WHY DOES THE CONSTITUTION MATTER?

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INTRODUCTION

It is a great honour and privilege to deliver this public lecture.[1] I am quite grateful for this opportunity to reflect on some of the issues that affect our constitutional democracy and, in particular, to share some of my thoughts on the Constitution. I am indebted to the Human Sciences Research Council for inviting me to deliver this public lecture. I sincerely mean it, despite the disruptive effect it has had on my quiet and private retirement life.

I was privileged enough to have been afforded the opportunity to apply the Constitution during my tenure as a member of the Constitutional Court and to participate in constructing our foundational jurisprudence on constitutional law. It was both a formidable and complex task. It was complex partly because when I joined the Court, the Constitution was about three years old and partly because there was little or no precedent to guide the process. We were virtually writing on a clean slate. It was a formidable task because we were constructing the foundational jurisprudence that would guide the future development of our constitutional law. We had to construct a sound and solid foundational jurisprudence that would withstand the test of time.

But of course the process of building our constitutional jurisprudence is a work in progress. As the Western Cape High Court recently observed, "twenty years of democracy is a relatively short time to have developed a certainty concerning the contours of constitutional democracy."[2] Our Constitution is still relatively new and the government that we have created is still an experiment. And we are still feeling our way through the Constitution. It is therefore not surprising that "in this period of constitutional adolescence the boundaries of constitutionalism ha[ve] been increasingly tested by a plethora of litigation, a move from political warfare to law-fare."[3]

The items that one finds on the agendas of our courts bear testimony to this. They range from disputes over the internal workings of Parliament,[4] the power to stop prosecution,[5] whether Parliament has failed to hold the President accountable,[6] to disputes over the internal affairs of

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[1] I would like to acknowledge the research and other assistance I received in the course of preparing this Lecture from Professor Bohler-Muller, Ayanda Ngcobo and Freda Mathaba.

[2] *Economic Freedom Fighters and Others v The Speaker of the National Assembly and Others* Case no. 21471/2014; Western Cape Division, Cape Town - 23 December 2014 at para 6, (Unreported *Nkandla case*)

[3] Id, at para 6

[4] *Mazibuko v Sisulu and Another* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297

[5] *National Director of Public Prosecutions and Others v Freedom Under Law* [2014] ZASCA 58; 2014 (4) SA 298 (SCA)

[6] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*Nkandla case*)

political parties[7] and religious bodies[8] including succession to traditional leadership positions.[9] The Constitution is always at the center of these disputes.

This is not a bad thing; on the contrary it is a good thing. It is a manifestation of faith in the Constitution and the rule of law.

Yet we have also witnessed in recent times violent protests involving the looting of businesses, the destruction of more than 20 buses in Tshwane,[10] burning down of more than 20 schools in Vuwani in Limpopo[11]; the destruction of more than 20 trains;[12] the burning down of a number of factories in Mandeni in KwaZulu-Natal;[13] xenophobic attacks[14] and political killings;[15] communities still yearning for service delivery;[16] homelessness;[17] and the forcible removal of members of Parliament from the parliamentary chamber by security personnel.[18]

We have also seen an upsurge in incidents of racism prompting government to consider a Bill to combat racism. These incidents and conditions require us to pause and reflect on whether or not our Constitution still matters.

To provide context for this lecture, let me first share my thoughts on what a constitution is as well as the issues involved in constructing our constitutional law jurisprudence.

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[7] *Letlapa and Another v Moloto and Others [2014] ZAGPJHS 302*
[8] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa (for the time being) and Another* [2015] ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC)
[9] *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC)
[10] 'They took everything': Tshwane protests turn into looting spree. http://city-press.news24.com/News/they-took-everything-tshwane-protests-turn-into-looting-spree-20160622 (accessed on 04 June 2016)
[11] #Vuwani Protests: 'I Feel Like My Future Is Going Up In Flames'. http://ewn.co.za/2016/05/05/Vuwani-residents-angered-by-arson-attacks-on-school (accessed on 04 June 2016)
[12] PRASA: 20 Trains Torched between April & May, Costing over R200M. http://ewn.co.za/2016/06/27/Prasa-20-trains-were-torched-between-April-and-May (accessed on 04 June 2016)
[13] KZN residents torch factory, cars in violent protest. http://www.citizen.co.za/1023728/video-kzn-residents-torch-factory-in-violent-protest/
[14] Xenophobic Attacks in South Africa http://mg.co.za/tag/xenophobic-attacks (accessed on 04 June 2016)
[15] David Bruce, "Political killings in South Africa: The ultimate intimidation", (Institute of Security Studies Policy Brief 64, 2014). pp1-6. (see https://www.issafrica.org/uploads/PolBrief64.pdf) (accessed on 04 June 2016)
[16] Growing civil unrest shows yearning for accountability. http://www.bdlive.co.za/opinion/2014/03/07/growing-civil-unrest-shows-yearning-for-accountability (accessed on 04 June 2016)
[17] More than just a roof: unpacking homelessness. http://www.hsrc.ac.za/en/review/hsrc-review-march-2015/unpacking-homelessness (accessed on 04 June 2016)
[18] *Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 8; 2016 (3) 487 (CC); 2016 (5) BCLR 577 (CC)

THE CORE OF OUR CONSTITUTION

What is a Constitution?

In *S v Acheson* [19] the Namibian High Court describing a constitution said:

> "The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and articulating its government." [20]

A constitution articulates the aspirations of a nation and embodies foundational values upon which the nation is founded and that will guide the pursuit of the goals that the nation has fashioned for itself in a constitution. These foundational values and goals are dictated by the history and experience of the nation. Indeed, for a constitution to have a meaningful place in the hearts and minds of its citizens, it must address the pressing needs of the people.[21] If it ignores the real concerns of the people, it will not find lasting resonance amongst the true guardians of the constitution – which are not the courts but the people.[22]

What are the goals that we have set for ourselves?

As a nation, we have declared four goals for ourselves in the Preamble to the Constitution.

And these are:[23]

- *Firstly, to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*
- *Secondly, to lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*
- *Thirdly, to improve the quality of life of all citizens and free the potential of each person; and*
- *Finally, to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.*

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[19] *S v Acheson* 1991 (2) SA 805 (Nm) at para 6
[20] Id at 813A-B
[21] Nicholas Haysom *Constitutionalism, Majoritarian Democracy and Socioeconomic Rights* 1992 (8) *SAJHR* 449 at 454
[22] Id
[23] The Preamble to the Constitution of the Republic of South Africa, 1996 "the Constitution"

The Constitution articulates and proclaims foundational values upon which our constitutional democracy is founded and which will guide us in the pursuit of our goals.

The foundational values

These values are:

- Human dignity; the achievement of equality and the advancement of human rights and freedoms;[24]
- Non-racialism and non-sexism;[25]
- The supremacy of the Constitution and the rule of law;[26]
- Universal adult suffrage; a common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.[27]

It is these values that should guide us in the pursuit of our national goals. Our aspirations and foundational values are designed to serve as a bond uniting us as we march towards our destiny. The green Y-shaped band on our National Flag eloquently captures this theme. It is a picture of the peoples of South Africa from all walks of life bound together by a common commitment to a new nation and converging to form one nation and then marching on the road towards its destiny. It is a constant reminder of where we have come from and where we desire to go. Our aspirations and values are recognition of "the injustices of our past"[28] and represent a commitment to establish "a [new] society based on democratic values, social justice and fundamental human rights."[29]

However, the system of government that we created as a vehicle to pursue our national goals is still an experiment. Our Constitution is still a young one and through constitutional adjudication it will generate constitutional principles and rules that will form the core of our constitutional law. Constitutional law is a complex and difficult area of law because it involves a mixture of law, politics and ideology. It raises all sorts of complex and difficult issues that have profound influence on the lives of ordinary citizens.

