*, s. 24.
[26] *Id.*, s. 28.
[27] *Id.*, s. 25(7). More precisely, those whose land was taken after June 19, 1913, the date of enactment of a crucial statute shortly after South Africa became independent, are entitled to this relief.
[28] *Id.*, ss. 26(2), 27(3); there are also similar qualifiers in ss. 24(b) and 29(1)(b), and a somewhat similar provision bearing on property in s. 25(5).
[29] Soobramoney v. Minister of Health, KwaZulu-Natal, 1998 (1) SA 765 (CC).
[30] *See id.* at ¶ 21, discussing SA Constitution, s. 27(3).
[31] *Soobramoney*, at ¶ 29.
[32] 2001 (1) SA 46 (CC).
[33] *Id.* at ¶ 4.
[34] *Id.* at ¶ 11.

"reasonable" for the government to make plans for housing that made no provision for the neediest of all, such as Mrs. Grootboom.[35] Justice Zac Yacoob wrote for the Court:

> Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right.[36]

The Court declared that the constitution "requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realize the right of access to adequate housing," a program which "must include reasonable measures … to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations."[37] This was a striking declaration, but it was a declaration rather than a direct order of specified action – and indeed Mrs. Grootboom died, years later, still without permanent housing.

In the next case, however, the Court went further. This was *Minister of Health and Others v. Treatment Action Campaign and Others*,[38] in which the issue was whether the government had violated the constitutional guarantee of health care by failing to establish a national program using the drug nevirapine to prevent "mother-to-child transmission of HIV at birth."[39] This time the court not only decided the government's performance was unconstitutional but ordered the new treatment program undertaken.[40] It did so quite self-consciously, declaring that,

> Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted.[41]

Even here, however, the Court refrained from a more elaborate order,

> a structural interdict requiring the appellants [the government] to revise their policy and to submit the revised policy to the court to enable it to satisfy itself that the policy was consistent with the Constitution.[42]

Instead, it wrote:

> We do not consider … that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of

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[35] *See id.* at ¶ 52 on the national "housing development" law's lack of such provision for "people in desperate need."
[36] *Id.* at ¶ 44.
[37] *Id.* at ¶ 99 (subsections 2(a) and (b)).
[38] 2002 (5) SA 721 (CC).
[39] *Id.* at ¶ 4.
[40] *Id.* at ¶ 135 (subsection 2 declaring the unconstitutionality of the government's actions, and subsection 3 ordering government to take specified steps "without delay").
[41] *Id.* at ¶ 106.
[42] *Id.* at ¶ 129.

> this Court. There is no reason to believe that it will not do so in the present case.[43]

The government – this was during the Presidency of Thabo Mbeki, who flirted with AIDS denialism for many years – muttered about disobedience before the decision was issued, but in the end did not challenge the judgment.[44]

What is most striking about this episode, it seems to me, is that the Constitutional Court confronted a policy that unmistakably belonged solely to the post-apartheid government. Even with the government having the benefit of the discretion built into the idea of "reasonable legislative and other measures, within its available resources," the Court found the government's action unbearably unjust. In this case, in a way that was not true at all of the *Executive Council of the Western Cape Legislature* case, the Court and the state found themselves truly at odds.

Socioeconomic rights litigation has continued, and continues to place demands on government in South Africa. The Court has intervened in a number of mass eviction contexts, imposing extensive duties of problem-solving on the governments concerned.[45] But those cases, demanding as they are, may be seen as simultaneously guiding and trusting the responsible government officials – and reflect the Court's preference not to attempt to "solve" these very difficult problems on its own but instead to cause the government to engage with its people. Moreover, the Court has steered clear of reading the socioeconomic rights as specifying minimum entitlements here and now, and has continued to defer to government action that it sees as reasonably responding to the human needs in question.[46] I don't mean to suggest that socioeconomic rights litigation necessarily entails sharp confrontation between the state and the Court; but it can entail this, and on occasion has. And the Court's encounter with sheer arbitrariness in *Treatment Action Campaign*, unfortunately, was not a unique event.[47]

The universalization of the constitution:

While divisions grew between the Court and the political branches, the Court was also working out its understanding of the relationship between the Constitution and other

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43 *Id.*

44 *See* Theunis Roux, The Politics of Principle: The First South African Constitutional Court, 1995-2005 at 298-99 (2013).

45 *See, e.g.*, Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v. City of Johannesburg and Others, 2008 (3) SA 208 (CC) at ¶ 18 (holding that the constitution "obliges every municipality to engage meaningfully with people who would become homeless because it evicts them"); Port Elizabeth Municipality v. Various Occupiers, 2005 (1) SA 217 (CC) at ¶ 43 ("absent special circumstances it would not ordinarily be just and equitable [for a court] to order eviction if proper discussions, and where appropriate, mediation, have not been attempted").

46 Mazibuko and Others v. City of Johannesburg and Others, 2010 (4) SA 1 (CC) (right to water).

47 *See* Nyathi v. Member of the Executive Council for the Department of Health, Gauteng and Another, 2008 (5) SA 94 (CC) (holding unconstitutional a statute that barred execution of judgment against the state, and keeping jurisdiction over all orders not yet complied with by the state); Njongi v. Member of the Executive Council, Department of Welfare, Eastern Cape, 2008 (4) SA 237 (CC) (responding to the Eastern Cape province's "mercilessly" denying payment of disability grants).

law. The answer it evolved turned on the "doctrine of legality." This rule states that "the exercise of public power is only legitimate where lawful," and the Court made clear that the exercise of every governmental power was subject to this rule as a matter of constitutional law.[48] The Court first laid down this principle under the Interim Constitution (the first post-apartheid constitution, replaced by the present constitution, which became effective in 1997); in that document, the Court said, a principle of legality is "fundamental" and "necessarily *implicit*."[49] In the final constitution, the principle is somewhat more explicit, in section 1's declaration that the country is founded in part on the "rule of law,"[50] but it seems fair to infer that the Court was prepared to understand this principle as indeed integral to constitutional order even without the final constitution's rather imprecise reference to it.

That decision was important on two grounds. The first was that it ensured that if the President (or any other government actor) exercised a power which was not specifically subjected to regulation in the constitutional text, he or she would still be subject to the constitutional requirements of legality, embodied in statutes and common law principles. The text of the constitution directly regulates "administrative action," and guarantees everyone "the right to administrative action that is lawful, reasonable and procedurally fair."[51] But the Constitutional Court decided that "[t]he administration is that part of government which is primarily concerned with the implementation of legislation."[52] This ruling could have meant that a considerable range of government decisionmaking (for example, "develop[ing] policy" and "initiat[ing] legislation,"[53] as well as important tasks vested in the President as "head of state"[54]) would be largely unregulated by the constitution – were it not for the requirements built into the doctrine of legality. Moreover, these requirements, though not spelled out in the constitution, are potentially far-reaching. Certainly the President must not contravene explicit prohibitions laid out in statutes. But he or she must also "act in good faith and must not misconstrue the powers" he or she wields.[55] One might extend these ideas further: perhaps Presidential action, though in good faith, is simply so unreasonable that it cannot be considered in compliance with law – and then it is the job of courts to assess reasonableness.[56]

The second is that the decision cemented the primacy of the constitution and, with it, the primacy of the Constitutional Court. The constitution, the Court makes clear, is the foundation of all law. As the Court says in the case of *Pharmaceutical Manufacturers*,[57]

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[48] Fedsure Life Assurance Ltd. and Others v. Greater Johannesburg Transitional Metropolitan Council and Others, 1999 (1) SA 374 (CC), at ¶ 56.
[49] *Id.* at ¶¶ 58, 59 (emphasis added).
[50] SA Constitution, s. 1(c); *see Fedsure*, at ¶ 57.
[51] SA Constitution, s. 33(1).
[52] President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, 2001(1) SA 1 (CC) at ¶ 138 [hereinafter "SARFU"].
[53] *Id.* at ¶ 142.
[54] *Id.* at ¶144; *see* SA Constitution, s. 84(2).
[55] *SARFU*, at ¶ 148.]
[56] On the meaning of the rule of law in South African constitutional law, see generally Alistair Price, *The Evolution of the Rule of Law*, 130 S. Afr. L.J. 649 (2013).
[57] Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others, 2002 (2) SA 674 (CC).

