

# The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?

THEUNIS ROUX

**ABSTRACT:** This article reviews the South African Constitutional Court's 2018 term. Against assessments that argue that the Court, and the judiciary in general in South Africa, have become immersed in 'lawfare', it argues that the Court's 2018 term is illustrative of an institution that is setting the constitutional parameters for democratic social transformation. Analysing twelve decisions covering a range of issues, from high-stakes questions of foreign policy to what may permissibly be said in the work place, the article finds little evidence for any of the three concerns typically associated with the lawfare critique, viz., the debilitation of democratic politics by the diversion of political struggles into the courts, the politicisation of the judiciary through loss of public confidence in its impartiality, and the abuse of the judicial process by political office bearers intent on avoiding accountability for their actions. In fact, in all three instances, the outcome is almost exactly the opposite of what the lawfare critique supposes. Rather than undermining democratic politics, the Court's decisions have been effective in reinforcing constitutional institutions established to support democracy. Instead of becoming politicised, the Court has successfully used legalist reasoning techniques and rhetorical devices to convert political questions into legal questions. And far from suffering the abuse of its processes, the Court has been able to use a range of remedial orders to sanction litigants who have lied to it or otherwise attempted to delay the onset of justice. In all these ways, the Court's approach to its mandate conforms to a progressive liberal conception of constitutional adjudication as providing the framework for, rather than displacing, democratically driven social change.

**KEYWORDS:** comparative constitutional law, judicial review, South Africa

**AUTHOR:** Professor of Law, University of New South Wales, Sydney, Australia  
Email: [t.roux@unsw.edu.au](mailto:t.roux@unsw.edu.au)

## I INTRODUCTION

The South African Constitutional Court's 2018 term traversed a vast array of issues, including family law and maintenance matters,<sup>1</sup> labour disputes and trade union turf battles,<sup>2</sup> racist speech,<sup>3</sup> the right to protest,<sup>4</sup> refugee rights,<sup>5</sup> gun control,<sup>6</sup> political party funding,<sup>7</sup> social security grants,<sup>8</sup> land and property rights,<sup>9</sup> criminal and civil procedure,<sup>10</sup> local government,<sup>11</sup> and customary law.<sup>12</sup> As one reads through the judgments, an impression of contemporary South African life begins to emerge. It is a story in part of governance failures and of social transformation goals not yet realised. But it is also a story of vibrant civil society organisations demanding that government perform better; of poor and marginalised groups finding their voice and claiming their rights; and of the dedicated work that many people in the country are doing to improve the functioning of public and private institutions.

To be sure, the picture that the cases paint is not completely representative. People do not go to court, after all, unless they, or the institutions on which they depend, are in some kind of crisis. Thus, all the occasions on which officials did their jobs properly, institutions functioned as they were expected to, and people were civil to each other, do not appear in the Court's 2018 record. In addition, constitutional litigation, in the nature of things, can address only some of the ways in which public and private power is exercised. Decisions by international actors — such as those by multinational corporations about where to invest and by President Donald Trump about what to tweet — are not represented in the cases.<sup>13</sup> Closer to home, the cases do not fully reflect the oppressive social and economic power structures to which poor, mostly black South Africans, are subject. Nevertheless, despite these omissions, the picture that the cases paint is undoubtedly more detailed than would have been the case twenty, or even

<sup>1</sup> *SS v VVS* [2018] ZACC 5, 2018 (6) BCLR 671 (CC).

<sup>2</sup> *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* [2018] ZACC 7, (2018) 39 ILJ 1213 (CC); *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa & Others* [2018] ZACC 22, 2018 (5) SA 323 (CC); *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union & Others* [2018] ZACC 24, 2018 (11) BCLR 1411 (CC).

<sup>3</sup> *Rustenburg Platinum Mine v SAEWA obo Bester & Others* [2018] ZACC 13, , 2018 (5) SA 78 (CC); *Duncanmec (Pty) Limited v Gaylard NO & Others* [2018] ZACC 29, 2018 (6) SA 335 (CC).

<sup>4</sup> *Mlungwana & Others v S & Another* [2018] ZACC 45, 2019 (1) BCLR 88 (CC).

<sup>5</sup> *Saidi & Others v Minister of Home Affairs & Others* [2018] ZACC 9, 2018 (4) SA 333 (CC); *Gavric v Refugee Status Determination Officer, Cape Town & Others* [2018] ZACC 38, 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC).

<sup>6</sup> *Minister of Safety and Security v South African Hunters and Game Conservation Association* [2018] ZACC 14; 2018 (2) SACR 164 (CC), 2018 (10) BCLR 1268 (CC).

<sup>7</sup> *My Vote Counts NPC v Minister of Justice and Correctional Services & Another* [2018] ZACC 17; 2018 (5) SA 380 (CC); *Abmed & Others v Minister of Home Affairs & Another* [2018] ZACC 39

<sup>8</sup> *South African Social Security Agency & Another v Minister of Social Development & Others* [2018] ZACC 26; 2018 (10) BCLR 1291 (CC); *Black Sash Trust v Minister of Social Development & Others (Freedom Under Law Intervening)* [2018] ZACC 36, 2018 (12) BCLR 1472 (CC) (*Black Sash Trust* 3).

<sup>9</sup> *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another* [2018] ZACC 41, 2019 (2) SA 1 (CC); *Rahube v Rahube & Others* [2018] ZACC 42, 2019 (2) SA 54 (CC).

<sup>10</sup> *Conradie v S* [2018] ZACC 12; 018 (7) BCLR 757 (CC), *Liesching & Others v S* [2018] ZACC 25, 2018 (11) BCLR 1349 (CC), *M T v S; A S B v S; September v S* [2018] ZACC 27; 2018 (2) SACR 592 (CC).

<sup>11</sup> *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board & Others* [2018] ZACC 15, 2018 (5) SA 1 (CC).

<sup>12</sup> *Sigcau & Another v Minister of Cooperative Governance and Traditional Affairs & Others* [2018] ZACC 28, 2018 (12) BCLR 1525 (CC).

<sup>13</sup> As distinct from international law, which is becoming more prominent in the Court's case law.

ten, years ago. In simple numbers, the Constitutional Court ('the Court') today decides about twice as many cases each year as it did in its first decade.<sup>14</sup> The nature of the cases has changed, too, from the rights-based challenges to old-order legislation that dominated the Court's first decade to the detailed, fact-driven inquiries into the lawfulness of executive and administrative action that occupy it today.

There are, of course, several reasons for these changes. With the expansion of the Court's jurisdiction in 2012 to non-constitutional matters,<sup>15</sup> the opportunity for appeals from the Supreme Court of Appeal (SCA) has increased. In addition, the development of the principle of legality as a broad ground for the review of exercises of executive power has given the Court a wider mandate than was perhaps originally envisaged.<sup>16</sup> But some of the Court's heavier case load, at least, has to do with an increasing turn to litigation on the part of public office bearers and the people impacted by their decisions. Whereas the Court's docket was dominated in the first decade of its institutional life by questions of collective political morality, such as the constitutionality of the death penalty, today the day-to-day workings of government are laid bare in court. Not just a thicker slice of social life, but also of specifically *political* life, is finding its way into the Court's judgments.

Is this something we should be concerned about? Is the fact that more and more everyday politics is passing through the Court a troublesome development or just the inevitable, and entirely healthy, consequence of the country's turn to constitutionalism and judicial review?

In their recent, co-authored book, Michelle le Roux and Dennis Davis sound a note of alarm.<sup>17</sup> While acknowledging the benefits of certain types of constitutional litigation, they argue that the increased rate of such litigation may have had a debilitating impact on the quality of South Africa's democracy. They are concerned, too, about the effect of all of this on the courts, and their ability to carry out their designated functions. Central to their argument is the concept of 'lawfare', which they borrow from expatriate South African anthropologists, Jean and John Comaroff. Though wonderfully protean, as we shall see, this term has a predominantly negative connotation, calling up as it does an idea of the law being *improperly* used in pursuit of political ends. In the Comaroffs' usage in particular, the judicialisation of social and economic struggles that has allegedly followed on the adoption of the Constitution of the Republic of South Africa, 1996 ('Constitution') is treated as a troubling development — as a form of 'fetishism' that distracts from the true purposes and possibilities of democratic politics.<sup>18</sup>

Neither le Roux and Davis nor the Comaroffs offer rigorous evidence in support of these concerns. Their methodology is rather to exploit the ambiguity of the term 'lawfare' to create a general sense of disquiet. Le Roux's and Davis's book, for its part, starts with a relatively clear statement of the problem, but then proceeds to a series of interesting but not obviously connected discussions of politically controversial cases. In consequence, it is not exactly clear what they are arguing. By their own admission, 'lawfare' comes in both 'good' and 'bad'

<sup>14</sup> This is not just a function of docket control because the Court does not have as much discretion over its case load as other constitutional courts.

<sup>15</sup> Section 167(3)(b)(ii) of the Constitution, as amended in 2012, gives the Court jurisdiction, in addition to constitutional matters, over any matter that raises 'an arguable point of law of general public importance'.

<sup>16</sup> See L Kohn 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' (2013) 130 *South African Law Journal* 810.

<sup>17</sup> M le Roux & D Davis *Lawfare: Judging Politics in South Africa* (2019).

<sup>18</sup> See the references in IIA below.

forms.<sup>19</sup> That being the case, their project required them to provide a conceptual framework for distinguishing between these two manifestations of the phenomenon and at least some sense of how the problems they identify might be mitigated. The Comaroffs' work is more conceptually sophisticated. The problem in this instance is that their argument is driven by a particular normative take on post-apartheid constitutionalism rather than a concern for empirically substantiating the claims they make about the Constitution's effects. We are thus left with a clear sense of the Comaroffs' distaste for what they take to be the Constitution's liberal-democratic commitments but no understanding of what should be changed if that distaste is not shared.

Against this background, the aim of this article is to bring more conceptual clarity to the debate — to use an assessment of the Court's 2018 term as an opportunity to reflect on what the lawfare concern is really about and whether South Africans indeed have grounds to be worried. I start by tracing the lineage of the term. As noted, le Roux and Davis borrow it from the Comaroffs, who first referred to 'lawfare' in a 2001 article. But the term also has other origins. Roughly contemporaneously with the Comaroffs' first usage, 'lawfare' was invoked by a US military lawyer as a label for the alleged abuse of international human rights law by America's supposed enemies. Closely allied to this, a pro-Israeli sense of the term emerged to describe the way in which international human rights law is supposedly being used to attack that country. Over the last five years, the term has morphed again, finding contemporary relevance as a label for the way that law has been used, particularly in Latin America, to neutralise legitimately elected democratic leaders.

With this understanding of the genealogy of the term in place, the second section breaks down the worry about lawfare into three specific concerns. The first is a concern about the debilitation of democratic politics that has allegedly followed the adoption of the Constitution. This concern is founded in the first instance on a leftist critique of the tendency of liberal-democratic governance systems to displace bottom-up popular rule with technocratic control. But it is also a concern that resonates with an older US civil rights literature, dating from the 1960s and 70s, about the dangers of waging political struggles through the courts. Finally, in its specifically South African manifestation, it is a concern about the way in which the Constitution allegedly diverts attention away from the broad sweep of South African history and the deep-seated sense of historical injustice and cultural alienation that black South Africans feel.

The second concern is about the effects of lawfare on the courts. In particular, the worry is that the judiciary, in the face of so much litigation about so many controversial issues, will inevitably be drawn into politics and thereby lose its reputation for independence on which its ability to constrain the abuse of political power depends. The Constitution, this concern goes, suffers from an overreach problem. In its ambitious attempt to subject all public and private power to legal constraints, it has triggered a reaction — the politicisation of the judicial process — that has undermined the achievement of that goal. While this concern has been voiced by critical left commentators, it is clearly one that connects to the traditional preoccupations of liberal constitutional theory, such as the need for a separation of powers and the role of courts as independent checks on the abuse of political power.

The third and final concern is narrower than the other two, although it picks up on aspects of both. It is a concern about the seeming ease with which corrupt officials in South Africa, often at public expense, have been able to avoid accountability for their actions by

---

<sup>19</sup> Le Roux & Davis *Lawfare* (note 17 above) 5.

delaying cases, either by taking procedural points or through endless appealing. Related to this, commentators have worried about the extent to which powerful individuals with deep pockets have been able to use not just legal proceedings, but law more generally, to achieve victories that they would not be able to achieve through ordinary democratic means. This concern thus combines aspects of the first concern about democratic debilitation with the second concern about the impact of lawfare on the judicial process. Nevertheless, it is sufficiently distinct to warrant examining separately.

While the second part of the article sets out these three concerns, the third part drills down on them to see whether they stand up to scrutiny. At a purely conceptual level, I argue, each of the concerns has certain features that suggest that it may be prone to overstatement. The problem with the first concern is that it assumes that the diversion of political disputes into courtroom battles necessarily cuts across democratic politics — that it is a question of a zero-sum game, in other words, in which as much politics as flows into the courts flows out of the democratic arena. Even without considering the Court's case law, that assumption seems questionable. There is no reason in principle why the diversion of political disputes into the court room should extinguish those disputes as a political matter. To be sure, some judicial decisions can be understood as policy interventions of sorts. But, as the US experience with abortion litigation shows, even such decisions do not represent the end of the road for democratic politics. Rather, as Gordon Silverstein has argued, constitutions that provide for judicial review invite an iterative, mutually constitutive relationship between law and politics,<sup>20</sup> so that what we get is not necessarily the death of democratic politics but a more complex and potentially richer form of democratic politics.

The second concern is also often overstated. On its own, the observation that the Constitution has drawn the courts into politics is question-begging. The real issue is whether the courts are able to maintain both their actual independence and their reputation for independence in the face of the controversial cases that they are asked to decide. While this is a highly disputed topic, many commentators would agree that a written constitution in a developed legal tradition with well-institutionalised conventions of legal reasoning has at least some capacity to restrain the influence of politics on judicial decision-making. Whether politicisation in this form occurs is thus always something that has to be investigated rather than a consequence that can simply be assumed. As to the question of perceived independence, even those who doubt law's actual constraining capacity might concede that law is a flexible enough medium to allow skilful judges to present their decisions as legally constrained. To be sure, in any reasonably complex constitutional system, there is a broadly shared sense of where the boundary between law and politics lies. But it is a boundary that judges can manipulate in various ways, either in a single case or in the general way in which they approach their mandate. Thus, once again, politicisation is not an inevitable result of the adoption of a system of judicial review but a possible consequence that has to be separately investigated in each case.

Finally, the third concern — about the use of procedural tactics and appeals to avoid accountability — assumes that the courts have no ability to prevent this kind of behaviour, i.e. that there are no mechanisms, such as punitive costs orders, that may be used to deter the abuse of the judicial process in this way. This concern also assumes that public office bearers who engage in these tactics will not pay some other price — such as a loss of credibility — that may act as just as much of a deterrent or sanction as anything that the courts do. Even if these

<sup>20</sup> G Silverstein *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (2009).

safeguards do not work, the remaining instances in which procedural rights are abused may be a price that is worth paying for the general subjugation of the exercise of political power to law.

Having analysed each of these concerns at a conceptual level, the third and fourth parts of the article turn to the Constitutional Court's 2018 term. As noted, the cases do not paint the whole picture, and thus we should be cautious about drawing firm conclusions. It could be that the Court's record is a sideshow of sorts — that however admirable its jurisprudence on paper, the Constitution is still failing South Africa. Certainly, it is not irrelevant that the cases discussed were all decided while the brute facts of unemployment, grinding poverty and physical violence continued unabated. But the point of the case analysis is not to investigate the broad effects of constitutionalism in South Africa but to examine whether the charge of 'lawfare' has any purchase. It is possible to do that by asking a series of fairly simple questions. What sorts of cases are being litigated and is there any sense in which these cases are displacing ordinary democratic politics? How convincing were the Court's justifications for its decisions and can we detect any obvious signs of political influence? And, finally, is there any evidence that the Court's processes are being abused so as to avoid accountability?

