

University of New South Wales Law Research Series

**Marking Constitutional Transitions: The Law
and Politics of Constitutional Implementation
in South Africa**

ROSALIND DIXON AND THEUNIS ROUX

[2018] *UNSWLRS* 64

UNSW Law
UNSW Sydney NSW 2052 Australia

Marking Constitutional Transitions:

The Law and Politics of Constitutional Implementation in South Africa

Rosalind Dixon & Theunis Roux

I Introduction

South Africa is often seen as one of the most successful recent instances of constitutional implementation: after decades of authoritarian, racially discriminatory rule under apartheid, its 1996 Constitution¹ established a system of multi-party democracy and rights-based constitutionalism. In the first ten years of democracy, the African National Congress (ANC) government passed a range of transformational statutes that re-moralized the legal system and began to address the consequences of past economic exploitation and discrimination. From a new, more worker-friendly industrial relations regime,² to land reform,³ and administrative justice,⁴ the Constitution's vision for a just legal and political order was given concrete legislative form. To be sure, in the second decade of democracy, from around 2008, the ANC's reputation as the driver of social and economic transformation began to decline, and the wheels have come off the South African democratic miracle to a certain extent. But the Constitution has not been substantially amended during this period, and it remains at the center of public discussion about how to restore the democratic system to health.

This chapter suggests that one important explanation for this experience lies in the degree to which key actors – such as the South African Constitutional Court – have implemented constitutional transformation imperatives in ways that are sensitive to the broader political context, particularly the context of political (non-)competition or dominant-party democracy. Initially, the chapter argues, the Court adopted a restrained role that avoided direct confrontations with the ANC government, and sought to encourage legislative and executive responsibility for constitutional implementation (the first constitutional period). Over time, as the ANC became less committed to the constitutional project, the Court gradually assumed a more active role in encouraging political pluralism and accountability, both within the ANC and more broadly (the second constitutional period).

Despite these efforts, the project of constitutional implementation in South Africa clearly remains incomplete. As a recent collection we edited documents,⁵ South Africa continues to grapple with problems of endemic corruption, the non-delivery of key services, and sexual and other violence. The ANC's ongoing electoral dominance means that it is in many ways part of the problem rather than the solution. Entrenched in power for more than twenty years, the ANC has been able to take

¹ Constitution of the Republic of South Africa 1996.

² The Labour Relations Act 66 of 1995.

³ See, for example, Restitution of Land Rights Act 22 of 1994 and the Extension of Security of Tenure Act 62 of 1997.

⁴ The Promotion of Administrative Justice Act 3 of 2000.

⁵ Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (New York: Cambridge UP, forthcoming).

control of nominally independent state institutions and turn them to its not always benign purposes. Worse than this, overwhelming evidence is now emerging that the currently dominant faction within the ANC, with President Jacob Zuma at its head, has been involved in a systematically corrupt relationship with powerful business interests. This has disabled state organs from properly implementing constitutionally-mandated programs.

In light of these developments, several scholars have criticized the Constitutional Court for being too slow to fashion robust constitutional doctrines to arrest the slide into corruption, clientelism and nepotism. While the Court's switch from 2008 to a more circumspect attitude towards the ANC was a move in the right direction, this argument goes, the Court might have done more sooner to combat the pathologies that have emerged. In particular, taking its cue from the Colombian Constitutional Court and the Indian Supreme Court, the Court should have engaged in substantive constitutional policy analysis of the problems facing South Africa's democracy, and developed the doctrines required to combat them.

This chapter agrees with these critiques up to a point, but stresses the need for the Court to respect culturally-defined understandings of the law/politics boundary, and to work from within traditionally accepted modes of legal reasoning to develop the required doctrines. In particular, South Africa's relatively formalist legal culture means that substantive constitutional policy analysis was more or less off the table as a legitimate doctrinal strategy. Rather, any successful transition by the Court from the first to the second constitutional period required the Court to find either clear textual authority or previously developed precedents for its interventions.

Using that understanding as the appropriate measure, the Court, in the first constitutional period, arguably failed to create the necessary doctrinal markers – or forms of second-order 'doctrinal deferral'⁶ – that might have better supported its role in the second period and encouraged the kind of litigation that would have seen it intervening sooner and more robustly. While the Court did much to elaborate its role, a close analysis of its case law reveals that several opportunities were missed for the Court to have laid the groundwork for later interventions.

The comparative insight emerging from this analysis is that successful constitutional implementation, by a court and other key institutions, will depend on a mix of sensitivity to the immediate political context, and the degree to which it may change over time, and a legal-doctrinal response that is not only flexible enough to accommodate such a change, but supports the litigation and doctrinal developments capable of underpinning the court's changing role.

The remainder of the chapter is divided into four parts. Part II sets out the background to the 1996 South African Constitution, and its substantive commitments, and the complex nature of any analysis focused on notions of forward-looking constitutional implementation. Part III explores the first and second periods of constitutional implementation in South Africa: the first, during which the Court tried to enlist the ANC as a partner in constitutional implementation, and the second, in which the Court has shifted to a more active role in constraining the ANC as the dominant political party while building pluralism. Part IV explores criticisms of the government's record of constitutional implementation and the Court's tardiness in responding to these failures. Part V suggests that for the transition from the first to the second constitutional period to have occurred more effectively,

⁶ This term is explained below.

doctrinal markers for this transition were required, and that in many cases, markers of this kind were notably absent in cases in the first period. Part VI offers a brief conclusion about the complex relationship between constitutional politics and legal legitimacy in processes of constitutional implementation, and the role of courts as strategic actors attentive to notions of both political and legal legitimacy.

II The 1996 Constitution's balance between change and continuity

In an early commentary, Cass Sunstein described the 1996 South African Constitution as 'the world's leading example of a transformative constitution'.⁷ Much of the literature on post-apartheid constitutionalism has been devoted to developing this idea, with Karl Klare's 1998 paper on 'transformative constitutionalism' achieving something close to canonical status.⁸ In fact, however, the 1996 South African Constitution is arguably more accurately described as containing both transformative and preservative elements. Its transformative aspect consists in its commitment to an imagined post-apartheid future free of racial and gender discrimination in which the rule of law has been extended to the country's entire population.⁹ But the 1996 Constitution is also preservative in the sense that it was the end-product of a negotiated settlement in which the old-order political regime sought to safeguard its constituents' key interests.¹⁰ This feature is most clearly represented by the 34 Constitutional Principles, to which the 1996 Constitution had to conform and which to that extent give it a more backward-looking character.¹¹ But there is an element of preservationism, too, in the general philosophy of social and economic transformation that underpins the 1996 Constitution. Even as it sets out its programmatic vision for social and economic justice, the 1996 Constitution clearly commits itself to gradualist, rights-based reform rather than the revolutionary overthrow of the old order.