CONSTITUTIONAL LAW AND CONSTITUTIONAL ADJUDICATION

A constitution is a document we look to for answers to some of the intractable societal problems that confront us whether they are social, economic or political. But the text of the

[24] Section 1(a) of the Constitution
[25] Section 1(b) of the Constitution
[26] Section 1(c) of the Constitution
[27] Section 1(d) of the Constitution
[28] Preamble to the Constitution
[29] Preamble to the Constitution

Constitution does not always provide a straightforward answer to the problems confronting us. In such a case we are compelled to look outside of and beyond the text of the Constitution "to various possible historical accounts, political and moral philosophy, theories of meaning and language, to practical and pragmatic considerations [and] to a host of matters beyond the Constitution that we can all see and read."[30]

The task of discovering the *invisible Constitution* belongs to the judiciary, which it conducts through the process of constitutional adjudication. The constitutional rules and principles that are formulated in the course of adjudication do not appear from the text of the Constitution but they are regarded as part of the Constitution because they illuminate the text of the *visible* Constitution. They constitute what has been described as an unwritten constitution or an invisible constitution. In this sense the "Constitution that we can all see and read" is a shadow cast by the invisible constitution. As the saying goes, "Everything we see is a shadow cast by that which we cannot see".[31] Take, for example, the doctrine of separation of powers. Nowhere does it appear in the text of the Constitution. Yet it is by now axiomatic that the principle of the separation of powers is one of the principles of our constitutional democracy.[32]

The invisible Constitution shapes the evolving interpretation, implementation and enforcement of the Constitution. Constitutional law scholars and commentators have argued that the Constitution that we can all see and read therefore "floats in a vast and deep - and crucially, invisible - ocean of ideas, propositions, recovered, and imagined experience …"[33] And they maintain that "more than we can realize, it is in the depth of this ocean that our Constitution finds meaning."[34]

Discovering the invisible text of the constitution is fraught with problems and raises difficult questions including: what ends does the constitution embody? How do these ends generate organising principles for the constitution's interrelated provisions and the structure they define? What makes the constitution and the practice of judicial review legitimate? How should we construe the constitution, in particular, how do different models of constitutional interpretation such as those focusing on structure, text, history and doctrine, relate to one another? What defines the boundary between constitutional interpretation and constitutional amendment?[35]

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[30] Lawrence H. Tribe, *The Invisible Constitution* (Oxford University Press 2008) (*The Invisible Constitution)* page 8

[31] *The Invisible Constitution* page 211

[32] Separation of powers doctrine is only mentioned in the interim Constitution, 1993, as one of the principles that should guide the drafting of the new Constitution. See Constitution of the Republic of South Africa, Act 200 of 1993, Schedule 4, Constitutional Principle VI

[33] *The Invisible Constitution* page 9

[34] *The Invisible Constitution* page xiv

[35] These questions are raised in a different context in Lawrence H, Tribe, American Constitutional Law, (New York Foundation Press. Vol.1 2000) at page 1

These questions might be thought to be academic; they are not. They invariably arise in the context of constitutional adjudication. As I will demonstrate later on in this lecture, the Constitution does not tell us where and how to draw the line between the legitimate exercise of the power of judicial review and the impermissible intrusion into the domain of other branches of government. This is an issue that is increasingly becoming important, as our courts are flooded with litigation that requires them to determine the contours of our constitutional democracy.

It is against this background that I would like to reflect on the topic for this lecture.

My remit this evening is to explore the question; does our Constitution matter? The answer to this question is yes, it does, provided we can honour it and the values enshrined in it. But while our Constitution matters, the violent protests and incidents of racism to which I have referred above pose a threat to our constitutional democracy. These challenges require us to reflect on how to safeguard our Constitution.

It is these themes that I would like to develop this evening and I propose to do so by reflecting on three interrelated questions: firstly, why does the Constitution matter; secondly, what threatens our constitutional democracy and thus our Constitution; and finally, how can we safeguard our constitutional democracy so that it matters to ordinary people. In the course of exploring these questions, I will put in perspective the role of the judiciary in our constitutional democracy. Its role is often misunderstood and has generated a great deal of anxiety, which, unless it is addressed, may undermine our constitutional democracy.

Turning to the first question: Why does the Constitution matter?

WHY DOES THE CONSTITUTION MATTER?

Our Constitution matters for a host of reasons, but two strike me as being particularly important having regard to our history: firstly it introduces a new constitutional order that is fundamentally different from that which prevailed under apartheid; and secondly it has a built in mechanism to safeguard and protect our constitutional democracy.

A. It Introduced A New Constitutional Order

The impact of the new constitutional order is better understood when it is assessed against the background of the apartheid legal order.

The Apartheid Legal Order

The apartheid order introduced a legal system that was premised on racial prejudice, and a denial of human dignity and other fundamental human rights and freedoms to a majority of South Africans. This legal system was buttressed by the doctrine of parliamentary supremacy,

which insulated apartheid laws from judicial review. Under this doctrine, parliament could make or repeal any law regardless of its impact on fundamental human rights and freedoms. The judiciary had no power to review statutes and was thus reduced to a mere spectator over the injustices that were perpetrated under the apartheid legal order. Regrettably, some of the judges actively, acquiescenced in the perpetration of racial injustice upon black people.

Cases such as *Moller*[36] *and Rasool*[37] and its progeny as well the trilogy of cases involving the disenfranchisement of the coloured community in the Western Cape, illustrate how this legal order operated.

(a) Racial Prejudice was used as an interpretive aid

In January 1911, the Moller family, who resided in a place called Keimoes in the district of Gordonia in the Western Cape, sent their two children to the only public denominational school in the area. Almost fifty percent of the white parents at the school withdrew their children from the school in protest of the presence of "coloured pupils". In response the school committee expelled the Moller's children from the school.

In the ensuing litigation[38] the central question was whether a child born of a white man and a coloured woman was a child of "European parentage or extraction" within the meaning of the Cape School Board Act, 1905. The phrase "European parentage or extraction" was not defined in the relevant statute and was arguably open to meaning either "wholly European extraction, or partly of European extraction". The Appellate Division, which was one year old, having been established as the highest court in the land after the formation of the Union of South Africa on 31 May 1910, construed the phrase to mean "of pure European descent" or "unmixed European parentage or extraction".[39]

What matters for present purposes is not so much the outcome of the case, but the reasoning behind the outcome.

All five judges who heard the case agreed that Moller's children should not be allowed to attend the school. But what illustrates the role of racial prejudice in the judicial process is the judgment of the leader of the judiciary at the time, Chief Justice de Villiers, who wrote the leading judgment. It provides an insight into the role that racial prejudice and racial injustice would play in the halls of justice. He said while the court may not be able to approve racial prejudice, they "cannot, as judges, who are called upon to construe an Act of Parliament, ignore the reasons which must have induced the legislature to adopt the policy of separate education for

[36] *Moller v Keimoes School Committee and Another* 1911 AD 635
[37] *Minister of Posts and Telegraphs v Rasool*, 1934 AD 167
[38] *Moller v Keimoes School Committee and Another, supra*
[39] Id at 644

European and non-European children".[40] In his opinion, segregation was, induced by the fact that blacks belonged "to an inferior race".[41]

> Explaining the reasons that induced segregation in education, he said:
> "As a matter of public history we know that the first civilized legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality. We know also that, while slavery existed, the slaves were blacks and that their descendants who form a large proportion of the coloured races of South Africa, were never admitted to social equality with the so-called whites. Believing, as these whites did, that intimacy with the black or yellow races would lower the whites without raising the supposed inferior races in the scale of civilization, they condemned intermarriage or illicit intercourse between persons of the two races."[42]

What the Chief Justice made clear was that judges would not ignore this racism in interpreting vague legislation or in determining disputes involving racial prejudice.[43] In effect, he upheld the perceived inferiority of black persons.