> 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…. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.[58]

The immediate issue in *Pharmaceutical Manufacturers* was whether a claim that the President had acted beyond his lawful powers (*ultra vires*) raised a constitutional issue, which would be a matter on which the Constitutional Court could speak, or whether, as a nonconstitutional issue, it could only be ruled on by another court, the Supreme Court of Appeal. That possibility created the prospect of a judicial system at war with itself, and Chaskalson emphatically ruled it out on behalf of the Constitutional Court:

> I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[59]

In short, the Constitutional Court had armed itself with a doctrine, largely discernible only by inference from the text rather than from its explicit words, that gave it potentially incisive authority to review all governmental action.

Intervention in politics – the participatory democracy cases:

Perhaps in part because of its increasing awareness of the shortcomings of the post-apartheid government, the Court began to look closely at the processes by which the new government operates. The Court's decisions reflected its commitment to reading the constitution so as to maximize its democratic aspects – and to limit the power of the government, that is to say the parliamentary majority, to rule in disregard of public or minority party objections.[60]

The first clear step in this direction was *Doctors for Life International v. Speaker of the National Assembly and Others*,[61] in which the Constitutional Court considered whether it

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[58] *Id.* at ¶ 33.
[59] *Id.* at ¶ 44.
[60] The "engagement" cases, two of which are cited in note 45 *supra*, can also be seen as expressing this commitment to maximizing democracy. *See generally* Michael Bishop, *Vampire or prince? The listening constitution and* Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others, 2 Const. Ct. Review 313 (2009).
[61] 2006 (6) SA 416 (CC).

indeed had the power to "interfere in the processes of other branches of government," and answered that it should not exercise such a power "unless to do so is mandated by the Constitution."[62] But the Court quickly determined that the constitution "entrusts this Court with the power to ensure that Parliament fulfills its constitutional obligations."[63]

Then the Court construed section 72(1)(a) of the constitution, which requires the National Council of Provinces (one of the two houses of Parliament) to "facilitate public involvement in the legislative and other processes of the Council and its committees."[64] It might have been thought that this provision was not much more than general encouragement, with little or no enforceable content; the government, while acknowledging that the provision did have meaning, urged that "what is required is *some opportunity* to make either written or oral submissions on the legislation under consideration."[65] Justice Sandile Ngcobo on behalf of the Court, however, looked to international human rights law and found there the "idea of an evolving human right to political participation," which it said "comports with this Court's view of human rights as open to elaboration, reinterpretation and expansion."[66] Looking to the history of the anti-apartheid struggle in South Africa,[67] the Court decided that:

> [O]ur democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our parliamentary democracy.[68]

The Court concluded that while Parliament has considerable discretion in deciding how to implement these principles, it must do so in an objectively reasonable fashion – and whether it has achieved that is reviewable in court.[69]

Even as the Court asserted its power to review Parliamentary processes, to be sure, it deferred to Parliament's judgments. Thus it emphasized that it "will pay particular attention to what Parliament considers to be appropriate public involvement."[70] But it proceeded to find that Parliament itself had manifested the view, with respect to two of the pieces of legislation at issue, that public hearings needed to be held in the provinces. These public hearings, however, had by no means fully taken place, and the Court said that :

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[62] *Id.* at ¶ 37.
[63] *Id.* at ¶ 38.
[64] SA Constitution, s. 72(1)(a). As the Court explains, *Doctors for Life* at ¶ 74, "[i]dentical duties are imposed on the National Assembly [the other house of Parliament] by section 59 and on the provincial legislatures by section 118."
[65] *Id.* at ¶ 76.
[66] *Id.* at ¶ 97.
[67] *Id.* at ¶ 112.
[68] *Id.* at ¶ 116.
[69] *Id.* at ¶¶ 124, 127.
[70] *Id.* at ¶ 128.

> [O]nce the NCOP [National Council of Provinces] has decided on a particular mode of involving the public in its legislative process and has communicated its decision to do so to interested parties, it must be held to its decision unless there is sufficient explanation for failure to give effect to that decision.[71]

On that basis, the Court held the statutes invalid – though it also suspended the declaration of invalidity for 18 months "to enable Parliament to enact these statutes afresh in accordance with the provisions of the Constitution."[72]

The power to regulate Parliament's proceedings to insure that they honor the participatory nature of South African democracy is a striking one and has been used on other occasions as well.[73] The Court has also moved to regulate Parliamentary proceedings in two other important respects. First, it ruled that Parliamentary rules that it saw as preventing individual members of Parliament from introducing legislation without the consent of the majority of Parliament were unconstitutional.[74] Second, it found that Parliament's rules did not properly provide for consideration of motions for a vote of no confidence in the President, and concluded that the rules in question were also unconstitutional.[75] In each of these cases, the Court in effect said that the power of Parliament's majority – which since the end of apartheid has always been held by the African National Congress – had to be constrained in the interests of democracy.

When we think about South Africa, moreover, we need to remember that power does not reside solely in the elaborate, Western institutions that the constitution closely regulates. Many South Africans still live largely or even primarily under customary law and customary authorities such as chiefs. The constitution explicitly affirms the validity of customary institutions and rules, "subject to the constitution,"[76] but exactly what that means was left for future determination. It is striking, then, that the Court has sharply curtailed discriminatory features of customary law,[77] and has welcomed (though it has not so far mandated) the infusion of principles of equality into the selection of customary leaders.[78] In these respects,

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[71] *Id.* at ¶ 165.
[72] *Id.* at ¶ 214. The power to suspend the declaration of invalidity is provided by SA Constitution s. 172(1)(b)(ii).
[73] Matatiele Municipality and Others v. President of the Republic of South Africa and Others, 2007 (1) BCLR 47 (CC) (overturning the transfer of a municipality from one province to another due to failure to "facilitate public involvement," while suspending the declaration of invalidity for 18 months); Merafong Demarcation Forum and Others v. President of the Republic of South Africa and Others, 2008 (5) SA 171 (CC) (finding no violation of the duty to facilitate public involvement in the case of another area's transfer from one province to another).
[74] Oriana-Ambrosini v Sisulu, 2012 (6) SA 588 (CC).
[75] Mazibuko v. Sisulu, 2013 (6) SA 249 (CC).
[76] SA Constitution, ss. 31(2) (cultural rights may not be exercised "in a manner inconsistent with any provision of the Bill of Rights") 211(1) (traditional leadership recognized, "subject to the constitution"). *See also id.* ss. 15(3)(b) (family law) & 30 (language and culture).
[77] Bhe and Others v. Magistrate, Khayelitsha and Others, 2005 (1) SA 580 (CC).
[78] Shilubana v. Nwamitwa, 2009 (2) SA 66 (CC).

as in its regulation of Parliamentary processes, the Court has made clear that it believes it can and must safeguard South African democracy in all its aspects.