Even with this fairly simple list of questions, the task is considerable. The sheer volume of cases — fifty-two — means that it is not possible in a single article to be comprehensive. Some basis for sampling needs to be found. As explained in more detail in part III below, twelve decisions were chosen for reasons of political salience, i.e. their importance to broader policy debates and institutional processes, and in terms of the number of South Africans affected. The sampled decisions were then broken into two further sub-groups: those dealing with democratic rights and the functioning of constitutional institutions, and those dealing with issues of social transformation and historical (in)justice. The sample deliberately leaves out cases on refugee rights and minority trade union rights on the grounds that these are separately discussed in this volume.

Analysis of the sampled cases in part IV reveals very little support for the three lawfare concerns in the Court's 2018 record. Far from displacing democratic politics, many of the cases are about preserving the institutional preconditions for democratic politics. Far from being politicised, the Court was able in the cases discussed to present what it was doing as the impartial enforcement of constitutional standards. And, thirdly, while there is some evidence of the attempted abuse of the judicial process, the cases reveal that the Court has been able to devise ways of combating this problem.

If not evidence of lawfare, then, what do the cases show? The concluding part of the article argues that the cases decided in the Court's 2018 term reveal a Court that has largely remained faithful to its mission of supporting democratic politics as the main vehicle for social and economic transformation. What has changed from the first ten years of its operation is that the Court has become much more concerned with upholding the integrity of the democratic system. Whereas in the first decade of its existence, it was inclined to treat the political branches as a partner in the realisation of the constitutional project, the Court is now actively engaged in protecting the democratic system against subversion. The nature of its judgments has also been changing, from the fairly legalist approach that the Court took in the first decade of its existence to a more direct reliance on commonsense ethical standards. In the face of a poorly performing and deeply corrupt governing party that the electorate has, for complex reasons, declined to vote out of office, the Court has given voice to the moral outrage that many South Africans feel.

## II ORIGINS AND MEANING OF THE TERM 'LAWFARE'

The term 'lawfare' first appeared in the Comaroffs' work in 2001, in an introduction to a symposium on 'colonialism, culture and the law'.<sup>21</sup> Pivoting off Martin Chanock's observation about law being the 'cutting edge of colonialism',<sup>22</sup> they cite a nineteenth-century historical source describing the Setswana practice of referring to the 'appurtenances' of English colonial law as a 'mode of warfare'.<sup>23</sup> This sets up their initial definition of 'lawfare' as 'the effort to conquer and control indigenous peoples by the coercive use of legal means'.<sup>24</sup>

In this first usage, then, the term resonates with a long literature on the abuse of law, and the ideology of legalism in particular, during the colonial era.<sup>25</sup> As is all too familiar to South Africans, the rule of law has a dark side.<sup>26</sup> The principle of law's separation from politics that undergirds this idea in liberal constitutional theory was distorted under colonial rule to justify the division of society into two spheres, one in which law indeed rules and the other in which colonised peoples are made the objects of law's repressive commands. The Comaroffs' use of the term 'lawfare' to describe this phenomenon does not add much to the existing literature, but it does emphasise the violence of colonial law in a way that more benign terms like 'rule by law' fail to do. As such, it is a useful addition to our vocabulary.

Around the same time as the Comaroffs were composing their symposium introduction, the term 'lawfare' was independently introduced to a very different audience by Major General Charles Dunlap,<sup>27</sup> then a deputy judge advocate general in the legal arm of the US Air Force. In a 2001 Harvard University working paper, Dunlap referred to the way that political lobby groups were allegedly using international human rights law to obstruct US foreign policy. 'Lawfare', Dunlap wrote:

describes a method of warfare where law is used as a means of realizing a military objective ... There are many dimensions to lawfare, but the one [increasingly] embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather [than] seeking battlefield victories, per se, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions.<sup>28</sup>

The Comaroffs and Major General Dunlap, one suspects, could not be further apart on the ideological spectrum. And yet there is a common element in their respective definitions of 'lawfare'. In both instances, what is being alluded to is the way that the rule of law's positive,

<sup>21</sup> JL Comaroff 'Colonialism, Culture and the Law: A Foreword' (2001) 26 *Law & Social Inquiry* 305.

<sup>22</sup> *Ibid* at 305, citing M Chanock *Law, Custom, and Social Order: The Colonial Experience Malawi and Zambia* (1985) 4.

<sup>23</sup> *Ibid* at 306.

<sup>24</sup> *Ibid*.

<sup>25</sup> For example, M Chanock *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (2001); J Meierhenrich *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (2008) (using Ernst Fraenkel's idea of the 'dual state' to analyse the bifurcation of the South African legal order before 1994).

<sup>26</sup> M Krygier 'The Rule of Law: An Abuser's Guide' in Andras Sajó (ed) *Abuse: The Dark Side of Fundamental Rights* (2006) 129.

<sup>27</sup> L Nadya Sadat & J Geng 'On Legal Subterfuge and the So-Called "Lawfare" Debate' (2010) 43 *Case Western Reserve Journal of International Law* 153.

<sup>28</sup> CJ Dunlap Jr. 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001) 11. Quoted in Sadat & Geng (note 27 above) at 157.

power-restraining overtones can sanitise and mask a more instrumentalist, abusive use of law for political purposes.

Following Dunlap's intervention, 'lawfare' was taken up by pro-Israeli lobby groups to refer to the way that Palestinian sympathisers allegedly use international human rights law to undermine Israel's national security interests and the rights of Jews in the diaspora more generally.<sup>29</sup> If you Google 'lawfare', one of the top hits is thus 'The Lawfare Project', a site that solicits donations to assist Jews across the world in combating this alleged practice.<sup>30</sup> I say 'alleged' because there is considerable doubt about whether the practice actually exists or, if it does, whether it should be interpreted in the way that the pro-Israeli lobby does. Former Constitutional Court Justice, Richard Goldstone's UN Fact Finding Mission report on the December 2008 Israeli incursion into Gaza, for example, quickly became exhibit no. 1 in this particular use of the term.<sup>31</sup> Whether or not you agree with the findings and recommendations in Goldstone's report, there can be no question that it was a sincere attempt to apply international law in a complex setting.

Lawfare, this episode shows, is a highly manipulable term that can be used to refer to very different phenomena, by commentators on opposite sides of the ideological spectrum, and with varying degrees of plausibility. In recent years, the term has been adapted again, this time to describe the use of law, particularly in Latin America, to sideline legitimately elected democratic leaders. The paradigmatic example of this is the way in which former Brazilian President, Luiz Inácio Lula da Silva, was sentenced to prison on allegedly trumped up corruption charges, thus preventing him from running in the 2018 Brazilian presidential elections. The legal backdrop to this incident seems to have been behind the decision on the part of a group of São Paulo attorneys to establish the Lawfare Institute — a left-leaning research and public advocacy group that is in many ways the Lawfare Project's polar opposite.<sup>32</sup>

The Comaroffs themselves have extended their use of the term 'lawfare' to add new layers of meaning. In a 2004 article, they argued that '[t]he faith in the capacity of [the 1996 South African Constitution] to resolve social problems by appeal to legalities verges on fetishism: The Constitutional Court is presented with an extraordinarily broad range of issues on which to adjudicate'.<sup>33</sup> While 'lawfare' does not feature in this particular passage, the Comaroffs go on in this piece to draw an explicit parallel between the colonial abuse of law and the use of 'the culture of constitutionalism and the language of law'<sup>34</sup> in the post-colonial state. Referring to their 2001 definition of 'lawfare',<sup>35</sup> the Comaroffs argue that '[it] seems overdetermined ... that, with the passage into postcoloniality, this same culture, this language, should come of age as the argot of authority, the source of civility, the guarantor of unity amidst difference — and

---

<sup>29</sup> Sadat & Geng (note 27 above).

<sup>30</sup> Available at [www.thelawfareproject.org](http://www.thelawfareproject.org). See also [www.en.wikipedia.org/wiki/Lawfare\\_Project](http://www.en.wikipedia.org/wiki/Lawfare_Project).

<sup>31</sup> Human Rights Council *Human Rights In Palestine And Other Occupied Arab Territories: Report Of The United Nations Fact Finding Mission On The Gaza Conflict* (2009), available at [https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48\\_ADVANCE1.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48_ADVANCE1.pdf).

<sup>32</sup> Available at <http://lawfareinstitute.com/> (John Comaroff is one of ten members of the Lawfare Institute's consulting board).

<sup>33</sup> J Comaroff & J Comaroff 'Policing, Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa' (2004) 29 *Law & Social Inquiry* 513, 521.

<sup>34</sup> *Ibid* at 540.

<sup>35</sup> *Ibid* (defining lawfare as 'the deployment of legalities to do violence to people and their property by indirect means').

should also be invoked by those who would perpetrate their own kind of cultural justice'.<sup>36</sup> The central idea here is that the colonial state's use of law in the suppression of indigenous peoples' cultural difference provides the model for, and evinces certain historical continuities with, the post-colony's suppression of cultural difference in the name of a modern nation state based on allegedly universal principles of human rights and the rule of law.

Two years later, the Comaroffs gave fuller expression to this idea in the introduction to their edited volume on *Law and Disorder in the Postcolony*.<sup>37</sup> The main argument of this piece is that modern liberal-democratic states, and especially those in formerly colonised parts of the world, are caught in a contradiction between their espousal of universalist notions of human rights, democracy and the rule of law and their need to foster culturally diverse ways of being. In a section on 'the fetishism of the law: sovereignty, violence, lawfare and the displacement of politics',<sup>38</sup> the Comaroffs repeat their observation about 'the almost salvific belief in [the] capacity [of national constitutions] to conjure up equitable, just, ethically founded, pacific polities'.<sup>39</sup> They then go on to document the various ways in which the advent of liberal constitutionalism in the post-colony drives law to the centre of social and political life. Documenting the 'explosion of law-oriented nongovernmental organisations in the postcolonial world',<sup>40</sup> they argue that 'nongovernmental organisations of this sort are now commonly regarded as the civilizing missions of the twenty-first century' and that they are 'asserting their presence over ever wider horizons, encouraging citizens to deal with their problems by legal means'.<sup>41</sup> This point is then used as the segue to a comment on the rising rate of litigation in South Africa and the fact that 'conflict among the African National Congress elect' is increasingly being fought out in the courts rather than through 'more conventional political means'.<sup>42</sup> The same is true of other forms of social conflict, they note:

Conflicts once joined in parliaments, by means of street protests, mass demonstrations, and media campaigns, through labor strikes, boycotts, blockades, and other instruments of assertion, tend more and more – if not only, or in just the same way everywhere – to find their way to the judiciary. Class struggles seem to have metamorphosed into class actions.<sup>43</sup>

At this point, then, the transition of 'lawfare' from a term used to describe the abuse of law and the ideology of legalism by colonial regimes to a term used to describe the questionable benefits of the increasing centrality of law in post-colonial states is complete.

On one level, this extended understanding of the term involves a purely descriptive, and not terribly novel, claim. The Comaroffs are not the first and certainly will not be the last scholars to take note of the way that liberal constitutions, and especially those that provide for judicial

<sup>36</sup> Ibid.

<sup>37</sup> JL Comaroff & J Comaroff 'Law and Disorder in the Postcolony: An Introduction' in J Comaroff & JL Comaroff (eds) *Law and Disorder in the Postcolony* (2006) 1, 22ff.

<sup>38</sup> Ibid at 22.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid at 25

<sup>41</sup> Ibid.

<sup>42</sup> Ibid at 26.

<sup>43</sup> Ibid at 27.

review, tend to judicialise politics.<sup>44</sup> What the Comaroffs add to the vast literature on this topic, however, is an observation about the moral desirability of this tendency in the post-colonial African state, and South Africa in particular. By using the term ‘lawfare’ to describe both the abuse of law by colonial regimes and the proliferation of litigation in post-apartheid South Africa, they suggest a certain elective affinity, if not actual causal relationship, between these two phenomena. While their argument is not explicitly spelled out, the connection seems to be that both the colonial and post-colonial states are founded on the liberal rule of law’s capacity to mask the violence that is done to indigenous peoples in the name of supposedly universal, civilised standards of good governance. Understood in this way, their argument takes on a normative inflection. It is not just a description, but also a critique of the effects of liberal constitutionalism in South Africa.

I will have more to say about the Comaroffs’ claims in part III. For the moment, simply note that their critical account of the Constitution’s political and cultural effects is just one of severable possible interpretations. While there are undoubtedly complex continuities between the way law was used in the colonial state and its operation in the post-colonial state,<sup>45</sup> there are other ways of seeing this connection. On the liberal view, at least, the Constitution retrieves and vindicates, not the repressive, violent and deeply hypocritical way that the apartheid government used law, but the nobler vision of law as a constraint on politics that survived the National Party’s depredations. The point was precisely to redeem the unfulfilled promise of the liberal rule of law by creating a state that would extend the same rights as had been enjoyed by the settler population to the black majority. To be sure, this enterprise is fraught with difficulty, not least the task of accommodating African cultural values within a constitutional system that is based, at least to some extent, on European enlightenment ideas. But the suggestion that this amounts to the ‘perpetrat[ion]’ of a culturally chauvinistic, Western conception of ‘justice’<sup>46</sup> appears to stem from an ingrained distaste for the Constitution’s liberal commitments (such as they are) rather than a dispassionate assessment of its actual effects.

This is not to deny that tremendous reliance was indeed placed on law by those who designed the Constitution. The constitution-making process was undoubtedly an aspirational moment when a new society was re-imagined and expressed in legal form. If there was an unjustified *faith* placed in law at this time, however, it was by the proponents of ‘transformative constitutionalism’, who called on judges, academics and practising lawyers to treat the Constitution as an ‘ideological project’ of ‘post-liberal’ social and economic transformation.<sup>47</sup> Liberal commentators were generally more circumspect about the role of the Constitution as an *instrument* of social change in that sense, seeing it rather as a *framework* for democratic politics. In Etienne Mureinik’s influential metaphor, for example, the 1993 — and by extension, the 1996 — Constitution was a bridge from a ‘culture of authority’ to a ‘culture of

---

<sup>44</sup> For example, T Moustafa ‘Law Versus the State: The Judicialization of Politics in Egypt’ (2003) 28 *Law & Social Inquiry* 883; T Ginsburg ‘The Constitutional Court and the Judicialization of Korean Politics’ in A Harding & P Nicholson (eds) *New Courts in Asia* (2009) 113; JA Couso ‘The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America’ in JA Couso, A Huneeus & R Sieder (eds) *Cultures of Legality: Judicialization and Political Activism in Latin America* (2010) 141.

<sup>45</sup> The most detailed treatment of this topic is Meierhenrich (note 25 above).

<sup>46</sup> Comaroff & Comaroff (note 33 above) 540.

<sup>47</sup> KE Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 12 *South African Journal on Human Rights* 146.

justification'.<sup>48</sup> That understanding of the Constitution's one-stage-removed role in social and economic transformation is also apparent in the Court's early judgments, in which it treated the African National Congress (ANC) government as the primary agent of this process.<sup>49</sup> In more recent years, to be sure, the Court has lost confidence in the ANC's capacity to drive the constitutionally imagined transformation of South African society. Unlike the Indian Supreme Court in the 1980s, however, it has not taken over this role itself. Rather, it has focused its attention on shoring up the constitutional institutions that make genuinely transformative democratic politics possible.