With hindsight, it is possible to see that constitution-makers in South Africa were faced with two distinct risks that they had to mitigate. The first was the risk that social and economic transformation would be too radical – that the advent of democracy would be followed by a rush to change all existing institutions and that in the process much that was potentially beneficial about South Africa's colonial legacy – its legal tradition, strong banking and tertiary education sectors, reasonably sound fiscal policies, and the like – would be sacrificed, with no real gains in economic development or poverty reduction. The second risk was just the opposite – that in pursuing gradualist, rights-based social and economic reform, the pace of transformation would be too slow, giving rise to a reactive populism that eventually destroyed the constitutional project.

⁷ Cass R. Sunstein, 'Social and Economic Rights? Lesson from South Africa' (2000/2001) 11:4 *Constitutional Forum* 123, 125.

⁸ Karl E. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 12 *South African Journal on Human Rights* 146 (arguing that the success of the transformative South African constitutional project depended on a prior transformation of South African legal culture to embrace a more politicized conception of constitutional adjudication). See also Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 (describing the point of South Africa's commitment to rights-based constitutionalism as being to develop a new 'culture of justification').

⁹ Jens Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (Cambridge: Cambridge UP, 2008).

¹⁰ On the idea of rights-based constitutions as tools of preservationism, see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2007).

¹¹ Schedule IV of the Constitution of the Republic of South Africa 1993 (interim Constitution).

Of those two possible risks, South Africa's constitution-makers chose to mitigate the first, and hope for the best about the second. Transformative as the 1996 Constitution's vision is, its insistence on gradualist, rights-based social and economic change puts it clearly at the reformist end of the continuum. If change was to occur, it had to occur through law, clear regulatory frameworks and processes that respected existing rights as far as possible and pursued careful balances between those rights and the rights of the new majority.

In choosing to go this route, constitution-makers in South Africa tied the fate of liberal-democratic constitutionalism to the success of the gradualist reform model. Wittingly or unwittingly, but now with hindsight quite clearly, the choice of this model meant that popular support for liberal-democratic constitutionalism would be vulnerable to facts on the ground about the actual extent of the reduction of inequality and racial and gender discrimination. More than this, the fate of liberal-democratic constitutionalism as measured by those indicators would not be entirely in the hands of its proponents. To the extent that factors beyond their control – global economic forces, say, or corrupt and nepotistic local politicians – frustrated the achievement of the Constitution's transformative vision, the South African public would not necessarily discriminate between those parts of the failed constitutional project that were attributable to the Constitution's chosen model of reform and those that were not. Liberal-democratic constitutionalism would shoulder the blame either way.

We may ponder now from a distance of a little more than 20 years whether this larger risk was foreseen and, if it was, whether it was taken on with eyes wide open. Almost certainly, the choice in favour of liberal-democratic constitutionalism was not unconstrained. Both South Africa's institutionalized legal tradition and the political dynamics of the constitutional negotiations process itself clearly structured this choice. The option of a more radical approach to social and economic transformation was also more or less put off the table as soon as the two major political groupings – the National Party (NP) and the African National Congress (ANC) – decided, for their different reasons, to go the negotiated-settlement route.¹² Once pragmatic, pro-negotiations factions on both sides won out, the gradualist, rights-based model was the only real game in town.

With the 1996 Constitution taking that form, custodianship of the constitutional project was to a large extent handed over to the judiciary. A range of other constitutional institutions – including Parliament and the so-called 'Chapter 9' integrity institutions – clearly had an important role to play in the process of constitutional implementation. But the dominance of the ANC within many of those institutions, combined with the emphasis on the part of both the ANC and NP on a legally-mediated transition, put the newly established Constitutional Court at the center of the constitutional enterprise. While it would clearly be able to draw on the support of civil society organizations – of public impact litigation firms like the Legal Resources Centre and social movements like the Treatment Action Campaign¹³ – in the end it was the Constitutional Court that was handed the

¹² See Mark Gevisser, *Thabo Mbeki: The Dream Deferred* (Johannesburg: Jonathan Ball Publishers, 2007) 526-54 (explaining how Thabo Mbeki's pragmatic vision for negotiated democratic transition triumphed over Chris Hani's more radical, revolutionary vision).

¹³ Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998) (on the 'support structures' required for a successful rights revolution).

primary responsibility for making the gradualist, rights-based approach to social and economic transformation work. It is to the Court's performance in that respect that the next section turns.

III Two periods

If the literature on constitutional courts in new democracies teaches us anything, it is that such courts need to build a constituency.¹⁴ Over and above the particular doctrinal choices that they make, constitutional courts in new democracies face an overarching choice about the general posture they wish to adopt towards major political actors and other potential partners in the constitutional project, whether those be dominant political parties, civil society organisations, business organisations, or the public more generally. That choice of posture must be made on the basis of an analysis of the political context – of the balance of forces favoring the success of the constitutional project, to which the Court's own success as an institution is ultimately tied.

This overarching posture is not something that the Court typically articulates in its judgments. It is not even something that is necessarily consciously discussed among the judges at judicial conferences. But it is nevertheless real and may be discerned in what the Court does and the doctrines it develops.

In South Africa's case, we suggest, there have been two such basic postures since 1994. The first, which spanned roughly the period from 1995-2007, was a posture in which the Court enlisted the ANC as its major ally in the implementation of the constitutional project. The second, spanning the period since then, has been one in which the Court has more or less given up on the ANC as a credible partner, and has sought instead a more diverse set of partners, apparently sensing that South Africa's dominant-party democracy is the major threat to the consolidation of liberal-democratic constitutionalism.

In many of the Court's early cases we thus see the Court paying respectful homage to the ANC as the driving force behind the establishment of democracy and as integral to the success of the constitutional project.¹⁵ The most obvious example here is the *Grootboom* decision,¹⁶ in which the Court resisted the invitation to adopt a minimum-core approach and instead opted for reasonableness review – an approach that explicitly opened up a co-operative dialogue with the ANC about how to implement the Constitution's vision for social and economic transformation.¹⁷ The

¹⁴ See, for example, James L. Gibson, Gregory A. Caldeira and Vanessa A. Baird, 'On the Legitimacy of National High Courts' (1998) 92 *American Political Science Review* 343; Lee Epstein, Jack Knight and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117.

¹⁵ Full a longer version of this argument, see Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge: Cambridge UP, 2013) (arguing that the key to the South African Constitutional Court's early success was its ability to enlist the ANC as a partner in the constitutional project). In response to Roux's argument, James Gibson has acknowledged that the ANC's role in mediating the Court's popular support requires an adjustment to his legitimacy theory of judicial review. See James L. Gibson, 'Reassessing the Institutional Legitimacy of the South African Constitutional Court: New Evidence, Revised Theory' (2016) 43 *Politikon* 53. For a further penetrating analysis of the Constitutional Court's approach to its mandate, which differs from Roux's account in certain respects, see James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge: Cambridge UP, 2016).

¹⁶ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

¹⁷ See Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong- v. Weak-Form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391.

review standard was a deferential one, but deliberately so, leaving space for the ANC to ‘own’ the constitutional project and take charge of it. Other examples include the Court’s approach to affirmative action, its use of remedies such as suspended declarations of invalidity, and emphasis on the rejection of apartheid as a constitutional imperative.