Scandal and its consequences:

Perhaps no single event encapsulated better the insidious impact of money on post-apartheid South African politics than the arms deal of 1999. Among those whose fates began to turn on the outcome of this scandal was Jacob Zuma himself, a senior leader of the African National Congress and now the President of South Africa. A close associate of Zuma, Schabir Shaik, was convicted of corruption and fraud in 2005, and the Constitutional Court, in affirming Shaik's conviction, observed that Shaik's counsel:

> very properly conceded in argument that, given the criminal conviction of Mr Shaik, it must be accepted for the purpose of these proceedings that Mr Shaik did pay bribes to Mr Zuma.[79]

When the Court issued that judgment, on May 29, 2008, Jacob Zuma was the President of the ANC; he would become the President of South Africa a year later, on May 9, 2009.[80] It is no small thing for a court to "accept for the purpose of these proceedings" that the leader of the country's ruling party, soon to be the country's President, took bribes.

Legal proceedings continued, as prosecutors and investigators sought to build a case against Zuma himself. One element of this case was an intensive search directed at a corporation alleged to be part of the corrupt transactions, and against two of Zuma's residences, two of his former offices, and his lawyer's offices. In due course the validity of this search made its way to the Constitutional Court, in the *Thint* case.[81] That would have been troubling enough. But worse was to come, as the chief judge of the High Court in Cape Town, Judge John Hlophe, allegedly spoke to two members of the Court to ask them to decide *Thint* in favor of Zuma. That prompted the Constitutional Court justices to file a complaint with the body responsible for judicial discipline in South Africa, the Judicial Service Commission (JSC), and generated a tangle of legal proceedings and controversy that has not yet concluded.[82]

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[79] Shaik and Others v. State, 2008 (2) SA 208 (CC), at ¶ 44.
[80] Jacob Zuma, http://en.wikipedia.org/wiki/Jacob_Zuma (accessed March 30, 2014).
[81] Thint (Pty.) Ltd. v. National Director of Public Prosecutions & Others, Zuma and Another v. National Director of Public Prosecutions & Others, 2009 (1) SA 1 (CC).
[82] The Supreme Court of Appeal, South Africa's second highest court, handed down two separate decisions finding that the proceedings of the JSC in addressing and deciding not to pursue further the Constitutional Court justices' complaint (and a counter-complaint filed by Judge Hlophe) were unlawful. Acting Chairperson: Judicial Service Commission & Others v. Premier of the Western Cape Province, 2011 (3) SA 538 (SCA); Freedom Under Law v. Acting Chairperson, Judicial Service Commission & Others, 2011 (3) SA 549 (SCA). Judge Hlophe appealed – but the only court to bring this appeal to was the Constitutional Court itself. Three members of the Court recused themselves, but the remaining 8 members, at the request of all the parties, ruled on the appeal and dismissed it. Judge President Mandlakayise John Hlophe v. Premier of the Western Cape Province; Judge President Mandlakayise John Hlophe v. Freedom Under Law and Others, 2012 (6) SA 13 (CC). The result is that proceedings still continue before the JSC.

Meanwhile, however, the challenge to the search was still pending, and the justices of the Constitutional Court still had to decide it – unless, of course, their own involvement in these events now rendered them unable to serve. Pius Langa, the Chief Justice, wrote for the Court that that was not the case:

> All the members of the Court … have considered their position in the light of the events mentioned above and their responsibilities as Judges of this Court. We are satisfied that the alleged acts that form the basis of the complaint to the JSC by Judges of this Court have had no effect or influence on the consideration by the Court of the issues in these cases and in the judgments given. It is recorded in the statement of complaint that there is no suggestion that any of the parties in these cases have had anything to do with the alleged conduct that forms the basis of the complaint by the Judges of the Court. The issues relating to the complaint have accordingly been kept strictly separate from the adjudication process in these cases. It is however important to emphasise that the cases have been considered and decided in the normal way, in accordance with the dictates of our Oath of Office and in terms of the Constitution and the law, without any fear, favour or prejudice.[83]

Having concluded that they were able to decide the case, the members of the Court did so, and ruled against Zuma.

The following month another case growing out of these ongoing scandals reached the Court, *Glenister v. President of the Republic of South Africa and Others*.[84] This was a challenge brought by a private citizen, Hugh Glenister, seeking to bar the Cabinet from initiating legislation to move the "Directorate of Special Operations (commonly known as the Scorpions)," from the National Prosecuting Authority into the South African Police Service.[85] Glenister argued that the result would be to undercut the Scorpions' effectiveness. Not coincidentally, "[s]ince its establishment in 2001, the DSO ha[d] undertaken a number of high-profile investigations, some of which have involved prominent members of the

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Meanwhile, Zuma challenged the case against him, partly on procedural grounds and partly based on the suggestion that the prosecution had been tainted by political influence (presumably ultimately attributable to President Thabo Mbeki, whom Zuma had successfully bested in an ANC power struggle). A lower court ordered the prosecution halted, but this decision was overturned by the Supreme Court of Appeal in National Director of Public Prosecutions v. Zuma, 2009 (2) SA 277 (SCA). Subsequently, however, the Acting National Director of Public Prosecutions made his own decision to end the prosecution because of this alleged political influence. That decision in turn has been challenged in the courts, and the Supreme Court of Appeal held in 2012 that the prosecutor's choice to terminate the case was subject to judicial review. Democratic Alliance and Others v. Acting National Director of Public Prosecutions and Others, 2012 (3) SA 486 (SCA). Litigation over what materials the NDPP must produce in court as the basis for the review continues. *See Editorial: The NPA grasps at its own fiction*, Business Day (Aug. 21, 2013), *available at* http://www.bdlive.co.za/opinion/editorials/2013/08/21/editorial-the-npa-grasps-at-its-own-fiction.

[83] *Id.* at ¶ 6. I discussed, and supported, this conclusion by the Court in Stephen Ellmann, *Marking the Path of the Law*, 2 Constitutional Court Review 97, 129-32 (2009).

[84] 2009 (1) SA 287 (CC) (*Glenister I*).

[85] *Id.* at ¶ 1.

African National Congress (ANC)." Among them was the investigation into Jacob Zuma that led to *Thint*; both the National Director of Public Prosecutions and the Investigating Director: Directorate of Special Operations were respondents sued in that case.

This case is notable as an instance of judicial restraint. The Court declined to intervene in Parliament's consideration of the proposed legislation, saying that it "must proceed on the basis that Parliament will observe its constitutional duties rigorously," and that if unconstitutional legislation were ultimately enacted "appropriate relief can be obtained thereafter."[86] In addition, the Court addressed an argument that the Court should do more than the Constitution as originally enacted envisaged. As the Court first described this argument, it was:

> that since the separation of powers doctrine is dynamic, it should be adapted to the prevailing conditions (in which there is a danger of "one-party domination") and accommodate institutional developments that have crucially shifted the balance of power between the branches of government. The relative marginalization of the legislature … has a disastrous impact on the ability of opposition parties to make their voices heard in policy formulation. The Court should act as a counterweight if the ruling party overreaches itself and, it contends, if the Court does not act, it is unlikely anyone else will.[87]

When the Court later addresses this argument, however, it construes it in a rather unwelcoming way. Chief Justice Langa writes, after referring again to the contention that "the Court should act because no-one else will":

> I cannot agree. The role of this Court is established in the Constitution. It may not assume powers that are not conferred upon it.[88]

The argument as originally presented did not assert that the Court should assume powers not conferred upon it – a proposition that would have to be anathema to a Court. Rather, it asserted that the powers conferred upon the Court should be understood in a flexible way in light of current circumstances – a kind of interpretation by no means alien to South African law. But the Court chose not to embrace that invitation to expand its domain.