The case of *Minister of Posts and Telegraphs v Rasool*[44] concerned a challenge to segregation of counters at a post office following an objection by a group of whites to being served at the same counter as Indians. The Acting Chief Justice Stratford writing for four out of five judges, condoned racial discrimination on the basis that "a division of the community on differences of race…[is] sensible [because it is] for the convenience and comfort of the public as a whole".[45]

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[40] Id at 643-644
[41] Id at 643
[42] Id at 643
[43] In *Seneque v Natal Provincial Administration* 1940 AD 149 the Appellate Division was given the opportunity to reconsider its decision in *Moller*. The case involved children who had been previously accepted as European by their local whites only school. A new headmaster required their father to submit proof of their European identity by submitting proof that their ancestry was all "pure" European ancestry. The AD held that successive headmasters were entitled to exclude children who were already attending school if they were not "pure" European ancestry.
[44] *Minister of Posts and Telegraphs v Rasool* 1934 AD 167. In that case, as in *Moller's* case, the white community of the town of Lichtenberg objected to being served from the same counter that served the Indian community. In response, the Postmaster-General issued an instruction that Indians should no longer be served from the same counter that served whites. They were to serve from the counter, which served the Africans. And in 1960 when Godfrey Pitje, who was at the time an articled clerk with the law firm of Mandela and Tambo, went to the magistrates' court to note the judgment in a case, he was ordered by the presiding magistrate not to sit at the table where white lawyers sat. In doing so the magistrate did not purport to act under any law. In upholding segregation in courtrooms, the Appellate Division justified magistrate's decision on the ground that he could have based his decision on Separate Amenities Act, 1953 which required segregation in public amenities. R v Pitje 1960 (4) SA 709 (AD). Of course the doctrine of the supremacy of parliament would have shielded this statute from any challenge.
[45] Id at page 175. The court developed the myth of "discrimination coupled with equality" per De Villiers JA (Id at 182-3), the South African equivalent of the US concept of "separate but equal", which was established by the US Supreme Court in *Plessey v Fergusson*, 163 U.S. 537 (1896) was a landmark United States Supreme Court decision upholding the constitutionality of the state laws requiring racial segregation in public facilities under the doctrine of "separate but equal". But doctrine was repudiated in landmark case of *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954) which in which the US Supreme Court declared state laws establishing racial segregation in public facilities unconstitutional

But why would the highest court in the land use racial injustice and prejudice as an interpretive aid in construing vague statutes or deciding disputes involving racial prejudice?

Too often we tend to forget that the legal process has never been devoid of values, preferences or policy considerations.[46] Law is used as a means of giving effect to these values, preferences and policies, and ultimately as a means of social control. Legal sociologists have argued that "beneath the veneer of consensus on legal principles, a struggle of interest is going on, and law is seen as a weapon in the hands of those who possess the power to use it for their own ends".[47] The ends are the values, policies and preferences of those in power.

Thus when adjudicating disputes, in particular, where there is no clear legal answer, the so-called grey areas, courts are guided by the societal values, preferences and policies. If the prevailing values happened to be founded on racism and racial injustice, these prejudices will be elevated into legal precepts.

As Oliver Wendell Holmes argued more than 135 years ago, albeit in a different context:

> "The life of the law has not been logic: it has been the experience. The felt necessities of the time, the prevalent moral and political theories, intuition of public policy, avowed or unconscious, even the prejudices judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[48]

Professor Charles Warren, one of the American scholars on the history of the US Supreme Court echoed a similar observation:

> "The Court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history past and present…"[49]

(b) The Doctrine of The Supremacy of Parliament

But for a system based on racial prejudice to survive, it must be buttressed by the doctrine of parliamentary supremacy to immunise its laws from judicial scrutiny. In *Collins v Minister of Interior and Another*[50] the Appellate Division upheld the disenfranchisement of the coloured community relying on the doctrine of the supremacy of parliament. In that case, after

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[46] A. Leon Higginbotham, Jr, *In the matter of Color,* (New York, Oxford University Press, 1978) page 13
[47] Vilhelm Aubert (ed.) *Sociology of the Law* Baltimore, Md: Penguin Books 1969 at page 11 (cited in A. Leon Higginbotham, Jr, *In the matter of Color, supra, at* pages 13-14)

[48] Oliver Wendell Holmes, The *Common Law* Boston: Little, Brown 1881, at page 1
[49] Charles Warren, *The Supreme Court in the United States History.* Boston: Little, Brown 1926, Vol 1 at page 2
[50] 1957(1) SA 552 (A)

two failed attempts to disenfranchise the coloured community in the Western Cape, the Nationalist Party government resorted to more devious means of taking away the franchise.[51]

The disenfranchisement of coloured people in the Western Cape required a two-thirds majority of both Houses of Parliament sitting jointly. The government was unable to obtain the required two-thirds majority on the composition of the Senate as it stood then. In order to circumvent the two-thirds requirement, Parliament passed the Senate Act[52], in separate sittings of the two Houses of Parliament. This statute increased the membership of the Senate and enabled the government to obtain the required two-thirds majority. Parliament convened and promptly passed the law, which disenfranchised coloured people in the Western Cape.[53]

In the ensuing litigation, the court accepted that the only object of the Senate Act, 1955 was to circumvent the entrenched clauses by providing the government with a two-third majority of members of both Houses, a majority it could not obtain as long as the old Senate existed. However, the constitutional challenge to the Senate Act failed because Parliament had plenary powers to legislate, including the power to increase membership of the Senate.

The newly reconstituted Appellate Division held that Parliament was supreme with power to make any law that it wished to make. As long as it has followed the procedure set out in the Constitution, the result is the law and courts had no power to review it. That the motive

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[51] The Nationalist Party (the NP) sought to disenfranchise blacks in the Western Cape by passing the Separate Representation of Voters Act, 46 of 1951 (disenfranchisement law), which was enacted by the Senate and National Assembly sitting separately. This was struck down by the Appellate Division in *Harris and Others v Minister of Interior and Another*, 1952 (2) SA 428(A) (*Harris* I) because it had not been passed in accordance with the procedure laid in the 1909 Constitution. The NP then resorted to the device of enacting the High Court of Parliament Act, 35 of 1952, a law, which constituted Parliament as the High Court of Parliament (HCP) with the sole power to reverse the decisions of the Appellate Division striking down legislation. This "court" promptly sat and reversed the earlier decision of the Appellate Division in *Harris* I. Parliament then re-enacted the Separate Representation of Voters Act. Mr. Harris and his colleagues successfully challenged the statute which established the HCP contending that it Parliament masquerading under a different name in order to achieve what it could not achieve through the legislative process.