As to the first of these additional mechanisms, the Court in early cases was asked to consider a variety of measures designed to address race-based inequalities. The Court consistently upheld these measures, applying a highly deferential standard of review. In *Van Heerden*, for example, the Court upheld a pension plan that distinguished between old (and predominantly white) and new (predominantly black) members of the National Assembly, holding that – provided such a plan sought to benefit a historically disadvantaged racial group – it was almost entirely for Parliament to determine the appropriate scope of such measures.¹⁸ Similarly, in *Bato Star*, in hearing a procedural challenge to the allocation of fishing quotas to various commercial operators, including black empowerment businesses, the Court declined to engage in any form of substantive reasonableness review of the government’s actions, suggesting that ‘the broad goals of transformation can be achieved in a myriad of ways’, and that it was for the executive and not the Court to determine the precise means used to promote this goal.¹⁹

The Court also consistently relied on suspended declarations of invalidity as a tool for enlisting the support of the National Assembly, and thus the ANC, in implementing the constitutional project. For instance, in *Volks NO v Robinson*, in finding that constitutional commitments to equality required *de facto* as well as legal partners to benefit from spousal support, upon the death of a partner, the Court read language into the relevant statute to achieve this, but then suspended the declaration of invalidity for a period of two years.²⁰ Similarly, in *Fourie*, in finding that the non-recognition of same-sex marriage was unconstitutional, the Court suspended the relevant declaration of invalidity for a period of 12 months to give the National Assembly a chance to remedy the defect.²¹ Remedies of this kind not only delay the legal effect of a finding of constitutional invalidity. They require legislators to take active steps to redress constitutional violations, thereby effectively enlisting them as partners in the constitutional project.²²

Finally, in the first decade of the Constitution’s operation, the Court repeatedly invoked the idea of apartheid as a form of constitutional ‘never again’. In *Makwanyane*, the first case ever heard by the Court, the Court emphasized the link between the constitutional commitment to human dignity and the break from apartheid, reasoning that ‘apartheid was a denial of common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished’.²³ In

¹⁸ *Minister of Finance v Van Heerden* 2004 (6) SA 121.

¹⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 pars 35-41.

²⁰ *Volks NO v Robinson* 2005 (5) BCLR 446.

²¹ *Minister of Home Affairs v Fourie* 2006 (1) SA 524. In the course of its judgment, the Court stated that ‘[i]t needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect.’ *Ibid* para 138.

²² Compare Rosalind Dixon and Samuel Issacharoff, ‘Living to Fight Another Day: Judicial Deferral in Defense of Democracy’ (2016) *Wisconsin Law Review* 583. See also Kent Roach, ‘Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity’ (2001) 35 *University of British Columbia Law Review* 211; Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford: Oxford University Press, 2015).

²³ 1995 (3) SA 391 par 51.

Phillips v Director of Public Prosecutions, the Court connected commitments to freedom of expression to the repudiation of apartheid, by characterizing apartheid-era norms and practices as a ‘restrictive past where expression, especially political and artistic expression, was extensively circumscribed’.²⁴ In *Bernstein v Bester*, the Court characterized a broad commitment to privacy as a response to apartheid-era practices of restricting liberty, suggesting that ‘the government’s frequent violation of individual freedom in the years of apartheid’ was a reason to favor a broad view of the right to privacy under the 1996 Constitution.²⁵ In *Ferreira v Levin*, the Court connected commitments to individual freedom to the repudiation of apartheid.²⁶ In *Lawyers for Human Rights v Minister for Home Affairs*, the Court emphasized the importance of protections against arbitrary detention ‘in light of [South Africa’s apartheid-era] history during which illegitimate detentions without trial of many effective opponents of the pre-1994 government policy of apartheid abounded’.²⁷ In *S v Lawrence*, the Court linked a commitment to religious pluralism, or the avoidance of giving preference to Christianity, as a response to the history of religious discrimination under apartheid.²⁸ In the *Gauteng School Bill Case*, the Court linked the scope of education rights under s 32 of the 1993 Interim Constitution to the apartheid-era system of Bantu education, which created a racially segregated public education and prohibition on private schools (including multi-racial schools).²⁹ In *Bhe v Khayelitsha*, in holding that customary law should be developed in light of the Constitution, the Court linked this project to the repudiation of apartheid-era practices of marginalizing and fossilizing customary law.³⁰ In taking this approach, the Court also effectively connected the entire South African constitutional project to the ANC’s political agenda – of creating a transition to true multi-racial democracy, or black-majority rule.

The adoption of the Court’s second basic posture began around 2008 and corresponded to the deposing of Thabo Mbeki as President and the rise of Jacob Zuma.³¹ From this time, the Court progressively lost confidence in the ANC as a central partner in the constitutional project. Instead, it sought to enlist a wider range of partners in an apparent effort to contribute to the building of a more diffuse, pluralist democracy. The main shifts in its jurisprudence that signal this underlying change in posture are: (1) the emergence of ‘meaningful engagement’ as the preferred approach to the resolution of social and economic rights claims (thus changing the Court’s partners from

²⁴ 2003 (3) SA 345 par 23.

²⁵ 1996 (2) SA 751 par 144.

²⁶ 1996 (1) SA 984 par 51.

²⁷ 2017 (5) SA 480 par 37 (further emphasizing that ‘we must never again allow a situation in which that is countenanced’).

²⁸ 1997 (4) SA 1176 pars 148-52.

²⁹ *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (3) SA 165 par 8. See also par 46 per Sachs J

³⁰ 2005 (1) SA 580 par 43. Compare also Penelope Andrews, ‘Women and Rights’ in *The Post-Apartheid Constitution: Perspectives on South Africa’s Basic Law* (P Andrews and S Ellman eds, Athens: Ohio University Press, 2001) 347-8; Dennis Davis, ‘Deconstructing and Reconstructing the Argument for a Bill of Rights within the Context of South African Nationalism’ in *The Post-Apartheid Constitution: Perspectives on South Africa’s Basic Law* (P Andrews and S Ellman eds, Athens: Ohio University Press, 2001) 207, 228.