In three subsequent cases, however, the Court made clear that it was in fact prepared to employ the law vigorously to resist governmental corruption.[89] The first was the second

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[86] *Id.* at ¶ 56.
[87] *Id.* at ¶ 22.
[88] *Id.* at ¶ 55. He adds: "Moreover, the considerations raised … do not establish that irreversible and material harm will eventuate should the Court not intervene at this stage."
[89] Another case also might be taken to reflect the Court's impatience with the government's identification of its own wishes with the national interest. In Independent Newspapers (Pty.) Ltd. v. Minister for Intelligence Services and Another, 2008 (5) SA 31 (CC), the Court addressed whether materials submitted to the Court in an earlier case (Masetlha v. President of the Republic of South Africa and Another, 2008 (1) SA 566 (CC), dealing with the firing of the Director-General of the National Intelligence Agency, Billy Masetlha, by then-President Thabo Mbeki) should now be

round of the *Glenister* case.[90] By now the statute moving the Scorpions into the South African Police Service was law,[91] and so the challenge Glenister now brought did not present the special problems of interfering with Parliament in mid-stream that his previous case had featured. In this case, although the Court was divided – holding by a 5 – 4 vote that the statute was unconstitutional – every justice appeared to agree that the constitution creates a duty to fight corruption. This consensus is quite striking, since it must be said that the constitution does not anywhere *state* that there is such a duty.

The dissenters, who joined in a judgment written by then-Chief Justice Sandile Ngcobo, maintained that the constitution did not prescribe where in the government a corruption-fighting investigative body should be located. But the dissenters did:

> recognise[] an obligation arising out of the Constitution for the government to establish effective mechanisms for battling corruption. The establishment of an anti-corruption unit is one way of meeting the obligation to protect the rights in the Bill of Rights. The Constitution is not prescriptive, however, as to the specific mechanisms through which corruption must be rooted out, and does not explicitly require the establishment of an independent anti-corruption unit.[92]

This in itself was a significant inference from section 7(2) of the Constitution, which establishes the obligation to "protect … the rights in the Bill of Rights."

Ngcobo also gave weight to section 205(2) of the Constitution, which, as he wrote:

> requires that the legislature "establish the powers and functions of the police service" in order to "enable the police service to discharge its responsibilities effectively." I accept that for the police service to effectively discharge its responsibilities under the Constitution, it must not be subject to undue influence."[93]

Ngcobo went on to note that an amicus (friend of the court) in the case had argued:

> that for an anti-corruption agency or body to be independent, it must: have the power to initiate its own investigations; allow investigators and

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available to the public as well. Though the justices differed on how much disclosure should be permitted, it's notable that the majority, which was more sympathetic to national security needs than the other members of the Court, nevertheless ruled that the Court was entitled and bound to decide what should be disclosed and what should not, and that "it would not be concerned with a statute or other law of general application as the basis for restricting the disclosure of the material," but instead should weigh all of the relevant circumstances for itself. *Id.* at ¶ 55.

[90] Glenister v. President of the Republic of South Africa and Others, 2011 (3) SA 347 (CC) (*Glenister II*).

[91] The Scorpions, the Directorate of Special Operations, were disbanded and replaced with the "Directorate of Priority Crime Investigation." *Id.* at ¶ 1.

[92] *Id.* at ¶ 84.

[93] *Id.* at ¶ 116.

> prosecutors autonomous decision-making powers in handling cases; not be subject to undue influence from any of the branches of government or any third party; and have structural and operational autonomy."[94]

Ngcobo largely agreed. "Save to point out that the second criterion must not be understood to suggest that an anti-corruption unit must be located within the NPA [where the Scorpions had been located], there is support for these broad criteria for independence."[95] In short, though Ngcobo argued at length that the newly constituted investigative body did in fact have sufficient guarantees of independence, he accepted the chain of inference that drew a constitutional obligation to combat corruption from text that did not directly declare it.

Dikgang Moseneke, the Deputy Chief Justice, and Justice Edwin Cameron wrote the majority judgment, holding the new arrangement unconstitutional (though suspending the declaration of invalidity for 18 months to allow Parliament to cure the problem).[96] They acknowledged that the constitution did not specify where an anti-corruption unit should be located,[97] as Ngcobo had argued, but they developed the argument for a constitutional duty to preserve independence with particular intensity. They were quite unmoved by the lack of explicit text:

> The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices.[98]

Moseneke and Cameron argued that the measure of the degree of independence necessary was to be found by consulting international law:

> Our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the state's conduct in fulfilling its obligations in relation to the Bill of Rights.[99]

But they also maintained that the same conclusion would have followed without reference to international law:

> [E]ven leaving to one side for a moment the Republic's international law obligations, we consider that the scheme of our Constitution points to the

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[94] *Id.* at ¶ 117.
[95] *Id.*
[96] *Id.* at ¶ 164.
[97] *Id.* at ¶ 162.
[98] *Id.* at ¶ 175.
[99] *Id.* at ¶ 178.

> cardinal need for an independent entity to combat corruption. Even without international law, these legal institutions and provisions point to a manifest conclusion. It is that, on a common sense approach, our law demands a body outside executive control to deal effectively with corruption.[100]

Even more bluntly, they observed that to allow a Ministerial Committee authority over the new investigatory body is perilous:

> The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed that those very political executives could themselves, were the circumstance to require, be the subject of anti-corruption investigations. They "oversee" an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function.[101]

This is almost to say, from the bench, that the politicians themselves are the problem.

For all justices, in short, the case was an illustration of the willingness of the judges to infer important obligations from text that is by no means clearcut – despite the court's stated commitment not to claim powers that it was not given by the Constitution. For the majority, the case was an occasion for implicit, but striking, suggestions about their perception of the roots of corruption in today's South Africa. Finally, though, the case came down to a very detailed analysis by the majority[102] – and equally detailed counterargument by the dissent[103] – about exactly how much independence the new investigative body would have. I won't recount here the details of that analysis. Rather, what is striking about it is that measuring the degree of independence is necessarily a nuanced, multi-factored assessment of complex governmental structures. This is not the stuff of classic categorical legal analysis; it is rather more the stuff of policy analysis – and the justices have undertaken to perform this sort of analysis as part of resisting the scourge of corruption.

The second case, *Democratic Alliance v. President of the Republic of South Africa*, also reached far into the operation of the government.[104] Here, the Constitutional Court

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[100] *Id.* at ¶ 200.
[101] *Id.* at ¶ 232.
[102] *Id.* at ¶¶ 208-47.
[103] *Id.* at ¶¶ 122-56.
[104] 2013 (1) SA 248 (CC). This decision upheld the judgment rendered by the Supreme Court of Appeal in Democratic Alliance v. President of the Republic of South Africa and Others, 2012 (1) SA 417 (SCA). *See also* Ramakatsa and Others v. Magashule and Others, 2013 (2) BCLR 202 (CC), in which the Constitutional Court held, by a vote of 7 – 3, that "[t]he provincial elective conference of Free State province of the African National Congress … and its decisions and resolutions [were] … unlawful and invalid." *Id.* at ¶ 133. This decision, which rested on the majority's conclusion that the pleadings established essentially undenied internal party election irregularities, was a striking intervention into the internal affairs of the ANC, all the more so because the Court heard the case on an urgent basis and issued its order on December 14, 2012, one or two days before the ANC's national conference. *See* ¶¶ 27, 121. The majority's decision also was a judgment against the ANC as an entity (since the ANC was one of the respondents in the case), and a rejection of the national

unanimously[105] rejected the appointment by President Zuma of Mr. Menzo Simelane as the National Director of Public Prosecutions. Acting Deputy Chief Justice Zac Yacoob, writing for the Court, reasons that "the Constitution by necessary implication," though not in so many words, "requires the National Director to be appropriately qualified."[106] The qualifications, stated in statute, are that the Director "must be a fit and proper person with due regard to his experience, conscientiousness and integrity."[107] Is this a subjective standard, the equivalent of telling the President to appoint someone "good," or an objective one? The Court responds that it is an objective measure, in part on the ground that "[a] construction that renders the determination of the qualification criteria to the President's subjective opinion is not in keeping with the constitutional guarantee of prosecutorial independence."[108]