The NP resorted to yet another stratagem to circumvent the entrenched clauses. It passed the Senate Act, 53 of 1955, a law, which enlarged the number of members of the Senate as well as the manner of their appointment. In addition, it enacted the Appellate Division Quorum Act, 25 of 1955, which increased the quorum of judges on the Appellate Division from 5 to 11. It made new appointments to the Appellate Division and armed with the Senate Act increased the number of members of the Senate. This enabled the NP to obtain the required two-thirds majority of both houses sitting together. Armed with the new majority, it enacted the disenfranchisement law, which repealed the entrenched clauses. In *Collins v Minister of Interior and Another*, Mr. Collins and his colleagues challenged the Senate Act but lost by vote of 10-1 in the Appellate Division. The newly increased Appellate Division held that Parliament was supreme with power to make any law that it wished to make. As long as it has followed the procedure set out in the Constitution, the result is the law and courts had no power to review it. That the motive of, and the effect of the law was to circumvent the entrenched clauses and deprive the coloured community of the franchise did not matter as Parliament was acting with the requisite majority could pass any law. That is what the doctrine of Parliamentary supremacy entails.

[52] Senate Act, 53 of 1955.
https://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01867.htm (accessed on 04 June 2016)

[53] *Collins v Minister of Interior and Another*, supra, at 563B-C

of, and the effect of the law was to circumvent the entrenched clauses and deprive the coloured community of the franchise did not matter as Parliament was acting with the requisite majority could pass any law. That is what the doctrine of Parliamentary supremacy entails.

In the words of the court, "Parliament sitting bicamerally had plenary powers to reconstitute the Senate in any manner it pleased and… the purpose or motive which it had in mind is irrelevant in law."[54] The Court added, "[e] ven if the Senate Act had reconstituted the senate by enacting that the senate should consist entirely of government supporters…it would still have been the House of Parliament within the meaning of the [1909 Constitution]."[55]

What cases like *Moller* and *Collins* illustrate is that law can be used as a weapon in the hands of those who possess the power to use it for their own ends. There was no objective standard to test the validity of legislation involved in the *Moller* and *Collins'* cases or the conduct of the postmaster-general in issuing the racist instruction in the *Rasool* case. The societal prejudice as buttressed by the doctrine of supremacy of parliament prevailed. Nor was there any protection of the fundamental rights of Moller's children to attend the school of their choice, or the rights, of Mr. Rasool to be treated with dignity and not to be discriminated against. Although the right to vote was entrenched in the 1909 Constitution, it was not guaranteed. Parliament could take it away at any time as it was supreme and the doctrine of supremacy prevailed.

The only means to safeguard against the use of law as a weapon in the hands of those in power for their own ends and ensure that judges do not resort to "the prejudices [they] share with their fellow-men"[56] in applying the law, is to establish a constitutional order based on the values of human dignity, the achievement of equality and the advancement of democratic values, social justice and human rights and freedoms, and the supremacy of the constitution.

This is precisely what the new constitutional order does.

The New Constitutional Order

The new constitutional order establishes the foundational values on which our constitutional democracy is founded. These values are based on fundamental human rights and freedoms;[57] they outlaw racism;[58] they uphold the supremacy of the Constitution and the rule of law[59]; they guarantee a government based on the will of the people; and they entrench the principles of accountability, responsiveness and openness.[60]

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[54] Id at 567H-568A
[55] Id at 567G-H
[56] Oliver Wendell Holmes, The *Common Law* (Boston: Little, Brown 1881) at page 1
[57] Section 1(a) of the Constitution
[58] Id at Section 1(b)
[59] Id at Section 1(c)
[60] Id at Section 1(d)

These foundational values are given effect in the Bill of Rights that guarantees, among other rights, political and civil rights. And to alleviate poverty and other adverse socio-economic conditions brought about by our past; the Bill of Rights makes provision for socio-economic rights. In order to protect these fundamental rights and freedoms, the new constitutional order introduced a legal system premised on the supremacy of the Constitution as envisaged in section 2 of the Constitution which declares that: all "law and conduct [that is] inconsistent with [the Constitution] is invalid"

Courts are given the central role to uphold the Constitution and give life to the foundational values. When deciding constitutional issues, courts are given the power to "declare . . . any law or conduct that is inconsistent with the Constitution . . . invalid"[61] and in addition, upon a finding of the violation of the Constitution, courts are empowered to "make any order that is just and equitable".[62]

The new constitutional order has had a profound impact, not only in the transformation of the legal process but also on the lives of many South Africans.

The impact the new constitutional order

Thus Mr Hoffman, who was denied a position as a cabin attendant solely on the basis of his HIV status, was able to appeal to the values of human dignity and equality enshrined in the Constitution in challenging discrimination.[63] In the *Hoffmann* case, the Constitutional Court acknowledged prejudice and discrimination against HIV-positive persons.[64] But instead of using the prevailing prejudice against people who are HIV positive to test the lawfulness of discrimination against people living with HIV, the Court tested this discrimination against the values of human dignity and equality enshrined in the Constitution.

It expressed itself as follows:[65]

> "The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. Nor can it be dictated by the policies of other airlines not subject to our Constitution …
>
> Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalized prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era - it is an era characterized by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly." (footnotes omitted)

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[61] Id at Section 172(1)(a)
[62] Section 172(b) of the Constitution.
[63] *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] BLLR 1365 (CC)
[64] Id at para 28
[65] Id at paras 36 – 37.

While courts had in the past routinely refused to recognise marriages according to Muslim rights and customary law on the grounds that these marriages were immoral,[66] in the *Daniels* case the Constitutional Court repudiated the values upon which these cases were based.[67] The central question in *Daniels* case was whether certain provisions of the Intestate Succession Act, 1986 [68] and the Maintenance of Surviving Spouses Act, 1990 [69] were unconstitutional and invalid for failing to include persons married according to Muslim rights as spouses for the purposes of these Acts. The central question in *Daniels* case was the meaning of the word "spouse".

While previously, courts would have interpreted this word in the light of prevailing racial prejudices against marriages by Muslim and indigenous rights, the Constitutional Court, construed the word in the light of the foundational values of human dignity and equality enshrined in the Constitution. In a comprehensive rejection of the values upon which cases like *Moller* and *Rasool* were based, the Court said:

> "The new constitutional order rejects the values upon which these decisions were based and affirms the equal worth and equality of all South Africans. The recognition and protection of human dignity is the touchstone of this new constitutional order. The new constitutional order is based on the recognition of our diversity and tolerance for other religious faiths. It is founded on human dignity, equality and freedom. These founding values have introduced new values in our society. The process of interpreting legislation must recognise the context in which we find ourselves and the constitutional goal of establishing a society based on democratic values, social justice and fundamental human rights."[70]

There can be little doubt that these cases had a profound impact on the lives of widows of Muslim marriages and marriages by customary law who were denied the benefits of their marriages as result of prejudice. In this sense the Constitution transformed the legal order into one based on human dignity, human rights and freedom. *That is why our Constitution matters*.

But our Constitution also matters because it protects and safeguards our constitutional democracy by providing a mechanism for holding accountable all those who exercise public power.

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[66] In *Seedat's Executors v The Master (Natal)* 1917 AD 302, the court declined to recognised a widow of a Muslim marriage as a "surviving spouse" because a Muslim marriage was "repugnant to the policy and the legal institution both of Holland and England" and "reprobated by the majority of the civilised peoples, on grounds of morality and religion." (page 308) On the basis of views of the "civilised peoples" the court refused to recognise a widow of a Muslim marriage as a surviving spouse for the purposes of the statute in question.

