The Democratic Risk to Democratic Transitions

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Writing in these pages four years ago, my colleague Sujit Choudhry soberly assessed the prospects for a democracy shorn of real electoral competition. What happens, he inquired, if a democratic system designed for vigorous dissent and electoral challenge is transformed by the will of the people into a one-party bazaar in which 'one party enjoys electoral dominance and continues to win free and fair elections that are not tainted by force or fraud?'[1] The heart of the question is whether in the absence of electoral competition, a tolerant constitutional order can be established and sustained. For Professor Choudhry, as for myself and other foreign observers, South Africa had been, and continues to be, the most intriguing and compelling example of constitutional hope in the transition to democracy. But that hope has increasing elements of concern over time, to which this Article is directed.

Judged from the outside, I would suggest three phases of the South African constitutional oversight of politics. In the first instance, and focused primarily on the historic *First Certification Judgment*,[2] the Constitutional Court of South Africa enshrined a period of what Bruce Ackerman has termed 'constrained democracy'.[3] The Court was created as a central institutional guarantor of the orderly transition from apartheid to competitive elections open to all South Africans. At the same time, the transition required that the guarantee of order be itself established so as not to yield to complete majority preferences, something the powerful white minority could never cede to the oppressed majority.

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[1] S 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, 3.

[2] *In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC)('*First Certification Judgment*'). See, further, M Chaskalson & D Davis 'Constitutionalism, the Rule of Law and the First Certification Judgment: *Ex Parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC)' (1997) 13 *South African Journal on Human Rights* 430; S Woolman 'Humility, Michelman's Method and the Constitutional Court: Rereading the *First Certification Judgment* and Reaffirming a Distinction between Law and Politics' (2013) 25 *Stellenbosch Law Review* 281.

[3] B Ackerman 'Meritocracy v Democracy' *London Review of Books* (8 March 2007) < http://www.lrb.co.uk/v29/n05/bruce-ackerman/meritocracy-v-democracy>.

The highlight of the transition, formalised as the 34 Constitutional Principles (CPs), was the commitment that certain features of the yet-to-be-formed constitution needed to be entrenched in order to place them safely beyond the realm of ordinary politics. The focus of the outside world, and much of the Court's work, concerned the valourisation of individual rights. As I wrote in my first assessment of the Court, however, the decision held at bay the incipient consolidation of majority rule that might threaten minority expectations and, perhaps democratic governance itself.[4] The prospect of a court capable of securing restraints on pure majoritarian exercises of power was an instrumentally critical factor in facilitating the transition to democracy through negotiation.[5] The *First Certification Judgment* upheld that task admirably and its accounts of the relation between constitutional principles and democratic self-governance set the standard for constitutional courts of the post-1989 third wave of democracy.

In the second period, the Court's mandate for transition from apartheid had largely run its course. South Africa was a democratic state with the ANC a triumphant, strong party riding the crest of its mandate as the driver of the successful anti-apartheid struggle. In this period, the Court continued to exercise its role as protector of individual rights, on important matters such as the death penalty and gay marriage. At the same time, the Court exercised great restraint in not pre-empting parliamentary fiscal and policy decisions in cases regarding matters such as demands for property and medical assistance. Yet, this was also the period in which a post-Mandela ANC government used its legislative super-majority to begin constricting its political accountability. One example, though not utterly decisive, was the attempt to legitimise floor-crossing, a device prohibited by the original constitutional pact as a mechanism that offered a dominant party too tempting a tool to compromise weaker parliamentary delegations. Beyond the practical returns offered by actual floor-crossing practice, the challenge to ANC parliamentary manoeuvres took on jurisprudential significance because it offered the Court an unrealised opportunity to reinforce some basic tenets of democratic contestation on rapidly consolidating one-party rule. During this second period, the Court turned time and again to demands for social justice from groups hoping for more than the government delivered – and likely could deliver – to the still impoverished mass of the population. The nutshell account of this period would describe the Court as not interfering with the ANC's consolidation of political power and, at the same time, allowing great latitude for policy discretion for the government.

After a period of relative quiescence to democratic governance, the Constitutional Court appears to be entering a third period, one whose progress is far from set, but meriting of notice. The defining feature of this latest phase is that the ANC is now the established and dominant political force in the country and,

[4] S Issacharoff 'Constitutionalizing Democracy in Fractured Societies' (2004) 82 *Texas Law Review* 1861, 1874–82 (Notes that great significance attaches to 'the provisions that reaffirmed limitations on government and those that were struck down for what may be termed an excess of majoritarianism [by the Court]'.)