³¹ Mbeki was deposed as President of the ANC at the 52nd ANC National Conference in Polokwane in December 2007. Mbeki resigned as President of South Africa in September 2008. See Jeremy Gordin, *Zuma: A Biography* (Johannesburg: Jonathan Ball, 2008); William Mervyn Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (Cape Town: Zebra Press, 2007).

national-level policy makers to local-level municipalities responsible for implementation);³² (2) a growing concern for the quality of the ANC's *internal* democratic processes as a way of stimulating pluralism within South Africa's dominant political party;³³ and (3) the more direct targeting of pathologies of nepotism and corruption (for example, by insisting on proper qualifications for senior appointees and challenging the ANC's policy of cadre deployment to that extent).³⁴

The case that perhaps best exemplifies this second period is the so-called *Nkandla Case*, which involved a challenge to the non-implementation of certain recommendations made by the Public Protector.³⁵ Previously lacking in independence, the Public Protector had been emboldened by the courageous leadership of its then head, Thuli Madonsela, to produce a damning report on unauthorized state expenditure on President's Zuma's rural homestead. When the National Assembly purported to absolve the President of the need to act on the report's recommendations, two opposition political parties applied to the Constitutional Court for a declaration that the President and the Speaker of the National Assembly had breached their constitutional obligations. In a highly critical judgment, the Court ruled that there had indeed been a violation of the Constitution and ordered the President personally to pay for that portion of the state expenditure that could not be justified.³⁶

The significance of the *Nkandla Case* is that it (a) signalled a clear shift towards enlisting the 'Chapter 9 institutions' (institutions supporting constitutional democracy) as partners in the enforcement of the Constitution; and (b) showed that the Court was prepared to directly criticize a senior national leader and identify his behaviour as a threat to constitutional democracy. This much may be inferred from the fact that the Court's decision, while legally plausible, was not doctrinally compelled. Section 181(5) of the 1996 Constitution provides that the Public Protector is 'accountable to the National Assembly', seemingly suggesting that the lower house of Parliament has the power to decide whether to act on the Public Protector's recommendations. Against this, the Constitutional Court needed to do a fair bit of legal work to justify its holding that recommendations made by the Public Protector could not be overridden by the National Assembly. Its preparedness to do that work

³² See, for example, *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC); *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2011 (7) BCLR 651 (CC). The Court's 'meaningful engagement' jurisprudence is discussed in Brian Ray, *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave* (Cambridge: Cambridge UP, 2016) 105-29.

³³ See, for example *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) (enforcing ANC's procedural rules governing the selection of delegates to a provincial party conference, discussed in Theunis Roux, 'Constitutional Courts as Democratic Consolidators: Insights from South Africa after Twenty Years' (2016) 42 *Journal of Southern African Studies* 5, 16).

³⁴ See *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC) (overturning parliamentary delegation of power to President to extend Chief Justice's term of office); *Democratic Alliance v. President of the Republic of South Africa* 2013 (1) SA 248 (CC) (rescinding the appointment of a new National Director of Public Prosecutions on the basis that the constitutional specifications for the position had not been fulfilled and the fact that adverse findings had been made by a commission of inquiry about the appointee's reliability as a witness).

³⁵ *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* (2016) 3 SA 580 (CC). See Heinz Klug, 'Corruption, the Rule of Law & the Role of Independent Institutions' in Rosalind Dixon & Theunis Roux, *Constitutional Triumphs, Constitutional Disappointments*, above n 5.

³⁶ *Economic Freedom Fighters*, above n 37.

is indicative of its post-2007 posture of broadening the pool of partners responsible for the implementation of the constitutional project.

At the same time, the *Nkandla Case* arguably had the indirect effect of contributing to political diffusion by damaging the ANC's reputation among voters. In the 2016 South African municipal elections held on 3 August, four months after the *Nkandla Case*, the ANC's overall share of the vote declined to 53.9%,³⁷ a shocking result for a party previously assured of a near two-thirds majority. While the *Nkandla Case*'s causal contribution to this result cannot, of course, be determined with any certainty, it is fair to assume that it played at least some role, along with other factors discussed in the next section.

IV Criticism of the ANC's record and of the Court's response

The shine has long ago come off South Africa's democratic transition 'miracle'.³⁸ As numerous studies over the last ten years attest, significant problems of neo-patrimonialism, clientelism and corruption have emerged. Mocking the Constitution's grand promises, economic inequality has in fact deepened since 1993, with the Gini co-efficient (expenditure per capita excluding taxes) sliding from 0.59 in that year to 0.67 in 2006.³⁹ Health and other quality of life indicators are also down. In KwaZulu-Natal, there are only two oncologists left in the public-sector hospital system, with none in the capital city of Durban able to train new doctors.⁴⁰ The secondary education system has long been in crisis, with textbooks regularly undelivered in Limpopo and Eastern Cape Provinces.⁴¹ The university student fees crisis dominated the news in 2016, with most major tertiary education institutions forced to close down for several months and exams missed.⁴² Imprudent economic management decisions are regular occurrences, including the politically-inspired ousting of trusted Finance Minister Pravin Gordhan on 30 March 2017, which led to the downgrading of South Africa's credit rating to junk status.⁴³ Earlier, in October 2016, South Africa had slipped down the rankings in the Mo Ibrahim Foundation's report on 'a decade of African democracy'.⁴⁴

Most significant of all these problems, perhaps, has been the rise and seeming entrenchment of corruption and nepotism. The second edition of R. W. Johnson's classic, *How Long Will South Africa Survive?*, documents in excruciating detail how public tenders and other processes have been

³⁷ Available at <http://www.elections.org.za/content/Elections/Municipal-elections-results/>.

³⁸ The use of the term 'miracle' to describe South Africa's democratic transition is ubiquitous in journalistic accounts. See for example, Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (London: Viking, 1997); Allister Sparks, *Beyond the Miracle: Inside the New South Africa* (Chicago: University of Chicago Press, 2003).

³⁹ The World Bank, *World Development Indicators: Distribution of Income or Consumption* (2013).

⁴⁰ Katharine Child, 'Too Few Oncologists Left in KZN to Train New Cancer Specialists', *Times Live (NZ)*, 25 June 2017, <https://www.timeslive.co.za/news/2017-06-25-too-few-oncologists-left-in-kzn-to-train-new-cancer-specialists/>. Since 2006, South Africa's Gini-coefficient has improved slightly, to 0.65 in 2011 (Statistics South Africa, *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011* (2014) 14).

⁴¹ See Bongani Nkosi, 'South Africa's Hidden Textbook Crisis', *Mail and Guardian (NZ)*, 23 August 2013, <https://mg.co.za/article/2013-08-23-00-south-africas-hidden-textbook-crisis>.

⁴² See Janet Cherry, 'The Successes and Failures of South Africa's Student Movement', *Waging Non-Violence*, 29 June 2017, <https://wagingnonviolence.org/feature/south-africa-fees-must-fall/>.

⁴³ S&P Global rating of 3 April 2017.

⁴⁴ Mo Ibrahim Foundation, *A Decade of African Governance 2006-2015* (October 2016) (as cited in Tom Daly, 'Diagnosing Democratic Decay', paper presented at Comparative Constitutional Law Roundtable, Gilbert & Tobin Centre of Public Law, UNSW, Sydney, 7 August 2017).

manipulated.⁴⁵ In a devastating recent analysis, a consortium of social science researchers funded by the Open Society Foundation (OSF) has gone further to allege that the South African state has in fact been captured by a 'power elite' that exploits the 'symbiotic relationship' between the 'constitutional state' and a 'shadow state'.⁴⁶ Building on an earlier report by the Public Protector,⁴⁷ the consortium's research meticulously documents how the Gupta family, three brothers who came to South Africa from India in 1993, have managed to influence the dismissal and appointment of senior managers of State-Owned Enterprises, in this way ensuring a steady flow of contracts to their companies.