[67] *Daniels v Campbell and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC)

[68] Act 81 of 1987

[69] Act 27 of 1990

[70] *Daniels v Campbell and Others, supra,* at para 54

B The Constitution protects and safeguards our constitutional democracy

The Constitution contemplates a government with divided functions, which is accountable to the people. It explicitly embraces the doctrine of the supremacy of the Constitution and the institution of judicial review, which is implicit, if not explicit in the doctrine of the supremacy of the Constitution. This basic structure of our Constitution gives effect to one of the defining features of our constitutional democracy, the principle of accountability. This principle is essential to the protection of our democracy.

The Principle of Accountability

The Constitution explicitly states that the "National Assembly is elected to represent the people and to ensure government by the people under the Constitution."[71] And it is required to do this by, among other things, "scrutinising and overseeing executive action."[72] It has a responsibility to hold the executive and other state organs accountable[73] and to maintain oversight of the exercise of national executive authority including the implementation of legislation.[74] In addition, it is required to maintain oversight over all other state organs.[75]

The National Assembly occupies a special place in our constitutional democracy and has a special role to play. As the representative of the people, it has the responsibility to ensure that the state machinery functions efficiently and effectively and in the interests of the people. It has been given enormous powers to ensure the effective performance of its role, including the power to summon people to appear before it to give evidence[76] and to compel them to comply with its summons,[77] to require any institution to report to it,[78] and to receive petitions or representations from any persons of institutions.[79] The National Assembly can also call for the removal of a judge if "the Judicial Service Commission finds that the judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct."[80]

But Parliament itself is also accountable to the people. The Constitution empowers the people to review the performance of the elected representatives every five years to ensure that they are accountable and responsive to their needs.[81] If they should fail to respond to the needs of the people, the Constitution empowers the people to vote them out of office after five years. During, the five-year period in between the elections, the Constitution allows the people to

[71] Section 42(3) of the Constitution
[72] Id
[73] Section 55(2)(a) of the Constitution
[74] Section 55(2)(b)(i) of the Constitution
[75] Section 55(2)(b)(ii) of the Constitution
[76] Section 56(a) of the Constitution
[77] Section 56(c) of the Constitution
[78] Section 56(b) of the Constitution
[79] Section 56(d) of the Constitution
[80] Section 177 (1) of the Constitution
[81] Section 49(1). See section 108(1) in relation to provincial legislatures

engage in public protest to draw attention to their grievances.[82] The people can also approach courts or *Chapter 9* institutions to ensure accountability.

Both the judiciary and the *Chapter 9* institutions are also accountable to the people. *Chapter 9* institutions are accountable to the National Assembly[83] and the judiciary to the people through the Judicial Service Commission and the National Assembly.[84]

But as democratic philosophers remind us, "the achievement of democracy depends not only on the rules and procedures that are adopted and safeguarded, but also on the way the opportunities provided by democracy are used by the citizens."[85] The political challenge facing us therefore is to make our constitutional democracy work for ordinary people.[86] For our democracy to work, these mechanisms for holding public institutions and officials accountable must be used. When people and institutions resort to court, they are simply calling upon the defaulting institution to account and this is a manifestation of the importance they attach to the Constitution. In particular, when political branches of government and opposition parties resort to the judicial process to resolve their differences, this is a vindication of the Constitution.

Accountability through judicial review

For example, President Mandela invoked the Constitution when he had concerns about the constitutionality of the Liquor Bill enacted by Parliament.[87] He also invoked the Constitution when he inadvertently brought into operation the provisions of the South African Medicines and Medical Devices Regulatory Act, 152 of 1998, when there was no underlying regulatory framework for the implementation of this statute.[88] Similarly, when President Zuma approached the Constitutional Court to set aside his decision because he had prematurely brought into operation certain provisions of the National Health Act, 61 of 2003, in the absence of the required regulatory framework for the implementation of the relevant provisions of the Act.[89]

Members of the opposition parties have invoked the Constitution to challenge their expulsion from Parliament;[90] the decision of the Speaker of the National Assembly to bring

[82] Sections 17, and 19 (2) and (3)
[83] Section 181 (5) of the Constitution
[84] Section 177 (1) of the Constitution
[85] Sen, Amartya, *Development as freedom*. (1st ed). (New York: Oxford University Press 1999), page 155
[86] Fidel Valdez Ramos, the former President of the Philippines, addressing the Australian National University audience. Cited by Amartya Sen, above note 85
[87] *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15. 2000 (1) SA 732 (CC); 2000 (1) BCLR 1
[88] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241
[89] President of the Republic of South Africa and Others v South African Dental Association and Another (CCT 201/14) [2015] ZACC 2; 2015 (4) BCLR 388 (CC) (27 January 2015)
[90] *Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 8; 2016 (3) SA 487 (CC); 2016 (5) BCLR 577 (CC)

members of the South African Police Services into the parliamentary chamber;[91] to hold the President and Parliament accountable and to ensure that the President complied with the remedial recommendation of the Public Protector.[92] In addition, the Constitution has been invoked to challenge the appointment of public officials by the President;[93] and the decision of the National Prosecution Authority to drop charges against the President.[94] And finally, the decision of the government not to arrest the President of Sudan pursuant to a warrant issued by the International Criminal Court, has recently come under judicial scrutiny.[95]

This litigation and growth of judicial review has changed the legal landscape in South Africa as elsewhere. It has introduced a culture of transparency and accountability. All those who are concerned with the conduct of the business of government must adapt to this new constitutional environment. It is fundamental to good governance and the rule of law that public powers should be exercised within legal limits and with fairness. This is essential for commanding the confidence and respect of the community in the process of government; in short, judicial review is a cornerstone of good governance. It enhances the quality of governance by ensuring its legality and fairness.

But, the increased resort to courts has generated a debate about the role of the judiciary in a constitutional democracy. It is essential to understand the proper role of the judiciary in a democracy, for unless its role is properly understood, judicial activities may be construed as an unwarranted intrusion into the domain of other branches of government, and this may undermine confidence in the judiciary.

THE ROLE OF THE JUDICIARY IN A CONSTITUTIONAL DEMOCRACY[96]

The debate defined

Increasingly, the judiciary finds itself thrust into the center of political disputes. Courts have been drawn into all sorts of disputes including highly sensitive political issues, which lie at the very edges of separation of powers, as well as disputes relating to the internal affairs of political parties[97] as well as religious bodies.[98] Courts, for example, have been drawn deeply into

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[91] Id

[92] *Economic Freedom Fighters and Others v The Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) (*Nkandla case*)

[93] *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC)

[94] *Democratic Alliance v Acting National Director of Public Prosecutions and Others*, [2016] ZAGPPHC; [2016] 3 All SA 78 (GP); 2016 (2) SACR 1 (GHC)

[95] *The Minister of Justice and Constitutional Development and Others v The Southern African Litigation Centre* [2016] ZASCA 17; 2016 (3) SA 317 (SCA)

[96] This section is based on an unpublished manuscript: Justice Sandile Ngcobo, "THE JUDICIAL AUTHORITY: The Theory and Practice of Judicial Review in South Africa."

[97] *Letlapa and Another v Moloto and Others [2014] ZAGPJHS 302*

[98] *Ecclesia De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* [2015] ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC)

the conduct of foreign relations which are "delicate, complex and involve large elements of prophesy",[99] in cases such as *Kaunda*[100], *Mohamed*[101] and *President Omar Al Bashir*[102] show.