But by virtue of the principle of legality, which we have already encountered, the President's appointment decision, employing this criterion, must be "rational."[109] We have already seen that the principle of legality is a potentially expansive one, and here the Court elaborates on the meaning of the rationality requirement, holding that it requires that "both the process by which the decision is made and the decision itself must be rational,"[110] in that they must be "rationally related to the achievement of the purpose for which the power is conferred."[111] Moreover, the Court notes that "a failure to take into account relevant material" might render the process, and therefore the decision, irrational as a whole.[112]

ANC's acceptance of the Free State ANC's actions, *see* ¶ 27. But in certain respects the case seems less doctrinally or jurisprudentially expansive than those I am discussing in this section of the essay. The decision rested, at least in part, on a relatively clear textual provision of the constitution, explicitly guaranteeing every citizen "the right … to participate in the activities of … a political party." SA Constitution, s. 19(1)(b). Moreover, the majority in the end chose not to order the national ANC to take any particular action. Instead, the majority observed in ¶ 125:

> We are disinclined to determine how the political party concerned should regulate its internal process in the light of the declaration made by this Court. We are satisfied that the ANC's constitution confers on the NEC [National Executive Committee] or the National Conference adequate authority to regulate its affairs in the light of the decision of this Court.

[105] One judge, Zondo, concurred in the result on slightly different grounds from the majority's.
[106] *Democratic Alliance* at ¶ 13(b).
[107] *Id.* at ¶ 13(c).
[108] *Id.* at ¶ 24.
[109] *Democratic Alliance*, at ¶ 12.
[110] *Id.* at ¶ 34.
[111] *Id.* at ¶ 36.
[112] *Id.* at ¶ 39. Samuel Issacharoff has argued that "[t]o 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." Samuel Issacharoff, *The Democratic Risk to Democratic Transitions* (Sept. 2013), New York University School of Law, Public Law & Legal Theory Research Paper Series, at 25, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324861 (forthcoming in the *Constitutional Court Review* (South Africa)). It seems to me, however, that the doctrine of "rationality" in South African constitutional law is becoming a much more supple and powerful instrument of review than the "rational relationship" test of U.S. constitutional law to which Issacharoff looks. Alistair Price

The court insists that none of this undercuts the separation of powers, citing an earlier case which had applied the rational basis test to legislative action and had observed:

> 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.[113]

This principle, the Court says, "applies equally to executive decisions."[114] There is no need to disagree with the Court's analysis in order to acknowledge, as well, that the Court is describing a separation of powers in which the other branches of government are significantly subject to judicial oversight.

All of this is interesting as a matter of doctrine, but the case is perhaps most notable for what follows: the facts. These, as set out by the Court, include page after page of transcripts of the testimony of Mr. Simelane before a Commission of Enquiry. The Commission, known as the Ginwala Commission, was asked to inquire into the fitness of an earlier National Director, Vusi Pikoli, to serve. Simelane, in turn, had himself been involved in the events surrounding Pikoli's removal from office, and the Ginwala Commission report described Simelane's conduct in the Enquiry as having "left much to be desired. His testimony was contradictory and without basis in fact or in law."[115] The Court sets out page after page of Simelane's testimony to confirm this characterization. The Court's final conclusion is less colorful than much that has preceded it:

> The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively.[116]

The third of these cases, *Justice Alliance of South Africa v. President of the Republic of South Africa*,[117] is the saddest, for it involved a senior and rightly respected jurist, Chief Justice Sandile Ngcobo. But the case is also particularly striking, because it involved the Constitutional Court ruling on an issue involving itself – the proposed extension of the

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summarizes the multiple threads of "rationality" in South African law today, and dryly comments that "[f]urther development seems likely," in Price, *supra* note 56, at .

113 *Democratic Alliance* at ¶ 43, quoting Affordable Medicines Trust and Others v. Minister of Health and Another, 2006 (3) SA 247 (CC), at ¶ 86.

114 *Democratic Alliance* at ¶ 43.

115 *Id.* at ¶ 50 (quoting Ginwala, *Report of the enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions* (Nov. 2008), http://www.info.gov.za/view/DownloadFileAction?id=03423).

116 *Id.* at ¶ 89.

117 2011 (5) SA 388 (CC).

Chief Justice's term in office for five years beyond its normal length. The constitution, by virtue of a 2001 amendment, expressly permitted Parliament to "extend[] the term of office of a Constitutional Court judge" by statute.[118] Parliament in fact had enacted a general extension, but it had also enacted a specific authorization for the Chief Justice to "continue to perform active service as Chief Justice of South Africa for a period determined by the President," until he or she reaches the age of 75.[119] Interestingly, Parliament had enacted this specific authorization at the same time that it had approved the amendment to the constitution itself.[120] Chief Justice Ngcobo's term was to expire on August 14, 2011, but President Zuma exercised his authority under this statute to ask him to continue in office for another five years.[121] Ngcobo agreed.[122] Public interest litigants invoked the procedure for "direct access" to the Constitutional Court to challenge the extension.[123]

Chief Justice Ngcobo took no part in the decision, but the other 10 members of the Court sat, and decided unanimously that the extension was unconstitutional. The Court was wholly unmoved by the suggestion that Parliament, having enacted the constitutional amendment and the statute supposedly founded on it at the same time, must have meant the amendment to authorize the statute.[124] Instead, the Court insisted on its own duty "to determine objectively the meaning of the constitutional provision irrespective of the meaing as perceived by Parliament."[125] The Court found that the constitution authorized only Parliament itself to grant extensions,[126] and moreover that even Parliament could not single out individual judges for extensions but must treat them all alike.[127]

Perhaps what is most striking about the Court's reasoning is that it is so deeply rooted in principles of judicial independence and the avoidance of the potential for interference. The Court says that "the Constitution's delegation to Parliament must be restrictively construed to realise" the protection of judicial independence.[128] For Parliament to grant the President the unfettered power to extend or not extend the Chief Justice's term, as the Court felt the statute did,

> may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive. The truth may be different, but it

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[118] SA Constitution, s. 176(1).
[119] *Justice Alliance*, at ¶ 4, quoting section 8(a) of the Judges' Remuneration and Conditions of Employment Act, Act 47 of 2001.
[120] *Id.* at ¶ 60.
[121] *Justice Alliance* at ¶¶ 6, 7.
[122] *Id.* at ¶ 9.
[123] *Id.* at ¶ 11.
[124] *Id.* at ¶ 61.
[125] *Id.*
[126] *Id.* at ¶ 69.
[127] *Id.* at ¶ 84. On this point the Court was not quite unanimous; three judges felt that in principle a distinction could be drawn between the Chief Justice and other members of the Court, but that the distinction drawn here was invalid. *Id.* at ¶ 85.
[128] *Id.* at ¶ 67.