South Africa's descent into economic mismanagement and corruption has had the predictable result of stimulating the growth of populist parties, with the Economic Freedom Fighters (EFF) chief among them. The EFF's policy platform calls for radical land reform and nationalization of the mining and banking sectors.⁴⁸ It garnered 8.2% of the vote at the August 2016 municipal elections,⁴⁹ giving it the balance of power in several large municipalities evenly divided between the ANC and the main opposition party, the Democratic Alliance. The ANC, in response, has itself become more populist, with leading spokesmen talking about the second stage of national democratic revolution in which economic liberation, through radical land reform and other measures, will follow political liberation.⁵⁰

It is clear to most informed observers that the ANC's talk of radical social and economic transformation is largely rhetoric, and that it has no viable plan to implement such a program. Indeed, it seems plausible that this talk is simply an ideological smokescreen for the real project of state capture being pursued by the Zuma faction.⁵¹ Nevertheless, at this rhetorical level, the path of radical reform that South Africa chose to avoid in 1994 is seemingly back on the agenda, and with that, a re-invigorated critique of the failings of the gradualist reform model associated with liberal-democratic constitutionalism. After a lull of some years, the 1996 Constitution is once again openly being spoken about as a white-minority compromise constitution that needs to be comprehensively overhauled if the national democratic revolution is to succeed.

It is not all doom and gloom. The Constitutional Court has had remarkable successes – chief amongst them the *Nkandla Case*. It is significant here that the EFF was a party to that case, as the Congress of South African Trade Unions (COSATU) had earlier been party to the *Treatment Action Campaign Case*.⁵² But the EFF's respect for constitutionalism is clearly opportunistic – it exploits popular disaffection with the Constitution as a barrier to radical reform one day, and uses the opportunities it provides for challenging the ANC and exposing its flaws the next.

⁴⁵ R. W. Johnson, *How Long Will South Africa Survive? The Looming Crisis* (Johannesburg: Jonathan Ball Publishers, 2015). See also Andrew Feinstein, *After the Party: A Personal and Political Journey Inside the ANC* (Johannesburg: Jonathan Ball Publishers, 2007) (detailing the corruption surrounding the Arms Deal).

⁴⁶ Haroon Borat et al, *Betrayal of the Promise: How South Africa is Being Stolen* (State Capacity Research Project, May 2017).

⁴⁷ Public Protector, *State of Capture*, Report 6 of 2016/17 (14 October 2016).

⁴⁸ See <http://www.effonline.org/policy>.

⁴⁹ See www.elections.org.za/content/Elections/Municipal-elections-results/.

⁵⁰ See ANC 'Is the National Democratic Revolution in Danger?', NGC 2015 Discussion Documents available at <http://www.anc.org.za/docs/discus/2015/balancer.pdf>.

⁵¹ Borat et al, above n 48.

⁵² *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721.

For many, the Constitutional Court has been too slow in reacting to this changed political context. In a 2009 paper, for example, Sujit Choudhry called for the Court to develop a series of ‘anti-domination’, ‘anti-capture’, ‘non-usurpation’, ‘anti-seizure’ and ‘anti-centralisation’ doctrines to counter the pathological effects of the ANC’s political dominance.⁵³ Samuel Issacharoff, too, in various publications, has called for the Court to adopt a more robust and creative approach to its mandate, on the model of the Indian Supreme Court and the Colombian Constitutional Court.⁵⁴ One of the main targets of his and Choudhry’s critique in this respect has been the *UDM* case,⁵⁵ in which the Court dismissed a claim that the removal of a constitutional ban on floor-crossing undermined South Africa’s democracy. In Choudhry and Issacharoff’s view, the Court should have renounced formalism and engaged in substantive constitutional policy analysis of the problems facing the country, and the pathologies of South Africa’s dominant-party democracy in particular.

Earlier, the Court’s reasonableness review standard had been vigorously critiqued as too deferential – as not recognizing the urgency of the poor’s needs.⁵⁶ Others have accused the Court of ‘proceduralizing’ social and economic rights, to the point where they have largely been blunted as tools for driving meaningful change.⁵⁷ The next section turns to assess the merits of these claims and to inquire whether the Court might have done more to anticipate the shift to the second constitutional period sketched in Part III above.

V Doctrinal markers

Could the Constitutional Court have done more to anticipate and prepare for the decline in the quality of South Africa’s democracy and the problems of constitutional implementation this has brought with it? Our answer to this question is mixed. While sympathetic to Choudhry and Issacharoff’s analysis that the Court should have responded more creatively and robustly to the ANC’s dominant position, we take a slightly different approach to the institutional context in which it was operating. Given the constraints of South Africa’s legal tradition, we argue, the Court could not, and should not, have engaged in the sort of substantive constitutional policy analysis in which the Indian Supreme Court and Colombian Constitutional Court have engaged. Nevertheless, the Court might have begun earlier to lay down doctrinal markers that would have smoothed the transition to the new political context it faced after 2007.⁵⁸

Choudhry’s suggestions about anti-domination doctrines, in particular, seem to us to downplay the constitutional-cultural constraints that the Court was under – the constraints, that is, not so much of

⁵³ Sujit Choudhry, “‘He Had a Mandate’: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy” (2009) 2 *Constitutional Court Review* 1, 6.

⁵⁴ Samuel Issacharoff, ‘Constitutional Courts and Democratic Hedging’ (2011) 99 *Georgetown Law Journal* 961; Samuel Issacharoff, ‘The Democratic Risk to Democratic Transitions’ (2014) 5 *Constitutional Court Review* 1.

⁵⁵ *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy and Another as Amici Curiae) (No 1)* 2003 (1) SA 488 (CC), 2002 (11) BCLR 1179 (CC).

⁵⁶ David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford UP, 2007).

⁵⁷ Danie Brand, ‘The Proceduralisation of South African Socio-Economic Rights Jurisprudence or “What are Socio-economic Rights for?”’ in Henk Botha, Andre van der Walt, & Johan van der Walt (eds), *Rights and Democracy in a Transformative Constitution* (Stellenbosch: Sun Press, 2003) 33.

⁵⁸ See Dixon and Issacharoff, above n 24. This section also draws on the related concept of ‘adjudicative strategy’ developed in Roux, *Politics of Principle*, above n 15, 99-101.

doctrine but of legal tradition.⁵⁹ Any developed legal tradition, this line of thinking goes, maintains an understanding of the appropriate relationship between law and politics – of the judiciary’s legitimate sphere of authority as defined by past decisions, its remedial powers and legitimate forms of legal reasoning.⁶⁰ With the adoption of judicial review, traditional understandings of the boundary between law and politics become in many ways more important to respect, even as the introduction of judicial review provides a justification for re-imagining them. Precisely because it threatens to politicize their role, courts with the power of judicial review need to work hard to maintain an impression of themselves as legal actors. The requirement that they remain within the culturally defined bounds of permissible judicial conduct exerts a moderately constraining influence on their capacity to respond to a changing political context. If new constitutional doctrines are required to combat emerging democratic pathologies, judges in formalist legal traditions,⁶¹ for example, may have to work towards those doctrines more systematically than judges in substantive traditions, where doctrines may be derived through constitutional policy analysis of the threat posed to democracy by the political actors the Court is trying to rein in.