The involvement of courts in these issues has given rise to a concern about the role of the judiciary in a democracy, in particular, the limits of the courts' powers of judicial review. Some are concerned that issues that should be resolved through the ballot box are increasingly being resolved in Bloemfontein and in Braamfontein. Some have even argued that this litigation suggests that in this country we now have a 'coalition government' comprising of the governing party, the opposition parties and the Judiciary.

Some of these sentiments are captured in President Zuma's address at a joint sitting of Parliament in the following terms:

> *[We] also wish to reiterate our view that there is a need to distinguish the areas of responsibility between* the judiciary and the elected branches of state, especially with regards to policy formulation. The executive, as elected officials, has the sole discretion to decide policies for government. The executive should be allowed to conduct its administration and policy-making work as freely as it could. The powers conferred on the courts could not be regarded as superior to the powers resulting from a mandate given by the people in a popular vote. To provide support to the judiciary and free the courts to do their work, it would help if political disputes were resolved politically. We now get a sense that there are those who wish to co-govern the country through the courts, when they have not won the popular vote during the election. [103]

But these concerns are not unique to South Africa. They are common in any democracy. A group of prominent constitutional law scholars and philosophers in the United States is beginning to question the institution of judicial review. A number of articles have been written attacking the institution.[104] These attacks have been matched by a number of articles defending it.[105]

> Professor Jeremy Waldron, puts the problem of judicial review as follows:
> By contrast, in the United States the people or their representatives in state and federal legislatures can address these questions if they like, but they have no certainty that their

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[99] *Chicago & S. Air Lines v Waterman S.S. Corp*, 333 U.S 103 (1948) at 111

[100] *Kaunda and Others v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC)

[101] *Mohamed and Another v President of the Republic of South Africa and Others* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC)

[102] *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* [2015] ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC)

[103] "Judiciary must respect separation of powers – Jacob Zuma" http://www.policsweb.co.za/polics/judiciary-must-respect-separation-of-powers-Jacob-Zuma (accessed on 28 June 2016)

[104] See, Larry D Kramer, "The People Themselves: Popular Constitutionalism and Judicial Review" (2004); Mark Tushnet, "Taking the Constitution Away From the Courts", (1999); Jeremy Waldron, "The Core Case Against Judicial Review"

[105] See, Ronald Dworkin, Freedoms Law: The Moral Reading of the American Constitution (1996); Richard Fallon, Jr, The Core of an Uneasy Case for Judicial Review, 121 Harv. L. Rev. 1693, 1699 (2008); Frederick Schauer, Judicial Supremacy and the Modest Constitution, 92 Calif. L. Rev. 1045 (2004); Saikrishna B. Prkash & John c. Yoo, The Origins of Judicial review, 70 U. CHI. L.REV. 887 (2003)

> decisions will prevail. If someone who disagrees with the legislative resolution decides to bring the matter before a court, the view that finally prevails will be that of the judges. As Ronald Dworkin puts it – and he is a *defender* of judicial review – on "intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries," the people and their representatives simply have to "accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special."[106]

Opponents of the institution of judicial review argue that it is undemocratic because when a court declares legislation unconstitutional "it thwarts the will of the representatives of the actual people."[107] Others argue that it is politically illegitimate and undemocratic because, by privileging the majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.[108]

But as indicated above, the institution also has its defenders who point out the advantages of the institution of judicial review comparing it to the electoral process and in particular, emphasising the political insulation of the judiciary as well as its institutional characteristics. A constitution should be enforced by a mechanism that creates the likelihood that its violations will be cured. The constraints imposed by a constitution should be real and enforceable and an institution that has the necessary characteristic to serve as an effective enforcement mechanism should safeguard them, which is the judiciary.[109]

At the core of these arguments and counter-arguments is the doctrine of separation of functions and the limits of the powers of judicial review. Thus, the role of the judiciary in our constitutional democracy must be understood in the context of the doctrine of separation of powers.

Separation of powers

There can be no gainsaying of the fact that the doctrine of separation of powers is today regarded as an essential and inherent part of a modern democracy founded on the rule of law. The central objective of the doctrine is to disperse power among the three branches of

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[106] Jeremy Waldron, The Core Case Against Judicial Review, 115 Yale Law Journal, 1346, 1350 (2006)
[107] Alexander Bickel, *The Least Dangerous Branch*, 2ed 1986. Others maintain that the people through their elected representatives should enforce the Constitution. As one critic has put it "[i]n a society that takes democracy seriously, there is no privileged place for judicial proconsuls or their scholarly cohorts – citizens can govern best when they govern themselves." Allan C Hutchinson, *A Hard Core Case Against Judicial Review, Harvard Law Review* 121 (2008) 57 at 64
[108] Jeremy Waldron "The Core Case Against Judicial Review" 115 *Yale Law Journal* 1346 at 1353 (2006). See also Larry D Kramer, The *People Themselves: Popular Constitutionalism and Judicial Review* (2004); Mark Tushnet, *Taking the Constitution away from the Courts* (1999)
[109] Jonathan R Siegel, "The Institutional Case for Judicial Review" 97 Iowa LAW Review 1147, 1192, (2012)

government in order to avoid concentration of power in one branch that may result in the oppression of other branches of government.

There are two essential features of the doctrine of separation of functions in modern democracies that are crucial to an understanding of the role of the judiciary in any democracy. The first one is a system of checks and balances, which gives each branch of government some, limited power over other branches so that the functions of government overlap. The principle of checks and balances results in the imposition of restraint by one branch of government upon another branch of government.

In democratic systems of government in which there are checks and balances, there can be no separation that is absolute.[110] Functions of government will overlap resulting in one branch of government making a decision that will impact on the domain of another branch of government. The intrusion that results from this process is a function of checks and balances.

The other essential and inherent feature of the principle of separation of powers is judicial review, which allows courts to exercise limited powers over the political branches of government. The institution of judicial review is deeply rooted in the rule of law and the doctrine of the supremacy of the Constitution, which are the basic substance of a democracy. It permits courts to set aside executive or legislative actions that are inconsistent with the Constitution and ensures that the other two branches of government act in accordance with, and within the limits of their constitutional powers.

In those democracies where courts enjoy the power of judicial review, striking down legislation made by the elected representatives obstructs the legislative function. But it is an obstruction that is mandated by the Constitution. Similarly, when the President declines to assent to a Bill passed by Parliament, as Presidents have done so previously, this interferes with the law making powers of Parliament, but it is an interference that is required by the Constitution. When the President pardons convicted prisoners, this too interferes with the judicial process, but it is an interference that is mandated by the Constitution. Similarly, when Parliament makes a law that prescribes minimum sentences, it interferes with the duty of courts to impose an appropriate sentence, but again it is an interference that is permitted by the doctrine of separation of powers.

It is important, however, to bear in mind that there is no single model of separation of powers. The conceptions of separation of powers and checks and balances vary from country to country. Different conceptions of checks and balances and the peculiarities of each country's constitution will give rise to different boundaries between the separate branches of government. It follows therefore that the relationship between the three branches of government should be

[110] *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 at para 109

tested, not against abstract notions of separation of powers, but by the conception of separation of powers as evidenced by the text and the structure of our Constitution.

It is the power of judicial review, which is inherent in the checks and balances, which permits courts to make decisions that have an impact on the domain of other branches of government. But this does not give courts the authority to perform the functions of other branches of government. In this regard, it is important to draw a distinction between a court determining whether or not policy or legislation is consistent with the Constitution or the law and a court taking command of such matters so as, in substance, to exercise a core function of those organs of state. Usurping the functions of another branch of government constitutes an impermissible intrusion into the domain of another branch of government.