> matters not. What matters is that the judiciary must be seen to be free from external interference.[129]

Moreover, the Court emphasizes that:

> It is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment.[130]

And even more bluntly:

> [I]t must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it…. The power of extension … must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it.[131]

The Court never accused its Chief Justice of any sort of dishonesty (nor do I), but it seems clear that this case, like the two just described, is a part of the Court's struggle against the danger of corruption. In its aftermath, Chief Justice Ngcobo revoked his acceptance of the extension and left the bench when his term expired.[132]

The state's reaction:

It should not be surprising that as Jacob Zuma became ensnared in legal difficulties, his supporters began to challenge the courts. Crowds supported him as he appeared in court.[133] Julius Malema, perhaps Zuma's most notorious supporter – and today a leading opponent – told a crowd in 2008 that "We are prepared to die for Zuma. We are prepared to take up arms and kill for Zuma."[134] Zuma escaped the corruption charges against him (and was also acquitted on a charge of rape), and became the President of the country, but his difficulties with the judiciary did not end.

In subsequent years, and perhaps particularly provoked by the *Glenister* and *Democratic Alliance* cases just discussed,[135] a number of ANC politicians spoke out against the Courts.

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[129] *Id.* at ¶ 68 (footnote omitted).
[130] *Id.* at ¶ 73.
[131] *Id.* at ¶ 75.
[132] Nickolas Bauer, *Chief Justice Sandile Ngcobo hangs up his gavel*, Mail & Guardian (July 27, 2011), http://mg.co.za/article/2011-07-27-chief-justice-sandile-ngcobo-to-step-down.
[133] Justin Pearce, *Analysis: SA's Zuma in the Dock*, BBC News (Oct. 10, 2005), http://news.bbc.co.uk/2/hi/africa/4328360.stm.
[134] *'Kill for Zuma': I can explain, says Malema*, Mail & Guardian (June 17, 2008), http://mg.co.za/article/2008-06-17-kill-for-zuma-i-can-explain-says-malema.
[135] Geoff Budlender, *People's Power and the Courts: Bram Fischer Memorial Lecture, 2011*, at 34.

George Bizos, a prominent anti-apartheid lawyer who has continued to defend human rights under the new government, has catalogued some of these remarks.[136] Perhaps the most startling was from Mr Gwede Mantashe, Secretary-General of the ANC, who Bizos reports told *The Sowetan* newspaper that:

> "The judiciary is actually consolidating opposition to government" and that "there is a great deal of hostility that comes through from the judiciary towards the Executive and Parliament," and that judges were "reversing the gains of transformation through precedents."[137]

Fueled by rhetoric of this sort, the government began proposing initiatives whose purpose seemed to many to be to challenge the direction of the courts' decisions. One of these proposals was for a commission to study the work of the Constitutional Court. Bizos observed that:

> The Cabinet's pronouncement just two weeks ago that it will appoint a body to assess the decisions of the Constitutional Court must give rise to great concern. This undefined and amorphous assessment body dangerously risks repeating our unhappy history.[138]

Another was the proposed Legal Practice Bill, which Arthur Chaskalson, the retired former President of the Constitutional Court and Chief Justice, sharply criticized in his last public speech, on November 9, 2012, as a measure "calculated to erode" the independence of the legal profession.[139] Chaskalson emphasized the power that the bill would give to the Minister of Justice and to an "Ombud":

> [They] are both appointed by the President which means that members of the executive have significant powers to control important aspects of the functioning of the legal profession. There is no reason to believe that these powers will be abused. But that is not the point. We do not know what might happen in the future. A structure is being proposed which opens the door to important aspects of the profession being controlled by the executive, and that is inconsistent with an independent legal profession.[140]

These particular threats may have eased. But the strongest weapon available to the executive in the long run is its power over the appointment of judges. Judges are appointed

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136 George Bizos, *Blame Neither the Constitution Nor the Courts* (Dec. 9, 2011).
137 *Id.*
138 *Id.*
139 Arthur Chaskalson, *The Rule of Law: The importance of independent courts and legal professions* (Nov. 9, 2012), http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=339695&sn=Detail&pid=71619.
140 *Id.*

by the President, but only after input from the Judicial Service Commission.[141] The Judicial Service Commission, in turn, is made up of 23 members, and of those the President seems to be in a strong position to choose many, perhaps a majority, on whom he or she can confidently rely.[142] When President Zuma's proposed extension of Chief Justice Ngcobo's term was invalidated by the Constitutional Court, therefore, the immediate result was that a new Chief Justice needed to be appointed. Zuma's choice, a member of the court named Mogoeng Mogoeng, was controversial, but after a bruising hearing before the Judicial Service Commission he was in due course appointed.[143] While Presidents – in the US and no doubt in South Africa – are frequently surprised by the decisions of those whom they appoint as judges, and Mogoeng may be an instance of this,[144] over time the appointment power is a profound one. I will return at the end of this essay to the question of whether the Court can succeed in its mission given the realities of political power.

II. The Roots of the Court's Approach

First, however, I want to explore the question of why the Court has undertaken this role. It is obviously a perilous one. Courts do periodically oppose politicians, but even in the United States, where the judiciary's power and prestige are long established, they are often circumspect about doing so. The Constitutional Court has challenged South Africa's political branches repeatedly, and in doing so has not hesitated to rely on interpretation that went well beyond the obvious demands of the constitutional text. What are the factors that drive the Constitutional Court's willingness to stand so determinedly in the face of the government? To answer this question, let us look at three considerations: the need for action and the judges' recognition of it; the doctrine; and the court's role in South African life.

The need, and the judges' recognition of it:

As Geoff Budlender has observed, judges read the newspapers.[145] The urgency of South Africa's situation is plain for all to see, in the economic inequality that has persisted or even deepened since the end of apartheid, in the high rates of crime and the low rates of educational success, in the endless saga of the arms deal, in the internecine politics of the ANC, in the frightening police shootings of strikers at Marikana, and in the longrunning,

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[141] More precisely, the President chooses the Chief Justice and Deputy Chief Justice after consulting with the JSC; for judges of lower courts (the Supreme Court of Appeal and the High Courts), the President must make selections from lists of nominees submitted by the JSC. SA Constitution, s. 174.
[142] SA Constitution, s. 178(1). This section lists the 23 members of the Commission, who include "the Cabinet member responsible for the administration of Justice," 6 members of the National Assembly, of whom 3 can be from the majority party, 4 delegates to the National Council of Provinces, provided 6 of the 9 provinces support them (8 of the 9 provinces are currently governed by the ANC), and 4 more people "designated by the President." Of course, other members – such as representatives of the legal profession and of law teachers – may also support the President's preferences. (When appointments are being made to a particular division of the lower courts, two additional members are added, one the Judge President of the division and the other the Premier of the province in question. *Id.* s. 178(1)(k).)
[143] I was a signer of a letter expressing concern at this prospective appointment.
[144] Niren Tolsi, *Applause for Mogoeng's judicial cadenza*, Mail & Guardian (Oct. 18, 2013), http://mg.co.za/article/2013-10-17-applause-for-mogoengs-judicial-cadenza/.
[145] Budlender, *supra* note 135, at .

almost comic scandal around the elaborate improvements at state expense to Jacob Zuma's personal residence in the village of Nkandla.[146] Across the border in Zimbabwe is an even more chilling reminder that things can go from bad to worse. I do not mean to suggest that South Africa's problems are by any means all the fault of the ANC; the task of righting the immense wrongs of apartheid was never going to be quick or easy. Moreover, I believe the ANC government *has* made a difference to the wellbeing of ordinary South Africans. But it is clear the country is in great difficulty.

Perhaps just as important, I think that the sense of partnership I've suggested judges and politicians felt in the early years of democratic South Africa has faded. Perhaps it was bound to fade, as people who had learned to trust each other deeply during the struggle years, such as Nelson Mandela and Arthur Chaskalson, passed from the scene, and as the inevitable multiplication of controversies gradually pushed the different branches of the government apart. These controversies may have multiplied especially quickly because the South African constitution's expansive provisions make so many issues, from HIV treatment to corruption, potentially the subject of litigation – and because South Africa's politics, so fully dominated by the ANC's parliamentary majority, press activists to find other routes of advocacy, from demonstrations to lawsuits.