There are thus reasons to doubt that the Comaroffs' account of the Constitution's political and cultural effects would withstand sustained scrutiny. Nevertheless, their account has not been short of popularisers. In their 2008 book, *Precedent and Possibility*,<sup>50</sup> Dennis Davis and Michelle le Roux drew on the Comaroffs' work to comment on various aspects of contemporary South African constitutionalism. In 2019, they extended their argument in a revised edition of this book under a different title, with the concept of 'lawfare' now taking centre stage.<sup>51</sup>

The introduction to the 2019 edition acknowledges the concept's ambiguity. 'Lawfare', le Roux and Davis write, 'should be understood as having a duality to it; it can be a good or a bad thing'.<sup>52</sup> Some of le Roux and Davis's examples of this phenomenon, such as their reference to Hugh Glenister's 'tireless efforts' in the Hawks matter, are thus clearly positive.<sup>53</sup> Elsewhere, 'lawfare' is used to describe actions and social phenomena of which le Roux and Davis clearly disapprove, such as former President Jacob Zuma's various attempts to use procedural devices to delay his prosecution on charges of corruption,<sup>54</sup> and the various respects in which South Africa's courts have allegedly 'become the site of pure political contestation because politicians seek to usurp judicial powers to achieve their objectives'.<sup>55</sup>

While their acknowledgment that 'lawfare' is an ambiguous term is welcome, le Roux and Davis do not offer us a normative theoretical framework for distinguishing between 'good' and 'bad' instances of the phenomenon. They also do not provide an in-depth analysis of whether there is anything that the courts or anyone else could do to mitigate lawfare's harmful effects. In the absence of that, their book has very little to teach us. Constitutional systems that provide for judicial review require courts to decide politically controversial matters. The whole point of adopting such a system is to subject the exercise of political power to constitutional standards. Inevitably, that means that political disputes that previously would have been resolved by other means come to the courts. That this has been the consequence of the adoption of the Constitution is so unremarkable as to be almost not worth saying. The real question is what effects this is having on democratic politics, the legal system and ultimately the lives of ordinary

<sup>48</sup> E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

<sup>49</sup> In *Government of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), for example, the Court famously left it to the legislature to fill the gap in South Africa's housing policy that this case identified.

<sup>50</sup> D Davis & M le Roux *Precedent and Possibility: The (Ab)use of Law in South Africa* (2008) 185-186.

<sup>51</sup> Le Roux & Davis *Lawfare* (note 17 above).

<sup>52</sup> *Ibid* at 5. While the Comaroffs' usage of the term is more consistently pejorative, both in their original 2001 article and in their later pieces, they do acknowledge the term's two-sidedness. See, for example, John Comaroff's explanation of the term 'lawfare' in a Youtube video (<https://www.youtube.com/watch?v=skCRotOT1Lg>).

<sup>53</sup> Le Roux & Davis *Lawfare* (note 17 above) at 8.

<sup>54</sup> *Ibid* at 7.

<sup>55</sup> *Ibid* at 5.

South Africans. Thinking through this question requires sustained attention, a knowledge of the local and comparative literature, and some openness to empirical contradiction. None of those qualities is on display in le Roux and Davis's book, which seems to have been written for a popular audience.<sup>56</sup>

Ordinarily this would not matter. But the success of le Roux and Davis in popularising the Comaroffs' use of the term 'lawfare' means that it has entered public debate. Opinion pieces and media talk shows in South Africa are now awash with references to the term as though its meaning were clear and its descriptive accuracy uncontroversial.<sup>57</sup> Worse than this, the term is being used in a way that plays into the hands of those who stand to benefit from a general perception that the judicial process has become politicised. It is therefore vitally important that this line of criticism be conceptually clarified and its specific claims tested.

Leaving aside its positive use as a term to describe instances where tenacious litigants use the Constitution to hold political actors to account (as in the Glenister/Hawks example), there seem to be at least three different phenomena that 'lawfare' describes, each of which is associated with a separate concern.

The first is a concern about *the debilitation of democratic politics*. This is the sense of the term associated with the Comaroffs' critique of South Africans' misplaced faith in the Constitution as the solution for all of the country's problems. The essential idea here is that the Constitution works a diversionary effect — in promising to subject the abuse of political power to law it causes everyone to forget about other ways in which power may be contested and democratic struggles waged. Making matters worse, politics is channelled into an institution, the Constitutional Court, that cannot resolve the issues it is being asked to resolve. Thus, not only is democratic politics debilitated, but social conflicts continue unabated. Understood in this way, this concern connects to an older US civil rights literature about the perils of waging important political battles through the courts. It also resonates with an incipient critical South African literature about the way in which the Constitution has allegedly removed vital issues from democratic politics — sanitising and depoliticising them in ways that benefit the white minority and the continuation of neo-apartheid.

The second concern is the more familiar worry about the effect of the Constitution on the perceived independence of the judiciary. With so many politically controversial cases being decided by the courts, this concern goes, judges will inevitably be drawn into the political disputes that they are being asked to decide. While they might succeed in maintaining their independence as an objective matter, the fact that they are deciding so many politically controversial cases will likely make it difficult for them to maintain their reputation for independence as a matter of public perception. This, in turn, is likely to have knock-on consequences for their capacity to act as an effective check on the abuse of political power. Call this the *politicisation of the judiciary* concern.

The final concern is a combination and particularisation of the previous two. It is the worry that the opportunities that the Constitution provides for litigants to delay cases by taking

---

<sup>56</sup> I say this because the book's treatment of the scholarly literature is very superficial, with complex arguments (including those found in the Comaroffs' work) reduced to soundbites and much of the local and comparative literature ignored. The book neither sets out a coherent, normatively grounded theoretical framework nor explores any particular thesis about the origins or effects of the phenomenon it describes.

<sup>57</sup> See H Corder 'Critics of South Africa's Judges are Raising the Temperature: Legitimate or Dangerous?' *The Conversation* (22 August 2019)(referring to 'lawfare' as the term now commonly used in South Africa to describe the tendency of 'politicians and civil society' to 'turn to the courts').

procedural points or appealing decisions all the way to the Constitutional Court allows corrupt or otherwise incompetent public officials to avoid accountability for their actions. This concern combines the first concern's worry about political battles being fought through the courts with the second concern's worry about the effect of all this on the perceived independence of the judiciary. But its focus is on how the judicialisation of politics/politicisation of the judiciary affects the proper functioning of the judicial system. Call this the *abuse of the judicial process* concern.

Part III examines these three concerns in the context of South Africa. It first elaborates on each concern and then asks in each case whether the concern is liable to being overstated.

### III DRILLING DOWN ON THE THREE CONCERNS

#### A Lawfare as the debilitation of democratic politics

The first concern is about the way constitutionalism and judicial review allegedly divert political struggles into litigation, thus limiting other forms of democratic politics. While featuring in the Comaroffs' work as an observation about post-apartheid South African society, this concern has a long pedigree. Its antecedents can thus be traced to debates in the 1970s and 1980s in the US, which still have echoes today, about whether the civil rights litigation of that era diverted attention away from the sort of bottom-up political mobilisation that might have achieved more thoroughgoing and long-lasting social and economic change.<sup>58</sup> As is well known, the Critical Legal Studies (CLS) school split over this issue, with feminist and critical race theorists largely resistant to the strong form of this critique and mainstream CLS scholars calling for the constitution to be 'taken away from the courts'.<sup>59</sup>

This controversy continues in the US today, with ongoing arguments, for example, about whether *Roe v Wade*,<sup>60</sup> despite its support for abortion rights, has not in some way set back the cause of women's freedom of choice. Had the case been delayed, one side contends, and the victory won in the court of public opinion, the current policy debate over abortion would be less polarised. Similar questions have been raised about the same-sex marriage line of cases,<sup>61</sup> although in this instance the general view seems to be that public interest litigators, aided by a Supreme Court that was sensitive to changing public opinion, did far better.<sup>62</sup> The key issue, it is now agreed, is how public interest litigation is conducted and how the results of any such litigation are fed back into the democratic process. While litigation may demobilise change-seeking groups by seducing them into thinking that courtroom victories amount to real social change, this is a problem that can be addressed through the careful choice of litigants and the sequencing of the issues litigated.

A full summary of this literature would require more space than is available here. For current purposes, the point is simply that the American experience shows that the claim that a constitution that provides for judicial review debilitates democratic politics is one that can be overstated. In probably the most sophisticated treatment of this topic, Gordon Silverstein has

<sup>58</sup> Though much criticised, the *locus classicus* remains GN Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (2nd Ed, 2008).

<sup>59</sup> D Meyerson *Understanding Jurisprudence* (2007) 114–115; M Tushnet *Taking the Constitution Away from the Courts* (1999).

<sup>60</sup> 410 US 113 (1973).

<sup>61</sup> Culminating in the US Supreme Court's decision in *Obergefell v Hodges* 576 US 644 (2015).

<sup>62</sup> Rosenberg *Hollow Hope* (note 58 above).

thus shown how the phenomenon of ‘juridification’ in the US sometimes amounts to ‘shaping’, sometimes to ‘constraining’, sometimes to ‘saving’ and only in certain instances to ‘killing’ off politics.<sup>63</sup> This more nuanced picture casts doubt on the Comaroffs’ sceptical account of the effects of the Constitution. Without a more detailed study of the kind Silverstein conducted in the US, it is dangerous to make assumptions about the impact of constitutionalism and judicial review on the quality of democracy in South Africa. As we will see when we get to the Constitutional Court’s 2018 record, many of the effects Silverstein identifies are detectable in the South African setting. Even in those instances where judicial review kills off politics, it is not certain that this is not the normatively preferred result.

There is another version of the democratic debilitation critique, however, which is more specifically South African and more thoroughgoing. On this version, constitutionalism and judicial review do not just channel democratic politics into the courts, they close off democratic discussion of certain important political issues altogether. The main proponent of this view is Joel Modiri, who argues that the Constitution, in as much as it was conceived as a response to the specific problem of apartheid, deflects attention away from the longer-term cultural and material effects of colonialism in South Africa.<sup>64</sup> What the Constitution did, Modiri thinks, was provide the basis on which a small section of the black community could be inducted into white society, largely on the latter’s terms. This conformed to the ANC’s reformist approach to the problem of settler colonialism. In its espousal of an essentially Western model of governance at the expense of indigenous African models, however, the Constitution perpetuated rather than addressed the injustices of South Africa’s 300-year colonial history.<sup>65</sup>

This argument’s indebtedness to the Comaroffs’ critique of the continuities between the way law was abused in the colonial state and its oppressive modalities in the post-colonial state is plain to see.<sup>66</sup> Although he does not himself use the term, Modiri’s analysis has certain affinities with the lawfare critique. The Constitution, he thinks, is the main means through which Western cultural values, intellectual traditions and professional skills are valued over indigenous African values, traditions, and skills. Thus have ‘white lawyers, activists and academics emerged as the primary intellectual and moral custodians of constitutional democracy in South Africa’.<sup>67</sup>

Modiri’s argument deserves a careful, point-by-point response of the kind that Firoz Cachalia has provided.<sup>68</sup> For my limited purposes here, however, it is not necessary to engage with his contentions at length. All that I need to show is that Modiri’s version of the lawfare critique, like the others considered in this article, is prone to overstatement.<sup>69</sup> If I can do that, I will have created enough space for the project I want to pursue in this piece — an assessment of whether the lawfare critique is supported by an analysis of the Court’s 2018 record.

The first point is that social transformation — or decolonisation — is a fraught process, and that there are many forces beyond the Constitution that stand in its way. Thus, the fact

---

<sup>63</sup> Silverstein *Law’s Allure* (note 20 above).

<sup>64</sup> For example, J Modiri ‘Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence’ (2018) 34 *South African Journal on Human Rights* 300.

<sup>65</sup> *Ibid.*

<sup>66</sup> Modiri cites several of the Comaroffs’ publications (*ibid* at 306–307 *ffn* 31–36).

<sup>67</sup> *Ibid* at 311.

<sup>68</sup> F Cachalia ‘Democratic Constitutionalism in the Time of the Postcolony: Beyond Triumph and Betrayal’ (2018) 34 *South African Journal on Human Rights* 375. See also le Roux & Davis *Lawfare* (note 17 above) at 16–18.

<sup>69</sup> Modiri ‘Conquest’ (note 64 above) has little to say about the Constitutional Court and its jurisprudence apart from a few remarks about the possibility of realistic, non-Utopian ‘constitutionalisms from below’. *Ibid* at 323.

that South Africa remains in many respects untransformed/un-decolonised does not mean that the Constitution and the model of governance it supports are to blame. The argument has to focus on the institutions that the Constitution establishes, the kind of democratic politics that they enable and whether there is something about those two things that is anti-transformative.

The second point is that Modiri is obviously correct that the Constitution represents the ANC's reformist tradition rather than a more radical Africanist understanding of the causes of the ongoing oppression of black South Africans. But that is because the ANC won the overwhelming majority of the votes at the first democratic elections. It is thus hard to see how a democrat could regret this fact. To be sure, the Constitutional Principles appended to the Interim Constitution restrained what the ANC could do.<sup>70</sup> To that extent, the Final Constitution overrepresents the white minority's interests. But by and large the constitution that South Africa has is the constitution that the ANC wanted it to have. The property clause, for example, was freely chosen by the ANC, and not required by the Constitutional Principles.<sup>71</sup> Like the other provisions, it focuses on South Africa's more recent, twentieth-century past rather than the entire period of its colonial history. The clause represents a pragmatic assessment in that sense of the extent to which the historical clock could be wound back. But this was a legitimate choice by a democratically elected party. It is therefore not one that should be regretted, but one that needs to be periodically re-evaluated in the light of experience — its merits and effects debated within the framework of democratic politics.

On that critical point, it is not clear that the Constitution does close down the sort of democratic discussion Modiri wants us to have. The Constitution has not prevented, as it turns out, the debate over the property clause or the need for a more thoroughgoing land reform process.<sup>72</sup> Nor has the Constitution prevented the rise of the Economic Freedom Fighters (EFF), whose critique of the conditions of black South African life Modiri's argument in many respects echoes. On the contrary, the Constitution has arguably preserved the democratic space for a party like the EFF to emerge.

It is of course possible that South Africans would have been debating the stubborn effects of settler colonialism sooner had the ANC not exerted such a great influence on the Constitution. But if Modiri is right about the importance of the *longue durée*, it is not clear that this would have left us in a better position. Whichever political party had controlled the constitution-making process, it would have been confronted by the 'deep structures'<sup>73</sup> of South Africa's colonial past. Even if the balance of political forces had been such that a more radical Africanist constitution had been adopted, this constitution, too, would have struggled with the challenge of converting its aspirations into meaningful social and economic change. Given South Africa's declining terms of trade, its skills shortage, and all the other well-known reasons for South Africa's lack of economic growth, it is not at all clear that such a constitution would have performed any better than the 1996 Constitution. At any rate, whether it did so or not would

<sup>70</sup> Schedule 4 of the Constitution of the Republic of South Africa, 1993.

<sup>71</sup> *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 72 (holding that 'no universally recognised formulation of the right to property exists' and implying that, even had the Final Constitution not contained a property clause at all, it would have survived challenge under the Constitutional Principles).

<sup>72</sup> J Dugard 'Unpacking Section 25: Is South Africa's Property Clause an Obstacle or Engine for Socio-Economic Transformation?' (2018) 9 *Constitutional Court Review* 135.

<sup>73</sup> Modiri 'Conquest' (note 64 above) at 314.

have depended on its tendency to support wise policy decisions, implemented by an effective public service, operating under a government that enjoyed public support. In short, we would be in exactly the same position as we are today, save that the Constitution would not be the whipping boy for all of South Africa's problems.

I hope that these brief comments are not seen as making light of the serious questions that Modiri raises. He has initiated a conversation that needed to be broached and which is already enriching public discourse. I am simply asking him to remain true to his laudable constitutional realism. If he thinks that too much faith has been placed in the Constitution as a vehicle for social and economic change, then he should not himself place too much faith in any other kind of constitution. What South Africa needs, as Cachalia argues, is a constitution that provides the framework for democratic social transformation.<sup>74</sup> The Constitution arguably does all of that and more. At least, it is worth examining the extent to which it has been, and is being, used for these purposes rather than dismissing this possibility out of hand.