The power of judicial review is not without limits.

The limits of judicial review

In *Doctors for Life*[111] the Constitutional Court accepted that there are limits to the exercise of judicial review holding that "[c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government."[112] Recently, in the *EFF and Others v The Speaker of the National Assembly and Others*, (the *Nkandla* case), the Constitutional Court reiterated that the judiciary "does not have unlimited powers and [that it] must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government."[113] It also emphasised the need to allow space to the political branches of government "to discharge their constitutional obligations unimpeded by the Judiciary save where the Constitution otherwise permits".[114]

Precisely what is the nature and scope of powers of judicial review under our Constitution? In a constitutional democracy where all laws or conduct must conform to the Constitution, are there no-go zones for courts? If there are any limitations, are these limits discernible from the text of the Constitution or are they contained in the invisible text of the Constitution, and if they are not, how should they be determined and who should determine those limits? How can we tell the difference between a court interpreting the Constitution and a court amending the Constitution?

Courts in other jurisdictions have grappled with these questions and continue to do so. In other jurisdictions, notably, in the United States, courts have developed the elusive doctrine of "political question" to limit the exercise of the power of courts to review decisions of the other

[111] *Doctors for Life International v Speaker of the National Assembly and Others*, 2006 (6) SA 416 (CC)
[112] Id at para 37
[113] Id at para 92
[114] Id at para 90

branches of government. In the United States, the Supreme Court has refused to review issues that touch on "political question". A political question arises when "issues [are] presented to courts whose final resolution should be left to branches of government other than the courts, or to the electorate as a whole."[115]

The leading Supreme Court case in the area of political question doctrine is *Baker v. Carr*, where the Court outlined six characteristics of a political question.[116] These include:

(a) A "textually demonstrable constitutional commitment of the issue to a coordinate political department; or"
(b) A "lack of judicially discoverable and manageable standards for resolving it; or"
(c) The "impossibility for a court's independent resolution without expressing a lack of respect for a coordinate branch of the government; or"
(d) The "impossibility of deciding the issue without an initial policy decision, which is beyond the discretion of the court; or"
(e) An "unusual need for unquestioning adherence to a political decision already made; or"
(f) The "potentiality of embarrassment from multifarious pronouncements by various departments on one question."

The challenge facing us as South Africans is to develop a coherent theory of judicial review, which is deeply rooted in the doctrine of separation of powers as provided for in our Constitution that will, in the words of the Western Cape High Court "guide the institution as to whether to accede or refuse the demands for what often appears to be heavy political lifting".[117]

> In developing such a doctrine, certain basic propositions must be accepted:
> First, our Constitution contemplates three co-equal branches of government; an all too powerful judiciary is a threat to our constitutional democracy in which government is based on the will of the people just as an all too powerful executive or legislature is a threat to our democracy;
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> Second, the very principle of separation of powers which forms part of our Constitution, presupposes that there are limitations on the exercise of the power of judicial review and

[115] Kenneth L. Gellhaus, Equitable Discretion As A Substitute For The Political Question Doctrine, 50 *Alberta Law Review* 193 (1985) at 193
[116] 369 U.S 186, 217 (1962)
[117] *The Economic Freedom Fighters and Others v The Speaker of the National Assembly and Others* Case no. 21471/2014; Western Cape Division- 23 December 2014 at para 6 - Unreported. The Constitutional Court very early on in *De Lange v Smuts NO and Others*, [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCCR 779 (CC) at para 60 urged South African courts to do, courts must a uniquely apply the South African doctrine of separation of powers, one that must "… fit the particular system of government [that is] provided for in our Constitution" and that "reflects a delicate balancing, informed by both [our] history and [our] new dispensation, between the need, on the one hand to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."

> requires the judiciary to observe the vital limits on the exercise of power of judicial review;
>
> Third, limitations must be sought in, and be derived from the Constitution; and
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> Fourth, while concepts such as the principle of deference or margin of appreciation or political question doctrine provide a useful starting point in considering limits on the power of judicial review, it is important to bear in mind that the principle to be developed must be informed by our Constitution and be anchored in our constitutional democracy which gives courts the central role in upholding and protecting the Constitution.
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> Fifth, as the Constitutional Court has recently emphasised, it must be informed by the need to allow space to the political branches of government to discharge their constitutional obligations unimpeded by the judiciary save where the Constitution permits.

In the so-called *Nkandla* case, the Constitutional Court has begun to identify the basic contours of the limits of judicial review. The Court held that where the Constitution entrusts a matter to a political branch of government and gives it discretion on how to fulfill the obligation in question, it "falls outside the parameters of judicial authority to prescribe" to that branch of government how to fulfill that obligation.[118] The court's role "is to determine whether what [the political branch in question] did in substance and in reality amounts to fulfillment of its constitutional obligations."[119]

The effect of the decision is that where the Constitution entrusts a matter to another branch of government without prescribing how the powers conferred should be exercised, that branch of government has discretion on how to perform its obligation. Courts may not prescribe to the political branch of government how to perform the obligation in question. As the court explained:

> "It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinize executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfillment of its constitutional obligations."[120]

This underscores what the minority judgment said in *Glenister v President of the Republic of South Africa and Others*, namely:

> "What must be stressed here is that it is not the judicial role to dictate to other branches what is the most appropriate way to secure the independence of an anti-corruption agency. The judicial role is limited to determining whether the agency under consideration complies with the Constitution. Indeed, the legislature here had to exercise

[118] *Nkandla* case at para 93
[119] Id
[120] Id at para 93

> a political judgment. That there is more than one permissible way of securing the structural and operational autonomy of the DPCI does not make the choice of one rather than the other unconstitutional."[121]

It is important, as the decisions of the Constitutional Court indicate, to understand that there are matters that, for good reasons, are reserved for political branches of government. This is essential to an understanding of what can legitimately be expected of the judiciary.

What can be expected of the judicial process?

Court decisions in judicial review cases can have profound consequences for various political, economic and social problems, which arise in our society. But it is important for the public to understand the proper role of the courts. The role of the court is only to determine the limits of legality in accordance with the relevant constitutional and statutory provisions and the applicable common law principles. The court is only concerned with what is legally valid and what is not, in accordance with legal norms and principles. The court does not assume the role of the lawmaker and does not deal with the merits of the decision as such as if the court were the decision maker.

It is important also to understand that having regard to their proper role on judicial review, courts cannot provide solutions to all political, economic and social problems that afflict societies in modern times. Within the limits of legality as determined by the courts, the appropriate solution to most political, economic or social problems can only be found through the political process. These problems are usually complex and they involve many conflicting interests and may involve the use and allocation of limited resources. It is only through the process of give and take of the political process after consultation and dialogue that a viable solution may be found.

Solutions found through the political process can reconcile various interests and take into account short-term needs and long-term goals. It is to the political process that the citizen must look for an appropriate resolution of these problems. The responsibility for the proper and effective functioning of the political process in the interests of the community rests of course with the executive and the legislature. Judicial review ensures that the political branches of government perform their constitutional obligations and do so in accordance with and within the limits of their constitutional authority and obligations.

But while our Constitution matters and will continue to matter, there are nevertheless challenges, which if not adequately addressed, may very well undermine our constitutional democracy. And this brings me to the question of the threats to our constitutional democracy.