This law/politics boundary as defined by past decisions, remedial powers and legitimate forms of legal reasoning is not static or uncontested, of course. Precedents and the scope of the court’s remedial powers will be open to interpretation and development, particularly in a new constitutional democracy where judicial review has been introduced for the first time. Different forms of legal reasoning – more formalist and more substantive styles, for example – will also be present in a single legal tradition, and it may be internally contested within that tradition which best serves the rule of law or best justifies the court’s powers. Nevertheless, beneath these differences, there may be a dominant conception of the appropriate role of the court in developing new doctrines and asserting new powers that exerts a moderately constraining influence on what a court may do. In the South African case, the ‘cautious traditions of analysis’, to which Karl Klare referred in his article on ‘transformative constitutionalism’,⁶² arguably constrained the sort of response Choudhry recommended – of developing anti-domination doctrines on the back of an explicitly substantive constitutional policy analysis of the problems facing the country. Rather, the Court had to work more systematically to build an adequate legal justification for its changing role. If it was to address the problem of the ANC’s political dominance, there had to be clear textual basis or other authority for its interventions, and the required doctrines had to be developed on the basis of that authority, however formalistically.

A good example of the operation of these moderate constraints is *Glenister II*,⁶³ in which a narrow majority of the Court turned to international law rather than substantive constitutional policy analysis to hold that the disbanding of the Directorate of Special Operations (aka the Scorpions), an effective corruption-fighting unit within the National Prosecuting Authority, and the transfer of its functions to the Directorate of Priority Crime Investigation (aka the Hawks), under the control of the

⁵⁹ The idea of law’s constraining role here derives from Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, MA: Little Brown, 1960).

⁶⁰ See also Theunis Roux, ‘The South African Constitutional Court’s Democratic Rights Jurisprudence: A Response to Samuel Issacharoff’ (2014) 5 *Constitutional Court Review* 33.

⁶¹ See Patrick S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford: Clarendon Press, 1987)

⁶² Klare, above n 8.

⁶³ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

South African Police Service, was unconstitutional. Rather than confronting head-on the politically explosive allegation that the disbanding of the Scorpions had been motivated by a corrupt desire to incapacitate it, the majority reached for a strained deduction from general international-law norms to develop specific constitutional duties.⁶⁴ In South Africa's legal tradition, this kind of reasoning, which may seem highly formalistic to an American observer, is seen to be more authentically legal, and thus carries greater authority, than substantive constitutional policy analysis.

Within these moderate constraints of background legal tradition and constitutional culture, of course, courts do have some capacity for agency. Even in very formalist legal traditions, judges may work towards new doctrines by progressively building authority for them. Elsewhere, in joint work with Samuel Issacharoff, one of us called this the strategy of second-order – or *Marbury v Madison*-style – judicial 'deferral'.⁶⁵ In essence, this strategy involves the court laying down doctrinal markers that anticipate future problems and provide a basis for it later to move into areas that may currently be regarded as off-limits. Specifically, we suggest that courts can use deferral as a tool for anticipating future threats to democracy – or marking the potential for future judicial doctrines limiting the actions of democratic elites. From a democratic 'hedging' perspective, the key function of doctrinal markers of this kind is to (a) articulate the institutional 'minimum core' necessary for a system of true, multi-party democracy, and (b) anticipate the potential long-term, as well as short-term, threats to this democratic minimum core.⁶⁶ Doctrinal markers of this kind serve a number of important functions: they suggest to lawyers or advocates potential lines of argument to which members of the court might be receptive.⁶⁷ This also has both direct and indirect effects on constitutional litigation. It encourages lawyers to make certain arguments, or bring cases, that allow the court to develop its jurisprudence in a particular direction. And it indicates to lower courts the direction the court might be willing to take in later cases, so that those courts are more willing to develop new lines of reasoning and argument, and parties have a higher chance of success at first instance, or at a lower court level, in ways that substantially reduce the costs of – and thus encourage – new and creative forms of constitutional litigation. One of the defining features of courts, compared to other institutions, is that they have control over their docket only in one direction: they can decline to hear particular cases, but they cannot add cases to their agenda without parties first bringing a case to court.

Doctrinal markers of this kind can also gradually shift the broader perception of lawyers, and legal scholars, as to the bounds of legitimate constitutional argument. By setting out certain arguments in dictum, reasoning of this kind can create a body of reasoning that, over time, re-shapes the attitudes

⁶⁴ See the discussion in Samuel Issacharoff, 'The Democratic Risk to Democratic Transitions' (2014) 5 *Constitutional Court Review* 1, 27-29.

⁶⁵ Dixon and Issacharoff, above n 24. See also Roux, *The Politics of Principle*, above n 15, 99-101 (referring to this kind of strategy and as an 'adjudicative strategy' and distinguishing it from the purely political strategies – such as those contemplated in 'tolerance-interval theory' – recommended by political-science accounts of institutional-legitimacy building).

⁶⁶ In this way they are similar to, but also distinct from, other forms of dicta found in a dissenting or concurring opinions.

⁶⁷ Compare the function of dissenting and concurring opinions generally as discussed in Richard B Stephens, 'The Function of Concurring and Dissenting Opinions in Courts of Last Resort' (1952) 5 *University of Florida Law Review* 394; William J Brennan Jr, 'In Defence of Dissents' (1987) 37 *Hastings Law Journal* 427; Ruth Bader Ginsburg, 'Remarks on Writing Separately' (1990) 65 *Washington Law Review* 133.

of lawyers of what counts as an argument that is internal to the legal system.⁶⁸ In countries where lawyers are also important political players, this can also shape broader perceptions of the legitimacy of certain forms of judicial review.⁶⁹ This is also extremely important in cases in which a court ultimately attempts to confront powerful political actors: For doctrinal markers to be part of a strategy of ‘deferral’, rather than persistent avoidance, courts must at some point be willing to enforce the constraints they have foreshadowed, if and when the relevant threats to democracy arise.⁷⁰ But judicial review of this kind also poses clear risks for a court: it can provoke a severe political backlash that undermines the court’s independence, jurisdiction and budget, and thus its capacity to perform its most constitutional functions.⁷¹ It will thus be critical for a court to have as many allies as possible – including lawyers, and the legal profession, as an important part of the support structure for courts.⁷² This understanding of the South African Constitutional Court’s capacity for agency, we suggest, is the appropriate measure of whether it did enough to ensure the successful implementation of the gradualist, rights-based constitutional project it was asked to oversee. Did it exploit the opportunities that it had to invite litigation and prepare the doctrinal way for the time when it could no longer rely on the ANC as a constitutional partner? Did it move quickly enough to realize that the ANC was not going to be the partner it expected, and begin to lay down doctrinal markers for the second period, the period when the success of the constitutional project depended on its contributing to greater political pluralism?