There have also been particularly painful moments along the way that may have played a part. Deputy Chief Justice Moseneke was sharply criticized for reportedly saying, *at his 60th birthday party*, that he served the people of the nation rather than the ANC.[147] Justice Edwin Cameron, a gay man who came close to death from AIDS, chose to speak out against the government's AIDS policies when he was already a judge of the country's second-highest court.[148] And the entire Constitutional Court was embroiled in controversy by the controversy over Judge Hlophe's communications with the judges about the Zuma search case they were deciding.

It is safe to say that the members of the Court are acutely aware of the gravity of the country's problems.

The doctrine:

South Africa's constitution reaches very widely, as I've just mentioned. A constitution that protects so many rights, and that regulates government power in such detail, obviously provides many potential occasions for litigation. Moreover, it has been clear since the start of the new nation that its judges were committed to interpreting this elaborate text in a purposive manner, to give proper play to all of its guarantees, rather than in ways that might have been narrower – entirely by the plain meaning of its text, for instance, or the

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[146] Samuel Issacharoff sets events in South Africa in the context of a broader comparative understanding of democratic failures, and broadly speaking all of these events are indeed evidence of democratic failure. Issacharoff sees "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." Issacharoff, *supra* note 112, at 3.

[147] *ANC takes issue with deputy chief justice*, Mail & Guardian (Jan. 15, 2008), http://mg.co.za/article/2008-01-15-anc-takes-issue-with-deputy-chief-justice.

[148] [Kirby, 79 Australian Law Journal 795 (2005)]

original intentions of its drafters (though these are not irrelevant). I have emphasized at several points that the Constitutional Court's decisions went well beyond what the text declared, but that does not take these decisions beyond the range of legitimate constitutional reasoning – any more than the fact that *Brown v. Board of Education*[149] fitted only very uneasily with the original meaning of the U.S. Constitution's equal protection clause undercut its legitimacy. Indeed, *Brown* was a court's reaction to the world in which it found itself – in 1954, 90 years after the Civil War and the adoption of the Fourteenth Amendment. In the same way, South Africa's courts have reacted to the world in which they have found themselves. In addition, doctrine has its own momentum, as the socioeconomic rights cases show clearly; when facts cry out for judicial intervention, courts build their doctrinal stores, and as courts confront injustice in one area, they may well become quicker to recognize it in others as well.

South African law also puts pressure on the courts, and in particular the Constitutional Court, to rule on cases that come to it. This proposition might seem odd – what else do courts do but rule on the cases that come to them? But in the United States, several different longstanding doctrines often enable, and may sometimes require, the courts *not* to rule.[150] Many U.S. cases, for example, are dismissed because the would-be plaintiffs lack the personal stake we require for "standing" to litigate; in South Africa, section 38 of the Constitution explicitly grants standing to "anyone acting in the public interest."[151] Even when a litigant has standing, moreover, it does not always follow that a court will hear the litigant's case. U.S. courts sometimes decline to rule on cases that too directly involve the fundamental decisions of other branches of government, on the ground that these issues involve nonjusticiable "political questions"; South Africa seems to have no such doctrine at all, and in fact such a doctrine would be flatly inconsistent with the South African constitutional premise that all public action is subject to review.[152]

Even when a case is otherwise appropriate, a court might choose not to hear it – if it had that prerogative. The U.S. Supreme Court has almost total control over its docket, and therefore can simply decline to hear a case; indeed, the usual procedure requires that four of the nine members affirmatively vote in favor of hearing a case ("granting certiorari") for it to actually become part of the Supreme Court's docket. Though the South African Constitution does not tell the Constitutional Court it must hear every case, and indeed provides for it to employ an "interests of justice" rule in deciding whether to hear many or most of its cases,[153] the Constitution confers a number of critical responsibilities on the Court that seem hard to evade. For example, "[o]nly the Constitutional Court may … decide that Parliament or the

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[149] 378 U.S. 483 (1954).

[150] Frank Michelman has noted this contrast between South Africa and the United States.

[151] SA Constitution, s. 38(d).

[152] US courts also will not rule on cases that are "moot" – that is, cases in which there is no longer any actual controversy between the parties, even if there remains an unresolved and significant question of law potentially affecting others. South Africa has a mootness doctrine too, but the Constitutional Court has explained that there mootness "does not necessarily constitute an absolute bar to [a case's] justiciability. This Court has a discretion whether or not to consider it." Independent Electoral Commission v. Langeberg Municipality, 2001 (3) SA 925 at ¶ 9. "That discretion must be exercised according to what the interests of justice require." *Id.* ¶ 11.

[153] *Id.*, s. 167(6).

President has failed to fulfill a constitutional obligation."[154] "Constitutional obligation" is a term that has been construed narrowly, since lower courts clearly do have the authority to rule on the constitutionality of legislation and of "conduct of the President"[155] – but "[t]he Constitutional Court makes the final decision" on these matters "and *must confirm* any order of invalidity made by" lower courts "before that order has any force."[156] Moreover, while the Constitutional Court is empowered to decide "only constitutional matters, and issues connected with decisions on constitutional matters,"[157] the Court's early determination that all law is founded on the Constitution, together with the sheer breadth of the constitution's provisions, makes this limit virtually no limit at all.

Yet one must add this: legal doctrine can push towards a result, but it rarely requires one and only one conclusion. As the *Democratic Alliance* case reflects, reasonable judges – even judges who all to some extent agree on a constitutional premise, namely that the constitution does require the state to combat corruption – can come to sharply different conclusions about the proper resolution of a case. South African legal doctrine has grown to be a sharp and demanding measure of the behavior of the government, but it did not simply have to grow in this direction and even now it could move in another direction in the future.

The court's role:

I think that neither need nor doctrine quite explains the Constitutional Court's efforts. We need to consider as well the nature of the role the Court has in South Africa's life. Several components of this role stand out.

We can begin here: perhaps no Court in the world has been assigned as much responsibility for transforming the country as South Africa's Constitutional Court. Here I am not speaking about the many rights and requirements over which the Court exercises jurisdiction all the time, but rather about one of the founding moments of the new South Africa, which I mentioned in the introduction to this paper: the requirement in the first post-apartheid constitution, the Interim Constitution, that the Constitutional Court review the proposed final constitution once it was negotiated and determine whether that draft complied with a set of Constitutional Principles adopted in the Interim Constitution. In effect, the Constitutional Court was called upon to decide whether the proposed constitution was itself constitutional. The Court did just that, and in an immense judgment found that in certain respects the draft first presented to it did not comply with the Principles.[158] Parliament revised the draft, and only then did the Court approve the constitution which it

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[154] *Id.*, s. 167(4)(e).
[155] *See, e.g.*, Daniel v. President of the Republic of South Africa and Another, 2013 (11) BCLR 1241 (CC).
[156] *Id.*, s. 167(5).
[157] *Id.*, s 167(3)(b).
[158] Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC). For a unique account of the multi-day argument before the Court when the draft constitution was presented to it, see Carmel Rickard, *The Certification of the Constitution of South Africa*, in Penelope Andrews & Stephen Ellmann eds., The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law 224 (2001).

has since that time enforced.[159] And even now the Court retains, under this constitution, the authority to "decide on the constitutionality of any amendment to the Constitution."[160]