## **B Lawfare as the politicisation of the judiciary**

The notion that the introduction of a system of judicial review, and particularly supreme-law judicial review, risks politicising the judiciary has a very long history. From the American legal scholar, Alexander Bickel's identification of the 'counter-majoritarian dilemma',<sup>75</sup> to Jeremy Waldron's critique of judicial review as amounting to judicial majority voting,<sup>76</sup> numerous commentators have been concerned about the moral justifiability of giving judges what amounts to a political function. As noted already, le Roux and Davis's discussion of this issue adds very little to our understanding of how great the risk of politicisation is or whether it has been realised in South Africa. They cite almost no local or foreign literature on the topic, and their discussion consists of a rather random sampling of cases that they do not try to mine in support of any particular argument about whether we would be better or worse off without the Constitution. In the result, their argument boils down to noting that the adoption of the Constitution has drawn the courts into many politically controversial cases and that this potentially poses a risk to their institutional legitimacy.

The danger of overstatement in this case, this example suggests, is that scholars may confuse the new theatres that constitutional courts are asked to enter with the consequences for them as an institution. Clearly, the conferral of the power to review legislative and executive acts for conformance with a constitution means that courts may become embroiled in high-stakes political cases. But this is a separate question from whether they are in fact politicised in the sense of losing their independence, whether actual or perceived. The necessity of politicisation in the first sense — actual independence — depends on where you stand in the long-running debate over the determinacy of law and also on whether you think that the fact that constitutional adjudication involves the enforcement of abstract moral values means that it is more indeterminate than adjudication in other areas of law.<sup>77</sup> This is a perennially

---

<sup>74</sup> Cachalia (note 68 above).

<sup>75</sup> AM Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2<sup>nd</sup> Ed, 1986).

<sup>76</sup> J Waldron 'Five to Four: Why Do Bare Majorities Rule on Courts?' (2014) 123 *Yale Law Journal* 1692. See also Waldron's earlier, better known piece: J Waldron 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

<sup>77</sup> For example, B Leiter 'Legal Indeterminacy' (1995) 1 *Legal Theory* 481; L B Solum 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54 *University of Chicago Law Review* 462.

fraught question that cannot be addressed here. But it is not, in any event, central to the lawfare concern. Whatever your stance is in relation to this debate, the fact that judges may not be able to prevent their private political views from influencing their decisions does not necessarily mean that constitutional courts will become politicised in the second sense, perceived independence, which is the real concern associated with the lawfare critique. This is because constitutional courts have developed numerous ways of preserving their reputation for impartial decision-making. The German Federal Constitutional Court, for example, successfully reworked that country's discredited tradition of legal positivism into an approach to its mandate that has been described as 'value formalism'.<sup>78</sup> This new way of presenting its decisions has enabled it to play a central role in political life in that country while maintaining its reputation as an impartial institution. Even the US Supreme Court, in respect of which the charge of politicisation is most frequently made, still enjoys relatively high institutional legitimacy ratings. According to one study, that is because the American public is able to distinguish the justices' principled pursuit of their private political values from partisan political decision-making.<sup>79</sup> On the strength of these examples, the politicisation of the judiciary in the sense of a loss of perceived independence is clearly not an inevitable consequence of the adoption of a system of strong-form judicial review. The question in every case is how the court concerned responds to its mandate and whether it is able to maintain a reputation for legally motivated decision-making, or at least avoid getting a reputation for partisan political decision-making.

### C Lawfare as the abuse of the judicial process

The concern here is that unscrupulous individuals will use the judicial process to avoid accountability for their actions. Clearly, this is a possibility,<sup>80</sup> but again the risks of this happening may be overstated. A mere increase in the number of cases in which public office bearers go to court is not indicative on its own that the judicial process is being abused. Many of these cases may be legally justified and some increase in the involvement of public office bearers in litigation is a welcome sign that the constitutional system is working. Indeed, were there no increase in the involvement of public office bearers in litigation, this would be in certain respects more worrying. Even if some of the cases that go to court might have been resolved politically, the fact that the courts are asked to become involved in them does not necessarily mean that their processes are being abused. As with the politicisation of the judiciary, much depends on how the courts respond and on whether the problem is so endemic as to overwhelm the judicial system.

In relation to the first possibility, the courts have a number of remedies at their disposal, such as the imposition of punitive costs orders or the issuing of arrest warrants, which allow them to sanction the taking of frivolous or irrational procedural points. In this way, they may

<sup>78</sup> DP Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989); M Hailbronner *Traditions and Transformations: The Rise of German Constitutionalism* (2015).

<sup>79</sup> JL Gibson & G Caldeira, 'Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?' (2011) 45 *Law & Society Review* 195 (finding that the American public accepts that the justices are influenced by their personal political ideologies, but nevertheless thinks that they maintain a 'principled' commitment to those ideologies that is above purely partisan politics).

<sup>80</sup> H Corder & C Hoexter "'Lawfare' in South Africa and its Effects on the Judiciary" (2017) 10 *African Journal of Legal Studies* 105, 114–116 (discussing Jacob Zuma's use of 'Stalingrad' tactics to avoid accountability for his alleged involvement in corruption).

be able to protect their processes from abuse. Once again, therefore, whether the risk that the lawfare critique identifies has been realised is an empirical question that depends, in this instance, on a careful assessment of what remedies the courts are using to protect the integrity of their processes and how effective they are proving to be.

At a certain point, to be sure, the problem of unscrupulous and unnecessary litigation by public office bearers may become so endemic as to overwhelm the judicial system. In India, for example, the legal process is being used to tie up political and commercial opponents in seemingly endless litigation, regardless of the merits of the case being pursued.<sup>81</sup> In that instance, lawfare qua abuse of the judicial process is a real problem. But the Indian scenario is not the inevitable result of the adoption of a system of judicial review. It represents rather a failure on the part of the courts in that country to resist the abuse of their processes in this way.

Finally, even if it could be shown that there have been a significant number of instances in South Africa where politically powerful or wealthy litigants have delayed the onset of justice against them, this would not necessarily be grounds for questioning the wisdom of maintaining the Constitution. The worth of any governance system ultimately has to be assessed through some sort of cost-benefit analysis. That being so, the ability of well-connected or wealthy litigants to use litigation to avoid accountability for their actions may in the final analysis be a price that is worth paying for the benefits that a commitment to constitutionalism and judicial review delivers.

All three subdimensions of the lawfare critique are thus prone to overstatement. Rather than simply accepting this critique at face value, this means its claims needs to be tested in each case. The next section takes the first step towards doing this by summarising some of the main cases decided by the Court in its 2018 term.

#### IV THE CASES

The 52 cases decided by the Court in its 2018 term covered a wide range of issues, as indicated at the outset. It is not possible to analyse all of these cases here. The focus needs to fall on some reasonably representative subset that can be used to assess whether the three lawfare concerns are warranted. At the same time, our sample should not bias the analysis one way or the other.

With those criteria in mind, this section presents short summaries of two broad categories of case: (1) cases dealing with democratic rights and the functioning of constitutional institutions; and (2) cases dealing directly with questions of social transformation and historical (in)justice. This sample gives a fair opportunity for an assessment of the three specific concerns associated with the lawfare critique. The first category thus collects a number of cases involving public office bearers, allowing us to examine why they went to court and whether the charge that democratic politics is being diverted through the courts is warranted. At the same time, many of these cases were controversial, allowing consideration of the politicisation of the judiciary concern. Finally, if there were instances in 2018 in which public office bearers used the judicial process to avoid accountability, they are likely to appear in this batch.

The second category collects cases in which the transformation of South African society or issues of historical (in)justice, such as the land question, were either explicitly or indirectly

---

<sup>81</sup> N Robinson 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts' (2013) 61 *American Journal of Comparative Law* 173, 183–184; N Robinson 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 *Washington University Global Studies Law Review* 1, 53 (reporting on attempts to control the abuse of public interest litigation in India).

at issue. This sample allows us to look at the question of whether the liberal-constitutionalist frame that was allegedly used to decide these cases somehow reduced their scope so that larger issues of colonial injustice were not raised and/or indigenous cultural values suppressed. In the nature of things, focusing on matters that were litigated in court means that many dimensions of South Africa's social and economic transformation process are left out of account. The assessment cannot capture the Constitution's exclusionary operation in that sense. But, to the extent that certain issues of social and economic transformation *were* in fact raised in Court, the second category of cases allows us to examine how they were dealt with.

Within the space available in this section, I can only give a very brief summary of each case. The summaries do not attempt to cover all of the legal issues raised. Rather, I say just enough to provide a flavour of the case and to set up the assessment in part IV.

## A Democratic rights and the functioning of constitutional institutions

### 1 *My Vote Counts*

*My Vote Counts* was a challenge under s 32 of the Constitution to the constitutionality of the Promotion of Access to Information Act 2 of 2000 (PAIA). The applicant, a non-profit company 'founded to improve the accountability, transparency and inclusiveness of elections and politics in the Republic of South Africa',<sup>82</sup> argued that access to information on private funding of political parties and independent candidates was crucial to a fully informed vote. Private funders inevitably expect something in return for their support — if not actual policy influence then at least broad ideological loyalty. Voters need reliable information about these possible influences on the party or candidate they were voting for. Moreover, to be effective, such information has to be available, not just on request through the cumbersome procedure that PAIA provides, but through a permanently available and updated public record. PAIA's failure to provide for such a record was fatal to its constitutionality.<sup>83</sup>

In its decision, the Court confirmed the order of constitutional invalidity made at first instance by the Western Cape High Court.<sup>84</sup> Informed voting, the Court agreed, required that information on political parties must not just be held by them but also be easily accessible to voters.<sup>85</sup> When s 32 of the Constitution was read with s 7(2) (the state's duty to respect, promote, promote and fulfil constitutional rights) and s 19 (the right to vote), it was clear that the state was under a duty 'to pass legislation that provides for the recordal, preservation and reasonable accessibility of information on private funding'.<sup>86</sup> While PAIA was to give effect to s 32, it was deficient in various ways. For one, it failed to provide for access to information on private funding of independent candidates because they did not fall under the definition of 'private body' in s 1 of the PAIA.<sup>87</sup> While PAIA applied to political parties qua juristic persons, political parties were not required to have juristic personality. This, too, therefore constituted a gap in PAIA's coverage.<sup>88</sup> But the most serious problem, the Court held, was that

<sup>82</sup> Available at <https://www.myvotecounts.org.za/what-we-are-about/>

<sup>83</sup> *My Vote Counts* (note 7 above).

<sup>84</sup> *My Vote Counts NPC v President of the Republic of South Africa* 2017 (6) SA 501 (WCC).

<sup>85</sup> *My Vote Counts* (note 7 above) at para 34.

<sup>86</sup> *Ibid* at para 44.

<sup>87</sup> *Ibid* at para 63.

<sup>88</sup> *Ibid* at para 65.

PAIA is a requester not a recordal regime. In particular, ss 18 and 53 of PAIA made obtaining information on private funding harder than it should be.

For all these reasons, PAIA was constitutionally deficient. The gap in the legislative framework, the Court held, could be remedied either through the amendment of PAIA or through the enactment of another statute or some combination of these two things.<sup>89</sup> What was important was that there be a legislative regime for the ‘holding, preservation and reasonable disclosure of information on private funding’.<sup>90</sup> Beyond this, however, the Court was not prepared to specify what the regime should look like. Like the Western Cape High Court, it accordingly refused to grant the specific order that the applicant had requested, viz. that whatever legislative solution Parliament devised should provide for the ‘continuous and systematic’ recordal of information.<sup>91</sup> That aspect of the order, the Court held, was unnecessarily intrusive on the legislature’s policy-making prerogatives. In their concurring judgment, Froneman J and Cachalia AJ agreed with this stance, but held that it was not compelled by separation-of-powers concerns.<sup>92</sup>

## 2 *Mlungwana*

Like *My Vote Counts*, *Mlungawana* took the form of a facial challenge to the constitutionality of national legislation, this time s 12(1)(a) of the Regulation of Gatherings Act 205 of 1993, which requires the convenors of a public meeting of more than 15 people held for political purposes to give notice of the meeting to their local municipality.<sup>93</sup> The applicants were members of the Social Justice Coalition (SJC), ‘a membership-based organisation operating within the City of Cape Town and its environs, including Khayelitsha’.<sup>94</sup> The SJC, the Court noted, had been established to lobby for improved municipal services, such as the provision of clean and safe sanitation. In pursuit of these objectives, 15 members of the SJC had chained themselves to the entrance of the Cape Town Civic Centre. They were joined by other members of the organisation, bringing the demonstration within the definition of ‘gathering’ in s 1 of the Act. As prior notice of the gathering had not been obtained, all were arrested on charges of participating in an unlawful gathering. Subsequently, 10 were convicted of having convened the gathering without giving notice, while the charges against the others for participating in the gathering were dropped.

In a relatively straightforward judgment, the Court accepted the applicants’ main argument that the criminalisation of the failure to give notice of a gathering had a ‘chilling effect’ on the exercise of the right to freedom of assembly in s 17 of the Constitution.<sup>95</sup> While s 12(2) of the Act did provide a defence on the basis that the gathering had been spontaneous, the applicants had not relied on this defence in their criminal trial and there was no obligation on them to do so.<sup>96</sup> The case thus fell to be decided on the question whether s 12(1)(a) of the Act unjustifiably limited the right to freedom of assembly. Dismissing the state’s argument

---

<sup>89</sup> Ibid at para 76.

<sup>90</sup> Ibid at para 80.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid at para 94.

<sup>93</sup> *Mlungwana* (note 4 above).

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

that s 12(1)(a) was a mere regulation rather than a limitation of the right,<sup>97</sup> the Court moved to apply its five-factor limitations analysis. The right to freedom of assembly, the Court held, was an important right given both its systematic denial in the past and the role it plays in contemporary South African democratic politics.<sup>98</sup> While the state had a legitimate interest in ensuring that this right was exercised with due regard to public safety and the police's ability to monitor gatherings, the criminalisation of the failure to give notice was unduly restrictive.<sup>99</sup> The threat of criminal sanction, given the severity of the consequences of conviction, was likely to deter many legitimate forms of protest.<sup>100</sup> Against this, there were other ways in which the state's legitimate objectives could be achieved without burdening the right to the same extent.<sup>101</sup> In short, the problem was that the 'fit' between the objectives sought to be achieved and the sanction of criminalisation was not 'tight' enough.<sup>102</sup> In the result, the Court struck down s 12(1)(a) with immediate effect, albeit limiting the application of its decision to the case at hand and all future cases.

### 3 *Corruption Watch*

*Corruption Watch* took the form of a challenge to the constitutionality of a settlement agreement offered to former NDPP, Mxolisi Nxasana, in return for vacating his office.<sup>103</sup> The applicants were three NGOs that have been actively involved in many of the Court's good governance cases: *Corruption Watch*, *Freedom Under Law* and the *Council for the Advancement of the South African Constitution*. Their application to the Court sought the confirmation of the North Gauteng High Court's order invalidating the settlement agreement between former President Jacob Zuma, the Minister of Justice and Correctional Services and Nxasana in his then capacity as NDPP. In addition to invalidating the settlement agreement, the High Court had ordered the repayment of the settlement offer paid out to Nxasana (in the region of R17 million less tax), declared the subsequent appointment of Shaun Abrahams as NDPP invalid consequent on the invalidity of the settlement agreement, and invalidated two provisions of the National Prosecuting Authority Act 32 of 1998 ('the NPA Act') that allowed the President to extend the NDPP's term after retirement and suspend the NDPP without pay.

The central issue in the case was whether the settlement agreement and the impugned provisions of the NPA Act compromised the constitutionally guaranteed independence of the NDPP and the National Prosecuting Authority (NPA). Section 179 of the Constitution requires there to be an independent prosecuting authority with the NDPP at its head but leaves the details to national legislation. While s 12(8) of the NPA Act provides for the NDPP voluntarily to vacate their office, it was agreed that this section was not applicable on the facts. Rather, the question to be decided was whether the settlement offer made to Nxasana compromised the independence of the institution. At the time of the offer, Nxasana had been facing an inquiry into his non-disclosure of a criminal conviction against him. As an alternative

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid* at paras 61–69.