The answer to these questions depends in part, of course, on the knowledge of members of the Constitutional Court about the potential future threats to constitutional democracy in South Africa, or how foreseeable those risks were to the justices at various times: it is, of course, possible that it is only with the benefit of hindsight that we now see the importance of doctrinal markers of this kind.⁷³ But we also believe that there were factors making the risk at least somewhat foreseeable to the justices: first, comparative experience in Africa and globally clearly points to the dangers for a new democracy, as it confronts the transition from the first- to the second-generation of political leadership. Many of the justices would also have been aware of that experience, from years spent working and studying while in exile, or for their broader professional experience. Second, several of

⁶⁸ Compare Dixon and Issacharoff, above n 24.

⁶⁹ See, eg, Steven A Boutcher, ‘Lawyering for Social Change: Pro Bono Publico, Cause Lawyering, and the Social Movement Society’ (2013) 18 *Mobilization*; Sandra R Levitsky, ‘To Lead With Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements’ in *Cause Lawyers and Social Movements* (A Sarat and SA Scheingold eds, Stanford, CA: Stanford University Press), 145.

⁷⁰ See *ibid.* Compare Erin F Delaney, ‘Analyzing Avoidance: Judicial Strategy in Comparative Perspective’ (2016) 66 *Duke Law Journal* 1 (distinguishing avoidance as a distinct strategy). Courts that promise deferral, but then consistently avoid confronting an issue, may also rapidly lose legitimacy and authority because of such actions.

⁷¹ See Stephen Gardbaum, ‘Are Strong Constitutional Courts Always a Good Thing for New Democracies?’ (2015) 53 *Columbia Journal of Transnational Law* 285 (Gardbaum argues against judicial review of this kind in part for this reason). See also Tom Gerald Daly, ‘The Alchemists: Courts as Democracy-builders in Contemporary Thought’ (2017) 6 *Global Constitutionalism* 101 (for a critical review of judicial review of this kind).

⁷² Compare Siri Gloppen, *Social Rights Litigation as Transformation: South African Perspectives* (Chr Micelsen Institute, 2005) (on a somewhat different notion of the support structure for social rights litigation provided by civil society). Compare also Michael McCann, ‘Law and Social Movements: Contemporary Perspectives’ (2006) 2 *Annual Review of Law and Social Science* 17; Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

⁷³ We are indebted to Richard Joseph for pressing us on this point.

the justices had first-hand experience working with President Mandela,⁷⁴ and so would have known how exceptional Mandela was in his commitment to the Court and the constitutional project, and thus that this level of commitment would inevitably decline within the ANC, over time. Third, the Court itself showed some real awareness of these future risks in its judgment in the *First Certification Case*.⁷⁵ The Court, for instance, stressed the need for heightened entrenchment of the Bill of Rights, and more onerous procedures for constitutional amendment generally, thereby implicitly anticipating the ANC's likely future dominance in the National Assembly.⁷⁶ It stressed the independence of the judiciary as a key constitutional principle, and suggested that this principle would be compromised if judicial appointments could be made by the President and National Assembly alone, without the involvement of the judiciary and profession.⁷⁷ And it held that the independence of various Chapter 9 institutions, such as the public protector, was 'vital to ensuring effective, accountable and responsible government'.⁷⁸ This again also seemed implicitly to acknowledge the potential future risk to democracy if the ANC were to continue to control both the executive and legislative branches of government. The decision thus confirms that the Court was a high-capacity court, with an appreciation of its legal and political role, capable of crafting a constitutional jurisprudence containing valuable democratic markers. We thus suggest two possible important doctrinal markers available to the Court in the first period, in addition to those it laid down in the *First Certification Case*, which could arguably have helped lay the ground-work for a more rapid and effective transition to the second period: first, a greater emphasis on transparency and good process in cases that gave the Court broad substantive freedom to define the scope of relevant government programs; and second, an emphasis on some form of 'democratic minimum core', not capable of being altered by either legislation or constitutional amendment.

In *Van Heerden*,⁷⁹ for instance, in upholding the broad scope of legislators and executive officials to determine the scope of measures to benefit a historically disadvantaged racial groups, the Court could readily have adopted a notion of political *transparency* as a pre-requisite for reliance on section 9(3): it could have required that before this special constitutional gate-way can be engaged, the Assembly must announce a decision to rely on a power of this kind, and thus take political accountability for such a decision. Similarly, in *Bato Star*,⁸⁰ the Court could have endorsed a highly deferential standard of substantive view of economic transformation decisions, but announced a more demanding set of procedural constraints on decisions of this kind *in dictum*.

Traces of an approach of this kind may in fact be found in the Court's earlier decision in *Walker* addressing the constitutionality of a Pretoria City Council water policy with racially disparate impacts.⁸¹ The substantive disparate impact, the Court held, was substantively justified under section 9 of the Constitution, as a means of promoting a culture of payment in historically under-serviced black neighbourhoods. But the Court also imposed a high procedural standard for the

⁷⁴ See Rosalind Dixon, 'Constitutional Design Two Ways: Constitutional Drafters as Judges' (2017) 51 *Virginia Journal of International Law* 1.

⁷⁵ *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744.

⁷⁶ *Ibid* pars 156, 159.

⁷⁷ *Ibid* par 124.

⁷⁸ *Ibid* par 163.

⁷⁹ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

⁸⁰ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490.

⁸¹ *City of Pretoria v Walker* 1998 (2) SA 363.

Council – in terms of the need for an official process of debate over such a policy, and transparency and consistency in approach. This was also all by way of dictum: the Court found that the policy was unlawful for failure to follow such procedures and requirements of proper legal authorization under section 33 of the Interim Constitution, but refused to grant Mr Walker any concrete remedy – on the basis that he did not have a right to refuse to pay his water rates, only a claim that others should pay more in certain circumstances.

Similarly, in early cases concerning the democratic process, the Court focused largely on rights-based violations, without taking the opportunity to lay down markers for a more *structural* approach to the defense of democracy.⁸² For instance, in *August v Electoral Commission*,⁸³ the Court emphasized the foundational nature of the right to vote, as ‘a badge of dignity and of personhood’,⁸⁴ and that prisoners could not be denied the right to vote without proper legislative authorization. But it did relatively little to spell out the idea that the right to vote ‘is one of the foundational values of our entire constitutional order’,⁸⁵ or that legislative or executive action that threatened the democratic constitutional order could itself be subject to judicial review. In *NICRO*, in considering the new form of limitation on prisoner voting imposed by the National Assembly, the Court likewise emphasized the importance of the relevant right,⁸⁶ and the need for transparent legislative deliberation about any decision to limit the right,⁸⁷ without any real emphasis on the degree to which decisions of this kind could affect the competitiveness of democracy, or accountability of key government institutions.