[5] See generally S Issacharoff 'Constitutional Courts and Democratic Hedging' (2012) 99 *Georgetown Law Journal* 961 (This point constitutes the article's central thesis.)

thus far, faces no significant political opposition. As is often the case when electoral competition recedes, the dominant party becomes the center for all political and economic dealings with the government, and an incestuous breed of self-serving politics starts to take hold. In this third period, the Court is confronting some of the efforts of the ANC government to place itself beyond customary forms of legal and democratic accountability. The political transcendence of the ANC limits the ability of the political system to correct course or, at the very least, has frustrated many efforts to date. In a case such as *Ramakatsa & Others v Magashule & Others,* for example, the Court had to confront an allegation of internal ANC voting irregularities in the selection of delegates to the Free State Provincial Congress of the party.[6] In granting relief that included the dissolution of the Provincial Executive Committee, the Court had to apply to the ANC party the constitutional guarantee of a right to participate in the activities of a political party as set out in s 19(1)*(b)* of the Final Constitution. *Ramakatsa* and a series of other cases from the recent past signal a new constitutional jurisprudence emerging to address the threats to democratic governance coming not from the history of apartheid but from a lack of electoral checks on the consolidation of power.

Like many foreign observers, I was drawn to the emerging South African jurisprudence during the halcyon first stage. The promise of a pacted transition under the constitutional oversight of a sophisticated Constitutional Court made the South African Court the most significant of the new judiciaries created by the post-1989 process of democratisation. As democracy and majority rule consolidated, most commentary turned to the role of the judiciary in securing social rights under the capacious commands of the new Constitution. At the same time, the deference to the policy initiatives of the ANC in the realms of the social and economic began to invite a worrisome deference as well to the consolidation of centralised political power. This prompted cautionary accounts of a different kind of threat to democracy, this time from an excess of majoritiarianism. Gauged from afar, the question is now whether the Court will be, and perhaps whether it can be, a restraining influence on excessive consolidation of political power.

The discussion proceeds in three parts. First, let me recount some constitutional history, familiar to most readers in South Africa, to set the stage for the constitutional inquiry. Then I will turn to foreign experiences for points of comparison on constitutional confrontations with excessive democratic consolidation of authority. Finally, I will turn to some recent case examples in South Africa to further develop the main theme of the Article.

I Promise and Concern

South Africa provided an inspiring example of the process of constitutional formation and the hope for constrained democratic governance. The question for outside observers is whether South Africa will also become the exemplar of the perils of constitutional retreat. The question is one of particular significance internationally because of the uniquely open powers, including the power to approve the Final Constitution, given to the newly created Constitutional Court.

[6] *Ramakatsa & Others v Magashule & Others* [2012] ZACC 31, 2013 (2) BCLR 202 (CC)('*Ramakatsa*').

It was, as Heinz Klug aptly summarises, a revolution 'represented by the triumph of constitutionalism over parliamentary sovereignty and, while its impact has yet to work its way fully through the labyrinth of South African law, its basic premise – a justiciable constitution – was fully guaranteed in the Constitutional Principles which guided the democratically elected Constitutional Assembly.'[7]

The debates over the limits of majoritarianism played out along a series of institutional design questions. For outsiders, South Africa offered an unusually open and self-conscious debate over purposive constitutional design. As expressed by Albie Sachs in 1986, 'the struggle for self-determination takes the form of a struggle within the frontiers of South Africa to create a new constitutional order.'[8] Having suffered under apartheid, the ANC saw constraints on majoritarian political power as a continued denial of political power to the black population. Thus, institutions of fractured or limited government, such as federalism, 'would prevent the emergence of national government, keep the black population divided, prevent any economic restructuring of the country and free the economically prosperous areas of the country of any responsibility for helping develop the vast poverty stricken areas.'[9]

That majoritarian vision, grounded in the basic tenets of electoral choice by all citizens, proved to be unworkable in securing the cooperation of the white minority in the repudiation of apartheid. Democratic choice, standing alone, can never serve as the guarantor of the rights of a disfavoured minority in the face of a cohesive majority. Other institutional features must be added to the mix to get minority buy-in, and this was a critical feature of the negotiated South African transition. As a result of the Kempton Park negotiations and accords, the constitutional pact that emerged contained significant limitations on the exercise of majoritarian political power. Thus, under the 34 Principles, there are three sets that may be subsumed under the category of antimajoritarian protections. First, there is an elaborate set of rights guarantees that extends to the confiscation of property. Although the new government would be devoted to the amelioration of disparities in wealth across racial lines, Principle V provides that '[e]quality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.'[10] In essence, this Principle extends legal protection to the white minority to prevent simple expropriation resulting from the exercise of ordinary political power. Second, there are limitations on the exercise of governmental authority through a balancing of powers within the national government and principles of federalism. These limitations include the requirements of formal lawmaking (CP X)[11] through a multiparty legislature (CP VIII),[12] a separation of powers

[7] H Klug *The Constitution of South Africa: A Contextual Analysis* (2010) 115.