<sup>99</sup> *Ibid* at paras 74–81.

<sup>100</sup> *Ibid* at para 87.

<sup>101</sup> *Ibid* at paras 95–100.

<sup>102</sup> *Ibid* at para 101.

<sup>103</sup> *Corruption Watch NPC & Others v President of the Republic of South Africa & Others; Nxasana v Corruption Watch NPC & Others* [2018] ZACC 23, 2018 (10) BCLR 1179 (CC), 2018 (2) SACR 442 (CC).

to proceeding with that inquiry, he was offered the opportunity to vacate his office in return for the payment of the salary to which he would have been entitled had he served his full ten-year term. While insisting on his fitness for office, Nxasana accepted the offer.

The Court held that the criminal justice system lies at the centre of a well-functioning constitutional democracy.<sup>104</sup> For this system to work effectively, the NDPP and the NPA need to be entirely independent of the President. This constitutional scheme was threatened by the ‘carrot and stick’ method that President Zuma had used to force Nxasana out of office. Nxasana either had done what he was accused of doing or he had not. That question needed to be resolved through proper proceedings, failing which, the inquiry should have been terminated. Instead, by alternately threatening disciplinary action and then offering a massive payout as an inducement to leave office, the President had compromised the independence of the office.

The invalidity of the settlement agreement meant that Nxasana’s forced departure from office was constitutionally improper. His own conduct, however, in accepting the settlement offer while denying the allegations against him, also fell short of the standards expected of the NDPP.<sup>105</sup> The just and equitable remedy, therefore, was that Nxasana should refund the payment made to him but not be re-instated as NDPP. Likewise, the subsequent appointment of Shaun Abrahams as NDPP was vitiated by the irregularity of the process that had proceeded it. Finally, the Court invalidated ss 12(4) and (6) of NPA Act in so far as they permitted the extension of the NDPP’s term of office beyond retirement age and the unilateral suspension of the NDPP without pay.<sup>106</sup>

#### 4 *Helen Suzman Foundation*

*Helen Suzman Foundation* was about whether the deliberations of the Judicial Service Commission (JSC), in the execution of its mandate to advise the President on the appointment of judges, could be requested under rule 53(1)(b) of the Uniform Rules of Court.<sup>107</sup> This question arose in the context of the Helen Suzman Foundation’s approach to the Western Cape High Court to review and set aside the JSC’s October 2012 decision advising the President on appointments to the Western Cape High Court. In the course of those proceedings, the Foundation had become aware that the JSC’s final deliberations had been recorded. It accordingly requested that these be made available in terms of URC 53(1)(b). (URC 53 applies to applications for review of proceedings inter alia of bodies performing administrative law functions. It provides for applicants in review proceedings to apply for the ‘record’ of such proceedings.)

The Supreme Court of Appeal (SCA) had held that applications under URC 53(1)(b) for release of the JSC’s deliberations should be decided on a case-by-case basis, weighing the need for full disclosure against protection of the confidentiality of the JSC’s deliberations (both so as to ensure the robustness of the discussion and also so as not to discourage future applications to the JSC). The Court, in its judgment, found this approach to be unnecessarily cautious. Stressing the importance of the judiciary to South Africa’s constitutional project,<sup>108</sup> the Court

---

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8, 2018 (4) SA 1 (CC), 2018 (7) BCLR 763 (CC).

<sup>108</sup> Ibid at para 32.

dismissed the JSC's confidentiality concerns, both as they pertained to the robustness of its discussions and as they pertained to discouraging future applicants. The JSC was composed of people, the Court held, who should be prepared to stand publicly by any comments they made about candidates in the JSC's deliberations. Likewise, for applicants, nothing could be more revealing of their character than the JSC interview itself.<sup>109</sup> The fact that s 12(2) of PAIA disallows access to the JSC's deliberations was irrelevant, given the different purpose of PAIA.<sup>110</sup> The Court accordingly ordered release of the JSC's deliberations under URC 53(1)(b), with precedential effect for all future such applications.

### 5 *South African Social Security Agency*

The *South African Social Security Agency* case<sup>111</sup> was the latest in a long series of cases involving the payment of social assistance grants. The broad factual background is that the South African Social Security Agency (SASSA) administers the payment of social grants on behalf of the Department of Social Development. SASSA's powers include the power to enter into contracts for the payment of the grants. A private company, Cash Paymaster Services (Pty) Ltd ('CPS'), had been awarded the contract to pay social grants after a tender process, but this process had been declared invalid by the Court in 2013.<sup>112</sup> Later, in 2014, the Court declared the contract between SASSA and CPS invalid and ordered that a new tender process be run.<sup>113</sup> This order was suspended until 2017 to give SASSA enough time to award the new tender. After SASSA missed this deadline, an NGO, the Black Sash, successfully applied on an urgent basis to have it extended.<sup>114</sup> When that extended order, too, threatened to expire without a new service provider in place, SASSA approached the Court on an urgent basis for a further extension.

The Court held that SASSA had been given ample opportunity to advertise and award the tender. The fact that the tender had not been awarded was thus largely due to its own failings. Ordinarily this would have been grounds for refusal of the application, but in this instance the interests of justice, and particularly the interests of social welfare beneficiaries, meant that the urgent application should be granted. After consideration, the Court decided not to impose a personal costs order against the Minister, Ms Bathabile Dlamini or SASSA's acting CEO, Ms Pearl Bhengu, for their handling of the matter. Dlamini and Bhengu's conduct, the Court held, though criticisable, fell short of the standard of bad faith and gross negligence required for such an order.

### 6 *Black Sash 3*

*Black Sash 3* was decided one month after *South African Social Security Agency*.<sup>115</sup> It is significant as the first case in which the Court ordered the payment of personal costs by a national government minister for conduct in the course of litigation associated with the performance

<sup>109</sup> Ibid at paras 38–39.

<sup>110</sup> Ibid.

<sup>111</sup> Note 8 above.

<sup>112</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42, 2014 (1) SA 604 (CC), 2014 (1) BCLR 1 (CC) ('AllPay 1').

<sup>113</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 (CC) ('AllPay 2').

<sup>114</sup> *Black Sash Trust v Minister of Social Development* [2017] ZACC 8, 2017 (3) SA 335 (CC) ('Black Sash 1').

<sup>115</sup> *Black Sash Trust 3* (note 8 above).

of her duties.<sup>116</sup> Whereas the Court in *South African Social Security Agency* had considered this question in the context of SASSA's application to extend the suspension of its order, its decision in *Black Sash 3* related to the preceding litigation in which the Black Sash Trust had applied on an urgent basis to have the Court's initial order extended.<sup>117</sup> After granting the Black Sash Trust's application in *Black Sash 1*, the Court had ordered that the Minister of Social Development show cause why she should not be joined to the proceedings and pay the costs thereof in her personal capacity.<sup>118</sup> In response to that order, Minister Dlamini had tendered an affidavit that raised various factual disputes about what the Court referred to as a 'parallel' process of responsibility.<sup>119</sup> After considering the existence of these disputes in *Black Sash 2*, the Court ordered that the Minister should be joined in her personal capacity and that a fact-finding inquiry be held into her conduct in terms of s 30 of the Superior Courts Act 10 of 2013. The inquiry, chaired by retired judge, Bernard Ngoepe, found that Minister Dlamini had indeed appointed a parallel team of people to report directly to her rather than to the CEO of SASSA, and that she had not disclosed this fact in her affidavits tendered to the Court following its decision in *Black Sash 1*.<sup>120</sup> In light of these factual findings, and further arguments before it, the Court held in *Black Sash 3* that Minister Dlamini should personally pay 20% of the costs of the Black Sash Trust and Freedom Under Law in bringing the original application. In so doing, the Court re-iterated its remarks in *Black Sash 2* that the common law provision for personal costs orders was now 'buttressed by the Constitution'.<sup>121</sup> Rather than breaching the separation of powers, the Court held, the awarding of personal costs against a national government minister was within its power to enforce compliance with the Constitution.<sup>122</sup>

### 7 *Law Society v President*

*Law Society v President*<sup>123</sup> concerned a constitutional challenge to former President Jacob Zuma's participation in the decision-making process that led to the suspension of the operations of the Southern African Development Community ('SADC') Tribunal. The lengthy build-up to the case started with the Zimbabwe government's policy of uncompensated expropriation of land owned by white farmers.<sup>124</sup> After failing in Zimbabwe's courts, a group of affected farmers took their case to the SADC Tribunal, which decided in their favour.<sup>125</sup> Instead of taking steps to enforce the order, the SADC Summit, the organisation's supreme body, resolved to frustrate the decision. This they did initially by refusing to appoint judges to the Tribunal,<sup>126</sup> and

<sup>116</sup> A personal costs order was made against former President Jacob Zuma in *Republic of South Africa v Office of the Public Protector* 2018 (2) SA 100 (GP) after he delayed the establishment of a commission of inquiry into state capture that had been ordered by the Public Protector. See Corder & Hoexter (note 80 above) 116.

<sup>117</sup> *Black Sash Trust v Minister of Social Development* [2017] ZACC 20, 2017 (9) BCLR 1089 (CC) (*Black Sash 2*)

<sup>118</sup> *Black Sash 3* (note 8 above) at para 1.

<sup>119</sup> *Ibid* at para 3.

<sup>120</sup> *Ibid*.

<sup>121</sup> *Ibid* at para 10.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51, 2019 (3) SA 30 (CC).

<sup>124</sup> The policy began in 2000, after the ruling party, ZANU-PF, lost a constitutional referendum. See D Compagnon *A Predictable Tragedy: Robert Mugabe and the Collapse of Zimbabwe* (2011).

<sup>125</sup> *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* [2008] SADCT 2.

<sup>126</sup> *Law Society* (note 123 above) at para 15.

then by adopting the 2014 Protocol on the Tribunal, which impermissibly used a simplified procedure to remove the Tribunal's jurisdiction to decide on individual complaints against member states.<sup>127</sup> In the North Gauteng High Court and then the Court, the applicants challenged President Zuma's participation in these events as a violation of s 167(5) of the Constitution, and particularly of the obligations it imposes on the President to act lawfully, rationally and constitutionally in the exercise of his executive powers.

In a convoluted and at times difficult-to-follow decision that is fully analysed elsewhere in this volume,<sup>128</sup> Mogoeng CJ dismissed the respondents' preliminary argument that the case was premature as the Protocol had not yet been ratified by the South African Parliament or entered into force.<sup>129</sup> Although courts should generally be reluctant to interfere in the internal procedures of Parliament, the Chief Justice held, there were crucial differences between the passing of legislation and the ratification of an international treaty. By signing the Protocol, the President exposed South Africans living in other SADC states and the citizens of those states to the possible violation of their rights were the Protocol later to enter into force. Signature of the Protocol also immediately signalled a shift in South Africa's respect for human rights that could have serious repercussions for people living in the country. Finally, South Africa was bound under customary international law by art 18 of the 1969 Vienna Convention on the Law of Treaties, which precluded it from acting in a way that defeated the object and purpose of the Protocol. For all these reasons, there was an immediate threat to constitutional rights that needed to be remedied.

In relation to the main complaint, the Chief Justice held that the President's actions in participating in the irregular amendment of the SADC Tribunal's jurisdiction for purposes that ran contrary to the Constitution's commitment to the rule of law and the right of access to courts were unlawful, irrational and unconstitutional.<sup>130</sup> The President's actions first violated the principle of legality because they ran contrary to South Africa's international law obligations under the SADC Treaty.<sup>131</sup> This appears to have been either because observance of the SADC Treaty's amendment procedures was constitutionally required or because, by participating in the undermining of the Treaty, the President acted in bad faith and purported to exercise powers he did not have.<sup>132</sup> Second, the President's actions were irrational because he exercised his power to amend the Treaty in a manner that was not rationally related to the purpose for which the power was conferred.<sup>133</sup> Finally, the President acted unconstitutionally by exercising his power under s 231(1) of the Constitution to sign an international treaty in a way that violated constitutional rights, and particularly the right of access to court.<sup>134</sup>

<sup>127</sup> Ibid at para 9.

<sup>128</sup> See articles in this issue by S Samtani, D Tladi, and A Coutsooudis & M du Plessis.

<sup>129</sup> *Law Society* (note 123 above) at paras 21–42.

<sup>130</sup> Ibid at paras 46–85.

<sup>131</sup> Ibid at para 53.

<sup>132</sup> Ibid at para 56.

<sup>133</sup> Ibid at paras 61–71.

<sup>134</sup> Ibid at paras 72–85.

## B Social transformation and historical (in)justice

### 1 *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association*

*Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* dealt with the constitutionality of a national government policy ('the policy') providing for the restructuring of the insolvency industry.<sup>135</sup> The policy regulated the distribution of provisional sequestration work to insolvency practitioners on the basis of race and gender. In particular, the policy established four categories of insolvency practitioner by race and gender and mandated a rotational system for their appointment by the Master, with preference given to people from historically disadvantaged race and gender groups.

The Western Cape High Court and the Supreme Court of Appeal (SCA), in their consideration of the matter, had held that the policy was rigid, arbitrary and capricious and amounted to a prohibited quota system.<sup>136</sup> The policy, the SCA held, unduly fettered the Master's discretion to appoint trustees and was ultra vires to that extent. It also breached the principle of legality in as much as it failed to promote the interests of creditors under the Insolvency Act 24 of 1936.<sup>137</sup>

While finding the policy unconstitutional, a majority of the Court disagreed with the SCA's reasoning. For the majority in the Court, the problem with the policy was that its fourth preferential category grouped together white males and members of other race groups who had become citizens after 1994. This, the Court held, violated the principle established in *Van Heerden*<sup>138</sup> that social transformation policies should be reasonably capable of achieving their desired outcome. Given the variety of measures to prevent the acquisition of citizenship by members of disadvantaged groups before 1994, the majority held, there was no rational reason why that date should have been used to discriminate between categories in the quota system.<sup>139</sup>

In dissent, Madlanga J, with Kollapen AJ and Froneman J concurring, stressed that the policy only covered provisional sequestrations, leaving the administration of final sequestration orders to be dominated by white practitioners.<sup>140</sup>

### 2 *Rustenburg Platinum Mine v SAEWA obo Bester & Others*

In this case, the Court set aside an order of the Labour Appeal Court ('the LAC') holding that the dismissal of a white employee for referring to a fellow employee as a 'swart man' (black man) was inappropriate.<sup>141</sup> The LAC had based its decision (a) on the need to apply an objective test to determine whether the remarks concerned were racially derogatory; and (b) on

<sup>135</sup> *Minister of Justice and Constitutional Development & Another v South African Restructuring and Insolvency Practitioners Association & Others* [2018] ZACC 20, 2018 (5) SA 349 (CC), 2018 (9) BCLR 1099 (CC).

<sup>136</sup> *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development* [2015] ZAWCHC 1, 2015 (2) SA 430 (WCC); *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2016] ZASCA 196; 2017 (3) SA 95 (SCA) ('SARIPA SCA').

<sup>137</sup> SARIPA SCA (note 136 above) at para 65.

<sup>138</sup> *Minister of Finance v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC).

<sup>139</sup> SARIPA (note 135 above) at paras 43–48.

<sup>140</sup> Ibid at paras 61–104.

<sup>141</sup> *Rustenburg Platinum Mine v SAEWA obo Bester & Others* [2018] ZACC 13, 2018 (5) SA 78 (CC).

a factual finding that the respondent did not know his fellow employee personally. Applying those criteria, the LAC decided that, in context, those who had heard the respondent's remarks should have understood that he was using the term 'swart man' in a purely descriptive sense.