Similarly, in early cases concerning the law of defamation, and its relation to constitutional commitments to freedom of expression, privacy and dignity, the Court largely focused on the individual rights-based dimension to these questions – and failed to draw out the importance of a free media, public criticism of government officials and *robust political competition* for the health of democracy in South Africa. In *Khumalo*, the Court emphasized the balance struck by the Supreme Court in *Bogoshi* between ‘between freedom of expression and the values of human dignity’,⁸⁸ without pausing to emphasize the importance – to competitive democracy – of freedom to criticize leaders of the *dominant political party* – i.e. Khumalo, as a leading ANC politician,⁸⁹ alleged to have been involved in a gang of bank robbers, and to be under police investigation.

In recent cases such as *UDM v Speaker of the National Assembly*,⁹⁰ this also made it more difficult for the Court to identify any formal doctrinal basis on which to limit the partisan consolidation of power by the ANC. The petitioners in the *UDM* case argued that the Speaker of the Assembly was wrong to refuse to authorize a secret ballot for motions of no confidence in the President. The Court responded with a ruling that fit with the relatively restrained conception of its role, which

⁸² Compare Samuel Issacharoff, Pamela S Karlan and Richard H Pildes, *The Law of Democracy: Legal Structure of the Political Process* (Foundation Press, 2002).

⁸³ 1999 (3) SA 1 (CC).

⁸⁴ *Ibid* par 17.

⁸⁵ *Ibid*.

⁸⁶ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* 2005 (3) SA 280. See also at par 113 per Madala J (dissenting).

⁸⁷ *Ibid* pars 66-7.

⁸⁸ *Khumalo v Holomisa* 2002 (5) SA 401 par 43.

⁸⁹ *Vincent Khumalo, Gauteng Provincial Legislature*, <https://www.pa.org.za/person/khumalo-sakhiwe/>.

⁹⁰ *United Democratic Movement v Speaker of the National Assembly* 2017 (8) BCLR 1061 (CC).

predominated in the first period: it made it clear that it was open to the Speaker to adopt a process of this kind, and that the Speaker had a constitutional duty to uphold the values of the Constitution – including openness – in this context, but that it was ultimately for the Speaker and not the Court to stipulate the relevant voting procedure. One possible contributing factor to this decision could also clearly have been the fact that, in the first period, the Court laid down few doctrinal markers to support the idea that the intensity of judicial review should be calibrated to the seriousness of the threat posed to South Africa’s democracy.⁹¹

Doctrinal markers of this kind would clearly have required a certain degree of delicacy, or diplomacy on the part of the Court: too strong or blunt an emphasis on future threats to democracy could readily have undermined the Court’s attempt, in the first period, to engage the ANC as a partner in the process of constitutional implementation. But courts also have a variety of tools with which to anticipate future dangers, while still maintaining (at least rhetorically) a belief in the good faith of current decision-makers: they can choose to place certain markers in footnotes, or phrase them in relatively abstract terms, or emphasise the dangers to democracy from potential actors, while emphasising the good faith of current actors. Lower courts can also play a valuable role in instructing markers of this kind – by laying down relatively low-profile markers, which an appellate court can then simply affirm in passing.

Further, not all judges will be equally motivated to adopt markers of this kind: some judges clearly have a stronger focus on long-term doctrinal change, and/or their own long-term reputation, than others. Doctrinal markers of this kind require courts to adopt a relatively long-term focus. And not all judges will have the same interest in long-term doctrinal change, and/or their own long-term reputation. But doctrinal markers can often be effective even if they appear in a single judgment. Providing they do not attract the express disapproval of other judges, the reasons of a single judge in dissent, or concurrence, can often have an important impact on the development of the law.⁹²

VI Conclusion

The South African constitutional experience over the last two decades has been of enormous interest to constitutional scholars worldwide: it is a leading democracy on a continent with a limited history of democratic rule, a significant economic player, and a country that has attempted to achieve major social, political and economic transformation through constitutional means. The South African experience therefore offers a useful test-case for the question that animates this volume – i.e. how constitutions fare at the implementation stage, or when ‘parchment becomes practice’.

We have suggested that, at least in the first decade, South African constitutionalism fared quite well at the level of implementation: the Constitutional Court handed down a number of important decisions giving effect to core constitutional guarantees, and the political branches consistently complied with those decisions, despite the dominance of the ANC across all branches – and thus the political power not to do so. An important factor that contributed to this ‘successful’ implementation in the first constitutional period was the skilful way in which the Court

⁹¹ The only exception was the *Certification Case*. See e.g. discussion of the case in *United Democratic Movement v Speaker of the National Assembly* 2017 (8) BCLR 1061 par 77.

⁹² See above n 69.

accommodated itself to the fact of ANC dominance – by adopting a relatively deferential, ‘weak’ approach to judicial review, which effectively remanded a range of questions to the National Assembly and the government, and attempted to make the ANC a true partner in the process of constitutional implementation.

In the second period of the Constitution and the Court’s operation, in contrast, many scholars suggest that the South African record is distinctly less positive: there has been a steady erosion of norms of openness and transparency within the ANC and the government, and consolidation in the power of certain ANC-elites, at the expense of the political opposition both within and outside the ANC. Despite opportunities to do otherwise, until recently, when it directly confronted the President in the *Nkandla Case*, the Court has also largely failed to impose substantive breaks on this trend.⁹³ This has also legitimately been called a failure of democratic constitutional implementation – or ‘hedging’ – by critics.⁹⁴

We argue, however, that for a more substantive form of democratic hedging of this kind to have occurred in South Africa in the second period, a critical legal pre-condition was required – a set of legal doctrines, laid down by the court in earlier, less controversial cases, which were capable of encouraging and legitimating the development of the kind of doctrinal limits required to support judicial hedging of this kind.

In fact, we suggest, this may ultimately be a quite general requirement for successful democratic ‘hedging’ by any constitutional court: Successful constitutional implementation will almost always be a function of background political and legal pre-conditions. While some of these pre-conditions may be outside the control of courts, others will be shaped by the court’s own jurisprudence: A court or other constitutional decision-maker that fails to take politics seriously will inevitably fail to translate constitutional parchment into practice. But so too will a court that fails to take law and legal culture seriously: courts can only ever succeed in implementing a constitution through arguments that the domestic legal culture accepts as legally plausible or legitimate. To succeed in implementing a democratic constitution,⁹⁵ courts must therefore always be sensitive to evolving political conditions and the need to develop the legal doctrines capable, at a later point, of supporting the legitimacy of the interventions they might need to make.

This, we suggest, may ultimately be the post important lesson to be gained from the implementation of the South African Constitution: if the South African Court may be criticized, it is in respect of its failure to do more, during the first period, to lay down doctrinal markers of this kind.

⁹³ Choudhry, above n 55.

⁹⁴ Ibid; Issacharoff, above n 56.

⁹⁵ This argument assumes, of course, that the judges are motivated to establish constitutional democracy. That may not always be the case. See Bjoern Dressel, Raul Sanchez-Urribarri, and Alexander Stroh, ‘The Informal Dimension of Judicial Politics: A Relational Perspective (2017) 13 *Annual Review of Law and Social Science* (forthcoming) (arguing that in non-Western contexts, the assumption that judges are friends of liberty motivated to restrain political actors who undermine democratic constitutionalism may not always hold).