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[121] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 374 CC; 2011(7) BCCR 651 (CC) at para 146

THREATS TO THE OUR CONSTITUTIONAL DEMOCRACY

The challenges facing our constitutional democracy are varied. They include corruption, racism, violent protests, political intolerance, and the slow pace of service delivery on the promise of socio-economic rights, as well as access to land that has resulted in unauthorised occupation of land, the so-called land invasions. The cumulative impact of these threats to our constitutional democracy should not be underestimated. The other threat, which is often overlooked, is collusion and price fixing in the private sector, which is driven by greed. This has given rise to higher prices for basic commodities such as bread and milk.[122] This undermines the right to food.[123]

However, due to time constraints, I will focus on two challenges that are presenting an immediate threat to our constitutional democracy because of their ripple effects. Both are on the increase.

Corruption and slow pace of service delivery

Corruption is so endemic in our society that it is like a cancer that is slowly eating away the fabric of our society and it is developing into a culture. It is costing us as taxpayers a fortune. Money that should be spent on service delivery or some other worthy cause is either being stolen or spent fighting corruption. It undermines service delivery. Lack of service delivery whether in relation to education, housing, and other socio-economic rights enshrined in the Constitution generates grievances and these grievances in turn lead to discontent.

Regrettably, nowadays this discontent is expressed in violent protests, which we have witnessed recently. And these grievances provide fertile ground for individuals and groups with ulterior motives to take advantage of these protests to further their own agendas. Violent protests have become a norm and have resulted in the destruction of schools, university property, and public amenities and even the loss of lives. Huge sums of money will be spent rebuilding the schools and other amenities that have been destroyed. Schooling has been disrupted. This has undermined the right to education and other rights enshrined in the Constitution.

Yet the Constitution guarantees to everyone the right to protest peacefully. Unless this trend of violence is arrested the country will soon deteriorate into lawlessness and chaos. The rule of law will be the first casualty. Our constitutional democracy will be in jeopardy. And the Constitution itself will be undermined. While the condemnation of violent protests by political leaders is a laudable step, something more is required to end violent protests; we need to address the root causes of these protests.

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[122] SA's price of bread and circuses. http://www.dailymaverick.co.za/article/2013-07-18-sas-price-of-bread-and-circuses/#.V3uH-_l96Uk (accessed on 28 June 2016)

[123] Section 27(1)(b) of the Constitution

But there is another threat, which is growing day by day; the threat raised by acts of racism.

Racial incidents

In January this year, it was reported that the Human Rights Commission had been receiving an average of thirty complaints of unfair discrimination based on race, a month[124]. From January to December 2015 the Commission had received four hundred and seventy equality complaints and almost two hundred and seventy of them were about racist statements. Just yesterday we heard an owner of a lodge in KwaZulu Natal publicly stating that he does not allow blacks in his facility.[125] Last week two white males were convicted of assaulting a black petrol attendant and sentenced to a term of imprisonment.[126] And recently a sitting judge has been accused of racism.[127] Sadly, racial prejudice is not limited to the streets and petrol stations, but extends to classrooms, churches and even to the halls of justice.

These racial insults and racial incidents are a reminder of where we are coming from as a nation and the road that we still need to travel in order to get to the new society contemplated in the Constitution. They lend continued vitality to the statement by Chief Justice de Villiers in 1911, in the *Moller* case when he said "racial …prejudices, have never died out, and are not less deeply rooted at the present day in South Africa".

One of the goals that we have fashioned for ourselves is the establishment of a new society, one that is based on democratic values, social justice and fundamental human rights and freedoms. The racial incidents are a major obstacle to the realisation of this goal. They constitute an enduring threat to our young democracy because they are sowing the seeds of racial hatred and prejudice. Unless these racial insults and racial prejudices are dealt with decisively, our constitutional democracy is in danger, and so is our Constitution. Unless something is done to address it now, the new society contemplated in the Constitution will remain a distant dream.

These and other threats to our constitutional democracy require us to reflect on how we might safeguard our Constitution and the democracy it embraces.

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[124] *Legal moves afoot as racism complaints rise.* http://www.heraldlive.co.za/legal-moves-afoot-racism-complaints-rise/ (accessed on 04 June 2016)

[125] *Calls to shut down KZN guest house that won't take 'black people or government employees'.* http://www.timeslive.co.za/local/2016/06/23/Calls-to-shut-down-KZN-guest-house-that-won%E2%80%99t-take-%E2%80%98black-people-or-government-employees%E2%80%99 (accessed on 04 June 2016)

[126] *Tzaneen petrol attendant attackers behind bars.* https://www.enca.com/south-africa/tzaneen-petrol-attendant-attackers-behind-bars (accessed on 04 June 2016)

[127] *Judge's Facebook comments about rape condemned as racist.* http://www.bdlive.co.za/national/law/2016/05/09/judges-facebook-comments-about-rape-condemned-as-racist (accessed on 04 June 2016)

CONDITIONS ESSENTIAL TO PRESERVE OUR DEMOCRACY

As I reflect on this question, I am reminded of my constitutional law class at Harvard that dealt with the constitutional convention, which resulted in the Constitution of the United States of America. One of the delegates to the constitutional convention in Philadelphia, Benjamin Franklin was asked what he had given the American people, he replied: "a republic, if you can keep it".

Our Constitution has given us a Republic founded on democratic values, fundamental human rights and freedoms, government by people to ensure accountability and responsiveness. We need to keep this Republic and safeguard our constitutional democracy.

As we reflect on how to safeguard our Constitutional democracy, we must draw inspiration from the goals that we have proclaimed in the Preamble to the Constitution and remember that we are bound together by a common commitment to a new nation of people from all walks of life converging to form one nation marching towards its destiny. Our Constitution will only matter if we can honour not just its letter but also its spirit. How we honour our Constitution will inspire generations to come and will determine the lives of present and the future generations.

We should bear in mind that a constitution in and of itself guarantees nothing. A constitution must embody something that is in the hearts of the people. In the midst of World War II, judge Learned Hand gave a speech in New York City's Central Park that came to be known as "The Spirit of Liberty." He said, "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes... Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it."[128]

Constitutional democracy and the values that it embraces must lie in our hearts; "if it dies there, no constitution, no law, no court can do much to save it." Institutions like the Human Sciences Research Council have a critical role to play by providing a forum where topical issues affecting our democracy may be explored and debated openly and objectively. And we should not be shy in debating issues that threaten our constitutional democracy or those that will strengthen it, regardless of how controversial they may be. In a different context, I spoke about the importance of public debate and said:

> "Public debate does not undermine democracy; it ***enhances*** it. Public debate promotes a better understanding of the role of each of the three arms of government and reinforces what our responsibilities are as citizens. The value of debate lies in its ability both to vindicate our point of view and to demonstrate that our view is erroneous. To paraphrase John Stuart Mill, if our point of view is erroneous, public debate provides the opportunity to review our view point and change "error for truth"; if our point of view is correct, it

[128] Judge Learned Hand "The Spirit of Liberty", 1944
http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1199

gives us "the clearer perception and livelier impression of truth produced by its collision with error."[129]

CONCLUSION

We cannot save our constitutional democracy unless we create at the same time a nation of people committed to this form of government and willing to stand up to save it. Our Constitution created it. Saving it is up to us. We must remember that the sustainability of our constitutional democracy does not only depend on the rules and procedures that we have adopted in the Constitution, but it crucially depends on the way we use the opportunities that our democracy provides.[130]

The challenge we face therefore is to make our Constitution work not for a few, but for all.

[129] Justice Sandile Ngcobo, Bram Fischer Lecture delivered on 08 November 2013
[130] Amartya Sen, *Development as Freedom*, page 155