On appeal, Theron J, on behalf of a unanimous Court, overturned the LAC's decision. Applying a less strict version of the objective test that the LAC had applied, Theron J held that the LAC had misdirected itself in deciding the case on the basis of a defence that the respondent had never raised. The respondent's argument, the Court held, was not that he had used the term 'swart man' as a descriptor but that he had never used the term at all. That assertion, however, had been contradicted by four witnesses and thus should not have been accepted as fact. Proceeding on the basis that the words had indeed been uttered, Theron J held that the LAC had also erred in failing to take into account that the context in which the words were uttered was that of a country with a history of racial discrimination. In that context, used in the way they were, the words were racially loaded. In considering whether dismissal was an appropriate sanction in light of that finding, Theron J took into account the fact that the employee had persisted in his denial of having used the words and had moreover engaged in further angry and abusive conduct during the hearing of the matter. In those circumstances, dismissal was justified. The respondent, like all South Africans, was under a duty to 'embrace the new democratic order' and treat his fellow employees with respect.<sup>142</sup>

### 3 *Duncanmec (Pty) Limited v Gaylard NO & Others*

This case concerned the lawfulness of the dismissal of nine members of the National Union of Mineworkers of South Africa (NUMSA) for racially offensive conduct.<sup>143</sup> In the course of participating in an unprotected strike on their employer's premises, they had sung an anti-apartheid struggle song containing the words (in isiZulu): 'Climb on top of the roof and tell them that my mother is rejoicing when we hit the boer'.<sup>144</sup> Their employer, the appellant, dismissed them on two charges of misconduct: for participating in an unprotected strike and for singing the song. This decision was subsequently reversed by an arbitrator, who ruled that the song was inappropriate but not racist, and that singing it did not warrant the employees' dismissal.<sup>145</sup>

On review before the Labour Court, NUMSA argued on behalf of its members that the singing of the song was justified because the effects of apartheid were still being experienced in the workplace. While officially race neutral, South Africa's economic structure still reflected past racial power imbalances.<sup>146</sup> The Labour Court accepted this argument and upheld the arbitrator's initial decision to order the employees' re-instatement.

On appeal to the Court, Jafta J accepted for purposes of his judgment that the song was racially offensive. Nevertheless, he held, the arbitrator's award was not unreasonable. In arriving at her decision, the arbitrator had taken account of the fact that the strike was peaceful, that the song was not racist when understood in context, and that the employees all had otherwise

<sup>142</sup> Ibid at para 62.

<sup>143</sup> *Duncanmec (Pty) Limited v Gaylard NO & Others* [2018] ZACC 29, 2018 (6) SA 335 (CC) ('*Duncanmec*').

<sup>144</sup> 'Boer' is the Afrikaans word for farmer. It can be used pejoratively or non-pejoratively depending on the context.

<sup>145</sup> *Duncanmec* (note 143 above) at paras 17–20.

<sup>146</sup> Ibid at para 24.

clean records. As those three reasons were all rationally related to the outcome arrived at, the Labour Court had been correct on review in refusing to set the arbitrator's award aside.<sup>147</sup>

#### 4 *Rahube v Rahube*

In this case, the Court struck down s 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 ('the Upgrading Act') insofar as it automatically converted deeds of grant and rights of leasehold into rights of ownership. The Upgrading Act had been introduced by the National Party government in 1991 shortly before its departure from office. It was part of a package of reforms that was intended to shape, and to a certain extent pre-empt, any land reform measures that the incoming ANC government might introduce. As enacted, the Upgrading Act did not provide for any investigatory process prior to the conversion of a pre-existing right in land to ownership.

On the facts, the applicant had been living in the property concerned when her brother (the respondent) had been nominated by the family to be the holder of a certificate of occupation, which was later converted into a deed of grant. When the Upgrading Act came into effect, the applicant's brother automatically became the owner of the land. The litigation commenced when the brother attempted to evict his sister from the property, some ten years after taking ownership. The challenge to the constitutionality of s 2(1) of the Upgrading Act was made in the course of the applicant's efforts to resist eviction. After succeeding in the High Court, the case came to the Court for confirmation.

Before the Court, the central point in dispute was whether the Proclamation that had governed the award of the certificate of ownership to the respondent, the applicant's brother, had a discriminatory operation along gender lines. In a unanimous judgment written by Goliath AJ, the Court held that it did. Reading the Proclamation in its historical context, Goliath AJ reasoned, it was clear that only men were capable of being the head of a household. This in turn meant that only they could be awarded certificates of occupation. Since the majority of existing rights holders were likely to be male, the provision in the Upgrading Act for automatic conversion of pre-existing rights to ownership, without a process of inquiry into how they had been acquired and who might be affected, violated the applicant's right to gender equality in s 9(1) of the Constitution.<sup>148</sup>

#### 5 *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another*

The final case considered in this review concerned a dispute between certain long-term, informal occupiers of land and two companies that had been granted rights to mine platinum and other minerals on the land.<sup>149</sup> The applicants were members of the Lesetlheng community that had purchased a farm outside the town of Rustenburg in what is now the North West Province in 1919. Because of racially discriminatory laws applicable at the time, the land could not be registered in their ancestors' names but was instead held in trust by the responsible minister on behalf of the Bakgatla-Ba-Kgafela community (of which the Lesetlheng community was just one sub-group). Ownership of the land subsequently passed to the tribal authority, which, together with the Minister of Rural Development and Land Reform, gave permission

---

<sup>147</sup> Ibid at paras 50–52.

<sup>148</sup> *Rahube* (note 9 above).

<sup>149</sup> *Maledu* (note 9 above).

for mining operations to commence in 2014. After the applicants had initially obtained a spoliation order preventing the mining operations from going ahead, the respondent mining companies approached the Mahikeng High Court for an order evicting the applicants and their employees.

The High Court, in its decision, granted an eviction order on the grounds that the applicants were not the registered owners of the land and that the tribal authority was authorised to grant consent to the Minister to enter into an agreement with the respondents for the lease of the land for mining purposes. On appeal, Petse AJ held for a unanimous Court that the matter could be resolved without deciding who the rightful owner of the land was. It was enough that the respondent mining companies were required by s 54 of the Mineral and Petroleum Resources Development Act 28 of 2002 ('the MRPDA') to consult with either the owner or the lawful occupiers of the land before commencing mining operations. Whatever the outcome of the ownership dispute, the applicants at the very least were lawful occupiers of the land under the Interim Protection of Informal Land Rights Act 31 of 1996 ('the IPILRA'), a post-apartheid statute that had been enacted to give effect to the constitutional property clause's requirement of security of tenure. As holders of informal land rights under the IPILRA, they could not be arbitrarily deprived of their property, which meant in this case that they had to be consulted under s 54 of the MRPDA before the mining operations could commence. The Court accordingly overturned the eviction order granted by the High Court so as to permit the s 54 consultation process to go ahead.

## V ASSESSING THE LAWFARE CRITIQUE IN LIGHT OF THE CASES

Even this very quick summary of 12 of the 52 cases decided in the Court's 2018 term gives an indication of the range, complexity and importance of the issues with which the Court was confronted. From ensuring the independence of the NDPP to overseeing the payment of social grants, the Court was asked to decide a number of politically salient cases. The sample is not, of course, entirely representative of what is going on in the judicial system or the extent of juridification of South African life more generally. The magistrates' courts, the High Courts, the Supreme Court of Appeal and the Labour (Appeal) Court have dockets that are probably more reflective of the real state of affairs, and the sample's focus on court decisions precludes analysis of the broader social, economic and cultural effects of the mode of governance that the Constitution enshrines. We should thus be cautious about drawing firm conclusions. Nevertheless, if the lawfare critique has any bite, we should see some evidence at least of its three main concerns: (1) the tendency of constitutional litigation to take the place of democratic politics; (2) a judiciary struggling to maintain its independence in the face of the controversial cases it is being asked to decide; and (3) the judicial process being abused by public office bearers. In fact, however, in relation to each of these three concerns, the evidence points the other way. The cases show a Court that is *bolstering* democratic politics, *resisting* politicisation, and *sanctioning* attempts to abuse its processes.

### A Debilitation of democratic politics?

There is no doubt that democratic politics in South Africa is dysfunctional in many ways. The ANC's electoral dominance has meant that the real struggle for political power in South Africa occurs within that party, in ways that the Constitution can only partly regulate. After 25 years

of single-party rule, South African democracy is plagued by serious problems of patronage and corruption.<sup>150</sup> At the same time, the ANC is so riven by factional disputes that it is no longer able to focus on, let alone deliver, a coherent programme of policy-driven social change.<sup>151</sup> Instead, the ruling party has lurched from leadership struggle to leadership struggle, with each new year bringing a fresh set of corruption allegations and commissions of inquiry.<sup>152</sup> On the side of the political opposition, the picture is not much better. The Democratic Alliance has had its own leadership battles and has generally been unable to shake its reputation as a minority-group party.<sup>153</sup> Its vote slid for the first time in the 2019 elections and it appears to have maximised its appeal at around 20%. The EFF, on the other hand, was able to increase its share of the vote in 2019, from 6% to 11%.<sup>154</sup> While it is still some way off from being able to govern in its own right, its growth, in combination with the DA's steady share of the vote, is threatening the ANC's absolute majority. The problem in this instance, however, is that the EFF's populist policies offer little real prospect of generating the inclusive economic growth that South Africa needs.<sup>155</sup> Without a new realignment in politics, the most realistic prospect is that the ANC will continue to contain the EFF's populism by itself moving in that direction.

It is one thing, however, to say that South Africa's democracy is dysfunctional in various ways, and another to say that the Constitution is responsible for this. All of the troubling features just listed have other obvious causes, such as the country's racially skewed capital-ownership structure, which inhibits economic growth and job creation, and thereby provides a constituency for populist political parties to promote policies that will inhibit economic growth even further.<sup>156</sup> More importantly as dysfunctional as South Africa's democracy is, none of the dysfunctional features specifically associated with the lawfare critique is obviously present, even if we go beyond the 2018 cases. Thus, while opposition parties have been

---

<sup>150</sup> Two recent books documenting the extent and nature of corruption in South Africa are P Myburgh *The Republic of Gupta: A Story of State Capture* (2017) and J Styan & Paul Vecchiato *The Bosasa Billions: How the ANC Sold its Soul for Braai packs, Booze and Bags of Cash* (2019). See further Public Protector *State of Capture* (Report No 6 of 2016–2017) and State Capacity Research Project *Betrayal of the Promise: How South Africa is Being Stolen* (2017).

<sup>151</sup> M Jonas *After Dawn: Hope after State Capture* (2019) (explaining the policy options to kickstart inclusive growth but acknowledging that the ANC is currently politically constrained in its ability to implement them).

<sup>152</sup> The two most prominent recent commissions are the Judicial Commission of Inquiry into Allegations of State Capture (Zondo Commission), launched in August 2018 and still running as of September 2019, and the Mokgoro Commission of Inquiry into the conduct of Deputy National Director of Public Prosecutions, Nomgcobo Jiba and Special Director of Public Prosecutions, Lawrence Mrwebi (Mokgoro Commission).

<sup>153</sup> At the time of the 2019 general elections, 62% of the DA's parliamentarians were people who would have been classified white under the apartheid system, in a country where only 9% of the population would now be so classified. Former Western Cape provincial leader, Patricia de Lille, formed a new political party, Good, after she resigned from the party in October 2018.

<sup>154</sup> In the 2019 general election, the EFF won 10.79% of the vote, an increase of 4.44% on its 2014 result. The Freedom Front Plus, Inkatha Freedom Party and African Christian Democratic Party also increased their share of the vote by marginal amounts. None of these parties represents a credible threat to the ANC, however.

<sup>155</sup> The ANC's embrace of the call for Expropriation Without Compensation (EWC), for example, is generally regarded as an attempt to head off the populist threat posed by the EFF.

<sup>156</sup> Jonas *After Dawn* (note 151 above) 111.

involved in many prominent cases over the last ten years,<sup>157</sup> there is no sense in which they have been waging policy battles through the courts. Rather, these cases have been about asking the judiciary to ensure that constitutional institutions that are meant to control the abuse of public power indeed fulfil that function.<sup>158</sup> Aside from political parties, this type of case has also been brought by civil society groups and NGOs whose pro-poor agendas are more or less in line with the ANC's stated policy commitments. Thus, far from undermining democratic politics, constitutional litigation is being used to reinforce the democratic process and to hold the ANC to its own electoral promises.<sup>159</sup>

The lawfare critique is also not made out in respect of the ANC's internal leadership struggles. True, many of the cases that the Court has decided have been related to these struggles. All of the voluminous litigation around the NDPP,<sup>160</sup> for example, has stemmed from a concern about the capacity of the NPA to perform its work independently in a situation where some of the people to be prosecuted are high-ranking ANC members. In addition, the cases about the fairness of provincial ANC elections directly affect the outcome of intra-party political struggles in a context where provincial leaders are playing a more prominent role in the party.<sup>161</sup> In deciding these cases, however, the Court cannot be said to have usurped the ANC's processes. Rather, it has acted to enforce existing procedural rules.

These features of the Court's record, familiar to those who have been following its decisions over the last ten years, were again on display in 2018. The *Corruption Watch* case,<sup>162</sup> for example, looks superficially like a case in which the Constitution diverted an internal ANC political struggle into the courts. The origins of this case may thus be traced back to the battle between Thabo Mbeki and Jacob Zuma for the 'soul' of the party<sup>163</sup> — a struggle that continues today in the efforts of President Cyril Ramaphosa's administration to combat corruption and prevent the resurgence of residual elements of the Zuma faction.<sup>164</sup> As noted in part IIIA3, Zuma's settlement offer to former NDPP, Mxolisi Nxasana, was made in the context of the on-again off-again corruption charges against him. Nxasana, it is generally agreed, had proven insufficiently controllable by the Zuma faction, and thus needed to be replaced with the seemingly more pliant Shaun Abrahams. The outcome of the *Corruption Watch* case, in that sense, was crucial to Zuma's ability to continue resisting prosecution, at least for the 10 years of Abrahams's tenure.

<sup>157</sup> For example, *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24, 2013 (1) SA 248 (CC)(challenging the appointment of Menzi Simelane as NDPP); *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11, 2016 (3) SA 580 (CC)(enforcing remedial action ordered by the Public Protector in the Nkandla matter); *Zuma v Democratic Alliance & Others; Acting National Director of Public Prosecutions & Another v Democratic Alliance & Another* [2017] ZASCA 146, 2018 (1) SA 200 (SCA)(overturning the NPA's decision to drop corruption charges against Jacob Zuma), *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47, 2018 (2) SA 571 (CC)(ordering the Speaker of the National Assembly to make rules regulating applications for the removal of the President under s 89 of the Constitution).

<sup>158</sup> Corder & Hoexter (note 80 above) at 119.

<sup>159</sup> F Cachalia 'Precautionary Constitutionalism, Representative Democracy and Political Corruption' (2018) 9 *Constitutional Court Review* 45.

<sup>160</sup> Corder & Hoexter (note 80 above) at 113.

<sup>161</sup> For example, *Ramakatsa v Magashule* [2012] ZACC 31, 2013 (2) BCLR 202 (CC).

<sup>162</sup> [2018] ZACC 23, 2018 (10) BCLR 1179 (CC), 2018 (2) SACR 442 (CC).

<sup>163</sup> WM Gumede *Thabo Mbeki and the Battle for the Soul of the ANC* (2007).

<sup>164</sup> For example, Pieter-Louis Myburgh, *Gangster State: Unravelling Ace Magashule's Web of Capture* (2019).