It was not an accident that the Constitutional Court was assigned this remarkable responsibility. I mentioned at the start of this essay the heritage of law in South Africa. This was a complicated heritage, because South African law under apartheid was deeply unjust. So was apartheid as a whole. But my sense is that for many South Africans law's injustice had a special flavor; it was not only wrong but *disappointing*. It was a breach of faith. South African law had enough of justice in it, and enough claim to a heritage of judicial independence and protection of rights (the rule of law as developed in Britain, where liberty slowly grew despite the absence of a written constitution), that South Africans could trace the shadows of fairness beneath the elaborate structures of apartheid. Such idealism may have been easier to entertain for whites than for blacks, since whites, even if they were outraged by apartheid's injustice, generally suffered far less from apartheid than did blacks, but there is some reason to believe that even black South Africans accorded "a measure of legitimacy" to the country's courts under apartheid.[161]

South Africans, I think, understand as well as anyone that judges are fallible and that judges' personal feelings and views affect their decisionmaking, but it is striking how often the Constitutional Court reiterates the importance of the "objective" judgment that judges must make. The *Justice Alliance* case was hardly alone in insisting on this role. Ironically, one source of this emphasis on judges' duty and capacity for objectivity may be the formalist adjudicative style of South Africa's apartheid years.[162] The achievements of anti-apartheid judges who firmly resisted seeing themselves as in any way the partners of the apartheid state – a judicial stance far removed from the "legal process" school that for a time guided much legal thinking in the United States – may also contribute to the commitment of today's judges to stand on their own as well. Indeed, Justice Cameron in the 1980s was himself a cogent critic of judges' using "inference from statute" as a guide to decisionmaking where they were not compelled to do so.[163]

Another strand of South African legal culture is important to take into account as well. Many years ago, a leading anti-apartheid legal scholar, Etienne Mureinik, articulated a vision of the future that is still recalled and quoted:

> If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a

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159 Certification of the Amended Text of the Constitution of the Republic of South Africa, 1997 (2) SA 97 (CC).
160 SA Constitution, s. 167(4)(d).
161 Stephen Ellmann, *Law and Legitimacy in South Africa*, 20 Law & Social Inquiry 407 (1995). No less an authority than Nelson Mandela, however, commented in his autobiography that he never expected justice from South Africa's courts, though he sometimes received it. Nelson Mandela, Long Walk to Freedom 260 (1995).
162 *See* Roux, *supra* note 44, at 192-201. *See also* Stephen Ellmann, In a Time of Trouble: Law and Liberty in South Africa's State of Emergency 231-44 (1992).
163 *See* Ellmann, *supra* note 162, at 50, discussing Edwin Cameron, *Legal Chauvinism, Executive-Mindedness and Justice: L. C. Steyn's Impact on South African Law*, 99 So. Afr. L.J. 38 (1982).

> culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.[164]

This is a profoundly demanding vision, and perhaps not one fully attainable. But I believe this vision has deeply engaged many of South Africa's lawyers and judges. Plainly this vision cannot accept the corrosion of the country's ideals through corruption. Equally plainly this vision cannot easily tolerate the judges' standing aside from the task of combatting that corrosion.

One further aspect of the Court's role should be noted: its own legitimacy. Just how firmly the Court stands in the estimation of the South African people may be debated; there is certainly survey research data suggesting that it by no means enjoys unhesitating adherence.[165] At the same time, until the recent years of clash between the government and the courts, the position of the judiciary in the eyes of South Africa's leaders seems to have been very strong.[166] Even now, the government does not seem disposed to challenge the judges head-on. Some of the comments defenders of the courts have singled out as disturbing actually seem, to American ears, relatively mild. The courts enjoy some considerable degree of respect – and that position gives the courts some potential to speak effectively to power, even though the ANC's political power is still immense. Moreover, this respect is likely founded on the courts' doing just that, on their being the objective voice of the law and of the culture of justification – and these sources of the courts' legitimacy themselves generate the courts' obligation to continue to act.

CONCLUSION

And so what should we expect? No one knows what the future will bring, but it is easy to trace two possible scenarios. Both have their analogues in recent U.S. history.[167] In the bleak version, political leadership grows steadily more determined to challenge the courts' power. Ultimately, if they could muster the two-thirds majority required to amend the constitution,[168] opponents could directly reduce the role of the Courts. Less dramatically, and more plausibly, over time those who want to tame the courts can seek to appoint judges to do their bidding; in the United States, we have seen repeatedly the impact a President can

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[164] Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 So. Afr. J. Hum. Rts. 31, 32 (1994).

[165] Gibson

[166] Theunis Roux incisively analyzes the politics of the ANC government's relations to the Constitutional Court in its first decade in Roux, *supra* note 44. In unpublished work, Tom Karis reviews Parliamentary reaction to Constitutional Court decisions and finds challenges to the Court's legitimacy singularly absent. [Karis]

[167] And in events elsewhere. Issacharoff invokes the struggles of the Indian and Hungarian constitutional courts and observes that "The Indian court survived and plays an important role in Indian democracy; the Hungarian Constitutional Court is, by contrast, a much weakened institution." Issacharoff, *supra* note 112, at 33.

[168] SA Constitution, s. 74.

have, long after his or her term, as a result of careful use of the power to appoint federal judges.

In the bright version, something quite different happens. Here we should think back to the case of *Cooper v. Aaron*.[169] In that case the U.S. Supreme Court confronted the intransigent resistance of Arkansas authorities to the enforcement of an order for the desegregation of schools. Here is part of the Court's response:

> However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine. Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* … that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 "to support this Constitution."[170]

It is quite possible that this eloquent and timely declaration was also overstated. Strictly speaking, judicial decisions bind only the parties to the case being decided, and they are binding only for what is necessary to the result the court reaches. Every government official is obliged to adhere to the constitution, and there is at least some role for conscientious officials to disagree with the courts' interpretations as long as those interpretations were not a holding in a case in which the officials were parties. But these points of constitutional theory were not the point. The reason for the *Cooper v. Aaron* decision was to invoke the full prestige and authority of the Supreme Court, at a time when the political branches in the United States were far from committed to uprooting segregation. The Court could not have won the battle against segregation on its own, and it took the newfound commitment of the political branches in the 1960s to enable the United States to make the imperfect progress in race relations that it has.[171] But the task of the Supreme Court was to do what it could, while it awaited – and hopefully encouraged – others to join the effort.

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[169] 358 U.S. 1 (1958).

[170] *Id.* at 17-18.

[171] As recently recounted in Michael O'Donnell, *"What the Hell's the Presidency For?"*, The Atlantic 88 (April 2014).

It is worth noting that the US Supreme Court was in many ways quite circumspect in its efforts. In 1954 *Brown v. Board of Education* declared the unconstitutionality of school segregation, but *Brown II*[172] directed the nation to remedy this wrong not at once but "with all deliberate speed." After *Brown*, meanwhile, the Supreme Court struck down segregation in many walks of life without hesitation, but it did not hold unconstitutional the various state laws barring marriage between people of different races until *Loving v. Virginia* in the late 1960s.[173] Whether there are ways the South African Constitutional Court should similarly calibrate its jurisprudence to help it stay the course as long as possible is an important question – but it must be said that even if such steps are conceivable, South African doctrine and culture leave less room for such maneuver than in the United States.

In any event, this is the task the Constitutional Court now is undertaking. It cannot prevail on its own. It can prevail – that is, it can contribute to the rise of a more principled and democratic political culture in South Africa – if South African politics shifts to support this. In the meantime, the Court must hope that its efforts are the basis for a new era rather than the vestiges of an era now departing. And we must hope the same.

[172] 349 U.S. 294 (1955).
[173] 388 U.S. 1 (1967).