Saying that the outcome of a case is important to one side's prospects of success in an internal political-party battle, however, is crucially different from saying that the case took the place of ordinary democratic politics. In the *Corruption Watch* litigation, after all, the Court was not being asked to decide between the competing factions. Rather, the case was about whether the settlement agreement and certain provisions in the NPA Act undermined the independence of the NDPP. It was a case, in other words, in which the Court was being asked to protect the integrity of the institutions affected by the internal struggle and their capacity impartially to regulate it. Rather than diverting the internal struggle into the Court, what the *Corruption Watch* case did was to empower another constitutional institution, the National Prosecuting Authority, to play its designated role. At the same time, the case illustrates the way in which the Constitution provides avenues through which concerned civil society organisations, which are not party to the ANC's internal disputes, can enliven the Court's jurisdiction to protect South African democracy against the institutionally destructive consequences of the ANC's electoral dominance.<sup>165</sup>

All of the other cases discussed in part III.A may be understood in the same way. *My Vote Counts* was about protecting the integrity of the democratic process against the corrupting influence of private political-party funding.<sup>166</sup> *Mlungwana* illustrates the role that the Court is playing in keeping open the space for the sort of democratic politics — street protests — that the Comaroffs claim has been channelled into litigation.<sup>167</sup> (In Silverstein's terms,<sup>168</sup> *Mlungwana* is an instance of law 'saving' this style of politics.) The decision in *Helen Suzman Foundation*, though immediately about whether the JSC's deliberations could be compelled under URC 53, was ultimately about preserving judicial independence.<sup>169</sup> Finally, *South African Social Security Agency* and *Black Sash 3* were about enforcing ministerial accountability in a dominant-party democracy where the electorate does not routinely sanction non-performance.<sup>170</sup>

Collectively, these cases reveal the role that the Court is playing in shoring up the institutions and accountability mechanisms on which the democratic system depends. To be sure, there is some selection bias at play here — all of the cases just mentioned were included in the sample precisely for this reason. But this does not detract from the function that the Court is performing in these cases. When considered together with the fact that there were no instances of cases in which the Court's decision discouraged more traditional forms of democratic politics, the sample provides powerful evidence that this aspect of the lawfare critique is unfounded.

---

<sup>165</sup> In this journal, Sujit Choudhry argued that the Court, in order to counteract the ANC's dominance, should explicitly develop a number of 'anti-domination doctrines'. See S Choudhry "'He had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" (2010) 2 *Constitutional Court Review* 1. Samuel Issacharoff, too, has argued that the Court should become more interventionist in this sense. See S Issacharoff 'The Democratic Risk to Democratic Transitions' (2014) 5 *Constitutional Court Review* 1. The Court's 2018 Term reveals that the Court has been able to do this, not so much by developing the cross-cutting doctrines Choudhry called for, but by expanding the reach of its powers on a case-by-case basis, particularly under the doctrine of legality.

<sup>166</sup> Note 7 above

<sup>167</sup> *Mlungwana* (note 4 above).

<sup>168</sup> Silverstein *Law's Allure* (note 20 above).

<sup>169</sup> *Helen Suzman Foundation* (note 107 above).

<sup>170</sup> *South African Social Security Agency* (note 8 above) and *Black Sash 3* (note 8 above).

Modiri's more general critique — that the Constitution has taken the deep-structural effects of colonialism off the democratic agenda<sup>171</sup> — is by its nature not something that an assessment of the Court's case law can establish, one way or the other. The *SASSA* case,<sup>172</sup> for example, is fairly inconclusive on the question of whether the Constitution provides a genuine framework for social and economic transformation or merely legitimates the unjust status quo. In holding Minister Dlamini to account for her mishandling of the second social grants tender process, the Court was attending to the integrity of a welfare programme on which millions of South Africans depend for their survival. It was therefore a case that was crucial to the stability of the post-apartheid political settlement. But this fact only counts as an argument in favour of the beneficial effects of the Constitution if you think that this political settlement was just or at least the closest approximation to a just settlement in the circumstances. If you do not accept that premise, the analysis is quite different. From a more critical perspective, South Africa's extensive social welfare system would not be necessary if the racialised structures of 'white monopoly capital'<sup>173</sup> had been broken down, thus freeing black South Africans to fend for themselves. On this view, the *SASSA* Court was simply tinkering at the margins. Its decision, as laudable as it may seem, did nothing to address the structural causes of poverty and unemployment in South Africa. Worse than this, by protecting the integrity of the social grants system, the Court unwittingly contributed to the legitimisation of the post-apartheid political settlement, which (on the critical view) substitutes welfare for genuine social and economic change.

On its own, the *SASSA* case cannot be enlisted to settle this debate one way or the other. Everything depends on your normative 'prior', as American political scientists like to say.

The two land reform cases look similarly inconclusive. *Rahube*,<sup>174</sup> as we have seen, took the form of an equality clause challenge to late-stage National Party legislation aimed at enabling black South Africans to upgrade their land tenure rights. In striking down s 2(1) of the impugned Upgrading Act, the Court's decision corrected an obvious gender bias in the original policy. It showed, in that sense, how the Constitution can be used to overturn discriminatory land-titling programmes that predate the democratic era, thus preventing the perpetuation of past unjust policies. On the other hand, *Rahube* did nothing to address the racially based landholding patterns consequent on South Africa's 300+ years of colonial land dispossession. That issue is regulated by the Restitution of Land Rights Act 22 of 1994, which is subject to the restrictive terms of the 1993 constitutional settlement.<sup>175</sup> Likewise, the second land reform case, *Maledu*,<sup>176</sup> did not address the ongoing problem of racially-based landholding

<sup>171</sup> See II.A above.

<sup>172</sup> *South African Social Security Agency* (note 8 above).

<sup>173</sup> This is the Zuma faction's and the EFF's preferred term for South Africa's racially skewed capital-ownership structure. It controversially featured in a social media campaign devised by public relations agency Bell Pottinger to discredit political parties and journalists critical of former President Jacob Zuma's links to the 'Guptas', a family of three brothers who it is alleged have been involved in corruption and state capture. As Jonas *After Dawn* (note 151 above) at 126–127 points out, the term is not strictly speaking accurate given the unbundling of the four major corporations that used to dominate the Johannesburg Stock Exchange before 1994 and the extensive foreign ownership of South African capital.

<sup>174</sup> *Rahube* (note 9 above).

<sup>175</sup> Section 121(3) of the Interim Constitution provided that the land restitution process should not reach back earlier than 19 June 1913, the date on which the Natives Land Act 27 of 1913 was passed.

<sup>176</sup> *Maledu* (note 9 above).

patterns in South Africa. Rather, it enforced land rights that were acquired in 1919, after the main acts of colonial conquest had taken place.

But perhaps this concedes too much to the critical view. Constitutions, especially those committed to transformation, must perforce address current imbalances of social and economic power rather than their historic causes. In *Maledu*, the applicants' access to land, as much as it depended on rights that were acquired after the main acts of colonial conquest had occurred, was threatened in the here and now, by two mining corporations that had been given permission to mine by the responsible tribal authority and the Minister of Rural Development and Land Reform. To that extent, the case pitted the descendants of a relatively well off, but still vulnerable, community against the post-colony's new power holders — the 'alliance of chiefs, black business partners and mining corporations' that a recent critical-left analysis lists as one of the major social mechanisms in the 'formation of a new black elite'.<sup>177</sup> While *Maledu* might thus have done nothing about the causes of colonial land dispossession, it did address the new vulnerabilities that less well-connected black South Africans experience under the current ANC dispensation. In addition to the 38 applicants, the Land Access Movement of South Africa (LAMOSA), an NGO that represents the interests of communities dispossessed after 1913, joined the case as an *amicus curiae*. While denying LAMOSA's application to introduce new evidence, the Court began its judgment by quoting Frantz Fanon (no less), on the importance of land to 'colonised people'.<sup>178</sup> *Maledu* is thus hardly an example of a case in which the Constitution elided the fraught history of land dispossession in South Africa. Rather, it provided a public forum for discussion of precisely the issue that the Comaroffs and Modiri allege the Constitution is silent about — the continuities between the colonial abuse of law and the ongoing social and economic marginalisation of black South Africans in the post-colony.

Likewise, the two 'racially abusive language' cases — *Rustenburg Platinum Mine*<sup>179</sup> and *Duncanmec (Pty) Ltd v Gaylard*<sup>180</sup> — illustrate the subtle shift in the balance of *cultural* power that the Constitution is driving in the South African workplace.<sup>181</sup> In the first case, as we have seen, the Court upheld the dismissal of a white employee for referring to a black colleague by race, whereas in the second it held that the dismissal of black workers for singing a protest song that contained the racially insulting word 'boer' was unreasonable. The two cases are distinguishable on the basis that *Rustenburg Platinum Mine* involved a direct personal insult whereas *Duncanmec* involved racially offensive conduct in the course of a strike.<sup>182</sup> But they are nevertheless indicative of the way in which the Constitution's values are reaching down into day-to-day interactions like these to vindicate certain ways of behaving over others. It is alright for workers to sing a racially offensive struggle song if that is done to express their sense

---

<sup>177</sup> K van Holdt *The Political Economy of Corruption: Elite Formation, Factions and Violence* Society, Work & Politics Institute Working Paper 10 (February 2019) 3.

<sup>178</sup> *Maledu* (note 9 above) at para 1, quoting Frantz Fanon *The Wretched of the Earth* (1963) 43.

<sup>179</sup> Note 141 above.

<sup>180</sup> Note 143 above.

<sup>181</sup> See the discussion in *Minister of Justice and Constitutional Development & Others v Prince (Clarke & Others Intervening)* [2018] ZACC 30, 2018 (6) SA 393 (CC), 2018 (10) BCLR 1220 (CC), at para 65 of the racist overtones of the regulation of cannabis use and the concomitant denial of cultural rights. This theme has appeared in all the *Prince* litigation at both the High Court and Constitutional Court level.

<sup>182</sup> See Joanna Botha's article in this volume of the *Constitutional Court Review*.

of oppression under what they perceive to be a racially exploitative economic system.<sup>183</sup> It is not okay to refer to a colleague by race if that is done in the course of complaining about his conduct in a way that suggests that his behaviour was typical of persons of that race. These are fine distinctions at the intersection of labour law and cultural politics, but it is not obvious that the Constitution is not capable of assisting judges to make them. The charge that the Constitution ‘perpetrates’ an exclusively Western view of ‘cultural justice’<sup>184</sup> is certainly not made out.

## B Politicisation of the judiciary?

The best evidence of the claim that the Constitution has politicised the judiciary would be social survey data that reflects a general loss of confidence in the independence of the courts. In the latest Afrobarometer survey, however, 67% of residents agreed or strongly agreed with the statement that ‘[t]he courts have the right to make decisions that people always have to abide by’,<sup>185</sup> and 71% agreed or strongly agreed that ‘[t]he president must always obey the laws and the courts, even if he thinks they are wrong’.<sup>186</sup> This is hardly evidence of a judicial system that is widely perceived to be illegitimate.

In more qualitative terms, the number of public accusations by prominent politicians that the judiciary has been politicised has certainly increased. Whereas in the first 15 years of democracy this type of attack occurred relatively infrequently,<sup>187</sup> there have been a number of fairly serious attacks in the last decade. The trend began with former President Zuma’s not-clearly-benevolently motivated 2012 inquiry into the impact of the Court’s decisions on social transformation<sup>188</sup> escalated into attacks on individual justices, who have been openly accused of bias.<sup>189</sup> In addition to the ANC, the political party that is fondest of this sort of rhetoric is the EFF, whose leader, Julius Malema, recently complained of ‘women judges’ who are supposedly ‘threatened by male white Afrikaner lawyers’.<sup>190</sup>

The fact that such attacks have been increasing, however, does not mean that the courts have been politicised. Drawing this conclusion amounts to treating the making of accusations of politicisation as proof of their validity. Such a conclusion would not only be wrong. It would

<sup>183</sup> The Court in *Duncanmec* (note 143 above) at para 6 acknowledges that the Constitution has thus far had limited impact on eliminating racism because of the difficulty of changing human behaviour. The National Union of Mineworkers of South Africa (NUMSA) argued that racist struggle songs were justified because of the ongoing economic effects of apartheid (at para 24).

<sup>184</sup> Comaroff & Comaroff (note 33 above) at 540.

<sup>185</sup> Plus 94 Research, ‘Summary of Results’ of Afrobarometer Round 7 Survey, South Africa (2018), available at [afrobarometer.org/sites/default/files/publications/Summary%20of%20results/saf\\_r7\\_sor\\_13112018.pdf](http://afrobarometer.org/sites/default/files/publications/Summary%20of%20results/saf_r7_sor_13112018.pdf).

<sup>186</sup> *Ibid.*

<sup>187</sup> The only incidents of this sort from this period were former Health Minister Manto Tshabalala-Misimang’s threat not to obey the Court’s decision in the Treatment Action Campaign case if it went against the government and the ill-fated attempt in 2006 to amend the Constitution so as to give the Ministry of Justice more control over the courts. See C Albertyn ‘Judicial Independence and the Constitution Fourteenth Amendment Bill’ (2006) 22 *South African Journal on Human Rights* 126.

<sup>188</sup> Corder & Hoexter (note 80 above) at 124.

<sup>189</sup> *Ibid.* at 124–125.

<sup>190</sup> A Mitchley ‘Advocates’ Body Slams EFF’s Julius Malema for his ‘Attack’ on SA’s Judges’ *News24* (16 August 2019), available at <https://www.news24.com/SouthAfrica/News/advocates-body-slams-effs-julius-malema-for-his-attack-on-sas-judges-20190816>.

also be dangerous.<sup>191</sup> The obvious point about these attacks is that they are themselves political. In a situation in which the courts, along with the media, have at times been the only defence against the ANC's slide into corruption, it is in the interests of those who might one day face criminal charges to attack the courts. The most troubling aspect of the use of the word 'lawfare' is that it feeds into these tactics. By describing both the benevolent and the abusive use of the courts in the same terms, the 'lawfare' critique encourages the very process of politicisation it purportedly seeks to guard against.

In addition to the absence of partisan-political influence on the courts,<sup>192</sup> there is also no evidence of the weaker, American form of politicisation, i.e. the influence of the judges' personal ideological views on decision-making. That is largely because the Constitution, read in the context of its enactment, presents a much more coherent account of its animating values than the US Constitution. What American CLS scholar, Karl Klare, famously presented as a post-liberal 'ideological project' is simply the political ideology actually informing the Constitution.<sup>193</sup> As such, judges in South Africa can enforce it through ordinary interpretive techniques.<sup>194</sup> Unsurprisingly, therefore, it is hard to divide the current members of the Court into ideological blocs. Such disagreement as there has been, has been about differences over the scope of the separation of powers doctrine.<sup>195</sup> With a bit of effort, one could try to make something of this — to suggest, for example, that there are more and less executive-friendly factions of the Court, and that this has to do with their political loyalties or ideological affiliations. But there is no strong evidence of this. The Court's differences over the scope of the separation of powers doctrine are more plausibly ascribed to disagreements about the Court's appropriate relationship to the democratic branches and the balance to be struck between constitutional enforcement and respect for democracy.

In short, the atmosphere of alarm about the possible politicisation of the courts that the proponents of lawfare seem to want to foster is not borne out by the Court's record and other evidence. Whether assessed quantitatively or qualitatively, the Court has maintained a reputation for law-governed adjudication. How has it done this?

As I have argued in more detail elsewhere,<sup>196</sup> we should resist monodisciplinary political science accounts of the Court as engaging in political power-building strategies and think instead in interdisciplinary terms of the Court as being at the centre of two distinct social subsystems — law and politics — each with its own conception of legitimate authority. In

---

<sup>191</sup> This problem also affects the otherwise more cautious account in Corder & Hoexter (note 80 above) in so far as they refer to the courts as a 'casualty' (at 120) of the process when it is in fact far from clear that they have been. This leads them into a more pessimistic analysis than is warranted.

<sup>192</sup> The only publicly recorded instance of attempted partisan-political influence on the Court concerns the still unresolved allegation that Justice John Hlophe of the Western Cape High Court attempted to influence two of the judges in their decision in a matter involving former President Jacob Zuma. Whether those allegations are true or not, the point is that the judges concerned resisted whatever influence Justice Hlophe might have sought to exert.

<sup>193</sup> Klare (note 47 above).

<sup>194</sup> T Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' (2009) 20 *Stellenbosch Law Review* 258.

<sup>195</sup> For an example of this in the Court's 2018 term, see Froneman J's concurring judgment, in which Cachalia AJ concurred, in *My Vote Counts* (note 7 above).

<sup>196</sup> T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013). See also R Dixon & T Roux 'Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa' in T Ginsburg & A Huq (eds) *From Parchment to Practice: Challenges of Implementing New Constitutions* (2020).

that setting, what the Court does — what all constitutional courts do in systems where law is relatively well institutionalised — is to negotiate the constraints that adherence to the rule of law in a settled legal tradition imposes while at the same time drawing on the legitimating effects of perceived adherence to the rule of law to resist attacks on its independence.<sup>197</sup> Without attempting to be exhaustive, we can observe at least four ways in which the Court did this in its 2018 decisions.

### 1 *Main posture: legalism*

‘Legalism’ as used here is a legal-cultural ideology that emphasises law’s autonomy from politics. I say ‘ideology’ because legalism is best understood as a cluster of ideas about the nature of law that has the power to legitimate the exercise by a court of its functions. Its success depends on inculcating in the public a certain faith in law — not the ‘fetishized faith’ that the Comaroffs allege certain people have in the Constitution’s ability to solve all of South Africa’s problems, but a faith in the capacity of law to act as a counterweight to politics. Legalism as an ideology in this sense is propagated in the public sphere in various forms. As far as the Court is concerned, it consists in the claim underlying each of its decisions, as it works its rhetorical effects, that the outcome was mandated by law and not by politics. Understood in this way, legalism is both an ideology and an umbrella term for a range of reasoning techniques through which the Court demonstrates that law provides a separate and distinct form of reasoning which is politically impartial — that for all of the political controversy of the questions put to it, once these questions are considered in court, they are converted from political into legal questions.<sup>198</sup>

Every decision that the Court takes is replete with these techniques, but the way that they convert political questions into legal questions is so taken for granted that we are mostly unaware of what the Court is doing. Take, for example, the *Corruption Watch* case.<sup>199</sup> As noted in part IV, the political subtext of that case was that Shaun Abrahams was seen as a generally more pliant NDPP than Mxolisi Nxasana. The political importance of the case, in that sense, had to do, not so much with whether President Zuma would be sanctioned for authorising the settlement agreement entered into with the latter, but with whether his subsequent appointment of Abrahams would stand. As a legal matter, the choice between these outcomes hinged on the Court’s approach to the question of whether the invalidation of Nxasana’s settlement agreement necessarily vitiated the appointment of Abrahams. Two alternative possibilities were at issue, first that Nxasana himself should return to office, and second, that Abrahams, having been appointed in consequence of, but not having been involved in, the settlement agreement, should continue as NDPP.

In argument, the Court was asked to apply the SCA’s decision in *Oudekraal* to the effect that administrative action ‘continues to exist in fact and has legal consequences that cannot simply be overlooked’ until it is set aside by a court in review proceedings.<sup>200</sup> On one possible interpretation of that holding, the invalidation of Nxasana’s settlement agreement, having

<sup>197</sup> For a closely related philosophical exposition of this idea, which draws on my work on South Africa, see R Mann ‘Non-Ideal Theory of Constitutional Adjudication’ (2018) 7 *Global Constitutionalism* 14.

<sup>198</sup> This understanding of legalism was succinctly expressed by Australia’s leading High Court judge, Sir Owen Dixon, on the occasion of his swearing in as Chief Justice in 1951.

<sup>199</sup> *Corruption Watch* (note 103 above).

<sup>200</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48, 2004 (6) SA 222 (SCA)(as cited and paraphrased by the Court in *Corruption Watch* (note 103 above) at para 31).

taken place after the appointment of Abrahams, should have had no effect on it. The SCA, however, had clarified its holding in *Oudekraal in Seale* to make it clear that it was only administrative action that depended on the factual existence of the prior administrative acts that remained valid, and even then only until the prior administrative act was invalidated.<sup>201</sup> The Court had endorsed this reading of *Oudekraal* in *Kirland*.<sup>202</sup> After summarising this line of cases, the Court was thus able plausibly to say that the law in the form of its prior decisions, consistently applied, dictated the invalidation of Abrahams' appointment.

There is no mystery in any of this. The Court is not manipulating the law in any great way to achieve these legal truth effects. It is, for all intents and purposes, just doing doctrine — parsing judicial dicta, distinguishing cases where necessary, and applying plausible readings of past decisions to decide current controversies. Charges of the necessary politicisation of the judiciary under a system of judicial review, however, often seem to be premised on a radically rule-sceptical account of law, such that any attempt on the part of a court to present its decisions as legally motivated is bound to be found out for the noble lie that it is. The *Corruption Watch* case and others like it in the Court's 2018 term illustrate that this account underestimates the ability of judges to legitimate the exercise of their authority. Legalism has the ideological resources, South African legal-reasoning conventions, and the techniques to convincingly translate controversial political questions into legal questions.

## 2 *Particularising the universal and universalising the particular*

Aside from resisting the appearance of politicisation through plausible application of its own doctrines, how does the Court confront the particular critique that the Constitution's rights are Western rights? On this version of the critique, no amount of doctrinal work can blunt the charge that the Court is essentially enforcing an alien value system. Indeed, the more ably the Court enforces that value system as a matter of legal technique, the more reliably it acts as an agent of Western cultural values.

The Court has not addressed this aspect of the lawfare critique head on in its judgments. Rather, what it has done has been to locate notionally universal human rights in the specific history of South Africa's struggle against apartheid and in the ongoing furtherance of what it refers to as 'our constitutional project'.<sup>203</sup> Thus, in *Mlungwana*, for example, the Court traced the origins of the right to peaceful assembly back to the denial of this right before 1994.<sup>204</sup> It then went on to demonstrate the contemporary relevance of this right to protests over municipal service delivery — thereby suggesting that the right to peaceful assembly is not an alien Western right but a right that emerged out of South Africa's own, unfinished tradition of struggle against the abuse of political power.<sup>205</sup> None of these passages is strictly speaking doctrinally required. Rather, they are intended to work a certain rhetorical effect in legitimating the work that the Court is doing.

---

<sup>201</sup> *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* [2008] ZASCA 28, 2008 (4) SA 43 (SCA) at para 13.

<sup>202</sup> *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6, 2014 (3) SA 481 (CC), 2014 (5) BCLR 547 (CC).

<sup>203</sup> *My Vote Counts* (note 7 above) at para 52.

<sup>204</sup> *Mlungwana* (note 4 above) at paras 64–67.

<sup>205</sup> *Ibid* at para 69. In similar vein, the Court in *Law Society* (note 123 above) at para 4 bolstered its extensive reliance of international law by stressing the role that international law had played in 'expos[ing] the barbarity and inhumanity of the apartheid system of governance'.

To be clear: I am not suggesting that these passages are deliberately intended to counteract the Western values critique, only that they tend to have that effect. In the face of the charge that the rights in the Bill of Rights are faux universal rights that act as a Trojan horse for Western values, the Court reminds us that they were fought for during the anti-apartheid struggle. Having been won, they remain relevant to the implementation of a Constitution that is presented as the continuation rather than the negation of that struggle. In this way, notionally universal rights are given a South African flavour, indigenising them and demonstrating their relevance to contemporary democratic politics.

In *My Vote Counts*,<sup>206</sup> by contrast, many of the Court's arguments about the need for legislation to require the recordal and disclosure of private funding to political parties could have been made in any liberal constitutional democracy. The Court is here appealing to emerging global best practice on the conditions for free multiparty competition. While there are several references to the danger of corruption that undisclosed political party funding poses,<sup>207</sup> these remarks are not particularised to the challenges that South Africa faces.<sup>208</sup> Rather, they are kept at a fairly general level, portraying this form of corruption as a universal problem that all constitutional democracies face. The Court's approach in this instance could be said to be exactly the opposite of that deployed in *Mlungwana* — 'universalising the particular' so as to demonstrate that the rights in the Bill of Rights, though emanating out of South Africa's own political experience, have broad international recognition and salience.

### 3 *Comparative and international law*

Closely related to the previous adjudicative techniques is the Court's ongoing practice of bolstering its decisions with references to foreign law. In *My Vote Counts*, the Court thus quoted a long extract from the US Supreme Court's decision in *Buckley v Valeo*.<sup>209</sup> The emphasis that the Court placed on this decision was slightly odd given the US Supreme Court's reputation as a court that has failed properly to address the influence of moneyed interests in politics. But the point seems to have been partly to convey the universality of the problems South Africa faces and partly to draw on what the Court took to be a helpful setting out of the link between private funding disclosure requirements and the prevention of electoral corruption. In other cases, the Court makes a point of referring to the case law of 'progressive constitutional democracies'<sup>210</sup> so as to explicitly locate its jurisprudence in an emerging international consensus about the role played by rights in the protection of the preconditions for genuine democracy.<sup>211</sup>

<sup>206</sup> Note 7 above.

<sup>207</sup> *Ibid* at paras 45–52. The Court cites both the UN Convention against Corruption and African Union Convention on Preventing and Combating Corruption (at paras 49 and 50).

<sup>208</sup> Perhaps because, until the recent Public Protector investigation into the funding of President Cyril Ramaphosa's ANC presidential election campaign, this problem had not received widespread media coverage.

<sup>209</sup> 424 US 1 (1976).

<sup>210</sup> *Mlungwana* (note 4 above) at para 69 with accompanying citations to the UNHRC (Finland) and ECHR (Russia).

<sup>211</sup> See also *Prince* (note 181 above) at paras 54–57 and 70–75 (referring to a range of approaches in foreign law to the criminalisation of marijuana use).

#### 4 Commonsense ethical standards rather than moral philosophy

The final adjudicative technique worth commenting on involves the way that the Court in its 2018 term appealed to commonsense ethical standards as opposed to presenting the Constitution, as it used to do, as an ‘objective normative order’.<sup>212</sup> Partly this has to do with the changing composition of the Bench and the changing nature of the cases. It has been a while since the Court had a Germanophile among its members, and most of the cases it today hears do not involve questions of collective political morality,<sup>213</sup> such as the constitutionality of the death penalty, but rather the moral probity of individual conduct. In that changed setting, one would expect commonsense ethical standards to come to the fore. But it is still striking how the Court, in cases such as *Corruption Watch*,<sup>214</sup> seems to base so much of its reasoning, not on complex theorisations of the Constitution’s underlying value system, but in simple statements of what the morally correct thing to do is in the circumstances was.<sup>215</sup> We should be cautious about overthinking this or suggesting that this is a deliberate strategy of sorts, but there are obvious advantages for the Court, given the Western values critique, in presenting its decisions as the enforcement of commonsense, everyday ethical standards. One of the oft-repeated charges against constitutional judicial review is that it invites judges to substitute their subjective views of how the constitution’s value system ought to be understood for that of the democratic branches — in the process acting politically. The Court’s commonsense ethical standards approach deflects this charge by appealing directly to South Africans’ moral outrage about the way public funds are being misspent or political power is otherwise being abused.

#### C Abuse of the judicial process?

While several cases in the sample provide evidence of lengthy appeals processes, particularly those involving labour matters,<sup>216</sup> there is only one 2018 case that suggests that public office bearers, litigating at taxpayers’ expense, may be able to use the legal process to avoid accountability. That case, of course, was the *South African Social Security Agency* case,<sup>217</sup> the latest in a long line of cases arising from the ongoing saga of the social welfare grants payments crisis. The potential abuse of the judicial process at issue in this case had to do with the way the former Minister of Social Development, SASSA and Cash Paymaster Services (Pty) Ltd were effectively able to hold the Court to ransom by repeatedly failing to implement its orders or by bringing last-minute urgent applications to extend them. This tactic put the Court over a barrel because it was not in a position to order the termination of the services in the absence of an appropriate alternative service provider, for reasons largely of the Minister’s and her administration’s making. In its decision in *South African Social Security Agency*, the Court considered but, in the end, did not impose a personal costs order against the former Minister (Bathabile Dlamini) and the acting CEO of SASSA (Pearl Bhengu) as a sanction for their misconduct. While finding that the Minister did not perform an ‘effective supervisory role’, the Court held that her conduct did not meet the standard of bad faith or gross negligence

---

<sup>212</sup> *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at paras 54–55.

<sup>213</sup> One exception here is *Prince* (note 181 above).

<sup>214</sup> Note 103 above.

<sup>215</sup> In addition, see also *Law Society* (note 123 above) at paras 1–3.

<sup>216</sup> *Ibid.*

<sup>217</sup> Note 8 above.

required for the imposition of a personal costs order.<sup>218</sup> The Court took a different approach in *Black Sash 3*,<sup>219</sup> however, on the strength of the Ngoepe Inquiry's findings.

Far from allowing its processes to be abused, these two cases suggest that the Court is starting to develop remedies that will prevent public office bearers from avoiding accountability. In 2019, these remedies were already being used to sanction the Public Protector, who some allege is abusing her office for partisan-political purposes.<sup>220</sup>

## VI CONCLUSION

In summary, none of the three aspects of the lawfare critique is borne out by the Court's 2018 term. There is no sense in which the cases decided by the Court in 2018 displaced democratic politics, drew it so far into politics that it was unable to maintain its independence, or abused the judicial process in ways that the Court was not able to manage. In fact, if there is a common theme in the twelve cases discussed in this article, it is the way in which the Court is continuing to shore up and defend constitutional institutions that are required to protect South Africa's democracy. In the face of a ruling political party that it can no longer unproblematically treat as a partner in the implementation of the constitutional project, the Court has signalled to minority political parties and civil society actors that it is willing to entertain cases aimed at reinforcing the integrity of the democratic process.

One way of interpreting this development is to say that the ANC's moral implosion as a political party has resolved the 'counter-majoritarian' dilemma that is ordinarily associated with strong-form judicial review.<sup>221</sup> The extent of corruption and maladministration in the ANC means that the Court is no longer confronted by an internationally celebrated political party, with clear social transformation plans, backed by an overwhelming democratic mandate. Instead, it is having to enforce the Constitution in the context of a faltering government that has in many respects lost its way. In that setting, rather than taking over the role of agent of social transformation, as the Indian Supreme Court did in the 1980s,<sup>222</sup> the Court has focused its efforts on protecting democratic institutions so that they can properly drive the constitutionally imagined social transformation process once again.

The Court's approach in this respect conforms to the conventional understanding of the legitimate role of constitutional courts in liberal constitutional theory. Liberal constitutionalism generally puts its faith in institutions and their ability to control and discipline human behaviour. In so doing, this approach to governance does not assume that constitutions are capable of solving all of a society's problems. Rather, it assumes that the role of a constitution is to enable well-meaning actors within a society to contribute to the solution of its problems, and to provide a method of sanctioning political actors who do not have the public interest at heart in this sense. The Court is right to stick to this understanding of constitutionalism and of its own role in democratic politics. The current attacks on the Constitution stem, not from the fact that this understanding is misguided, but from the fact that the Court's role in ensuring that the democratic process functions properly is only part of the story. On the one

<sup>218</sup> Ibid at paras 46–47.

<sup>219</sup> Note 115 above.

<sup>220</sup> *Public Protector v South African Reserve Bank* [2019] ZACC 29, 2019 (6) SA 253 (CC).

<sup>221</sup> Bickel (note 75 above).

<sup>222</sup> The best recent discussion of this phenomenon is A Bhuvania *Courting the People: Public Interest Litigation in Post-Emergency India* (2017).

hand, the Court cannot on its own ensure that democratic politics is directed towards public-interested behaviour if the electorate is not prepared to vote partisan, incompetent or corrupt public office bearers out of office. On the other, the Court's efforts will bear little fruit until the global economic order is controlled by genuinely public-interested institutions. Until those two problems are resolved, the Court and the Constitution more generally will continue to be blamed for an outcome — the relatively slow progress of social and economic transformation in South Africa — that is largely beyond their power to control.