[8] A Sachs 'Towards the Constitutional Reconstruction of South Africa' (1986) 2 *Lesotho Law Journal* 205, 205.

[9] A Sachs *Protecting Human Rights in a New South Africa* (1990) 152–153.

[10] Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution), Sch 4, Constitutional Principle V.

[11] Ibid at Constitutional Principle X.

[12] Ibid at Constitutional Principle VIII.

(CP VI),[13] an independent judiciary (CP VII),[14] and a multiparty representative government based on proportional representation (CP VIII).[15] More unique are the constitutional guarantees to the provinces and local governments to be able to claim an 'equitable share' of national resources (CP XXVI),[16] and the creation of a Public Service Commission and Reserve Bank independent of legislative control (CP XXIX).[17] Third, there are protections provided by the supermajority processes needed to amend the Constitution that require not only a two-thirds vote in the second chamber of the national Parliament, known as the National Council of Provinces in the Final Constitution, but also approval by a majority of provincial legislatures (CP XVIII).[18]

The 34 Constitutional Principles sought to facilitate the transition to democratic rule by assuring the white minority that democratic rule would not simply be an invitation to majoritarian retribution.[19] Whatever the historical merits of retribution, and whatever the grave injustices of apartheid rule, the fact remained that without some formal guarantee of security, power would never be ceded except on the closing end of a bloody civil war. The mechanism for enforcing security would be the newly crafted Constitution, but its drafting and implementation presented two key problems, which are best set out in the words of the Constitutional Court of South Africa:

> The first arose from the fact that [the architects of the constitutional compromise] were not elected to their positions in consequence of any free and verifiable elections and that it was therefore necessary to have this commitment articulated in a final constitution adopted by a credible body properly mandated to do so in consequence of free and fair elections based on universal adult suffrage. The second problem was the fear in some quarters that the constitution eventually favoured by such a body of elected representatives might not sufficiently address the anxieties and the insecurities of such constituencies and might therefore subvert the objectives of a negotiated settlement. The government and other minority groups were prepared to relinquish power to the majority but were determined to have a hand in drawing the framework for the future governance of the country. The liberation movements on the opposition side were equally adamant that only democratically elected representatives of the people could legitimately engage in forging a constitution: neither they, and certainly not the government of the day, had any claim to the requisite mandate from the electorate.[20]

The impasse was resolved by a compromise which enabled both sides to attain their basic goals without sacrificing principle. What was no less important in the political climate of the time was that it enabled them to keep faith with their respective constituencies: those who feared engulfment by a black majority and those who were determined to eradicate apartheid once and for all. What is

[13] Ibid at Constitutional Principle VI.
[14] Ibid at Constitutional Principle VII.
[15] Ibid at Constitutional Principle VIII.
[16] Ibid at Constitutional Principle XXVI.
[17] Ibid at Constitutional Principle XXIX.
[18] Ibid at Constitutional Principle XVIII.
[19] Ibid at Constitutional Principle XIV ('Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.')
[20] *First Certification Judgment* (note 2 above) at para 12.

more, an independent arbiter would have to ascertain and declare whether the new constitution indeed complied with the guidelines before it could come into force.[21]

Of greatest significance for present purposes are the provisions of the Court's judgment that reaffirmed limitations on government and, in particular, a number of the provisions of the draft constitution that were found inconsistent with the 34 CPs because they failed to adequately safeguard the commitment to constitutionalism itself or betrayed the guarantee that both state power and private power would be subject to judicial review. These draft provisions encompassed the attempt to preclude constitutional review of certain categories of statutes (labour laws),[22] the absence of adequate safeguards on centralised power and the failure to elucidate the manner in which coordinate spheres of government would exercise their authority,[23] and the lack of supermajoritarian protection for certain components of the Constitution itself – the Public Protector, the Auditor-General and the Bill of Rights.[24] With regard to this last category (protection of the Bill of Rights), the Court noted that the text failed to meet the obligation to provide for the special procedures – in addition to the special majorities – that the Constitutional Principles required.[25] The Court's majestic ruling turns on critical understandings of permissible constitutional law, often times on the same issues that would return once the ANC had consolidated political power. To the everlasting credit of President Mandela, the government did not waver in directing the Constitutional Assembly to revise the constitutional draft to meet the Court's concerns in October of 1996, and following a second round of judicial scrutiny, the new Constitution came into effect on 4 February 1997.[26]

Of particular concern for present purposes is the Court's broad interpretation of constitutional protections for minority parties, a check even in the early days of post-apartheid governance against the possibility of one-party domination. I want to focus here on a relatively secondary provision among party protections, one that is nonetheless significant. As part of the *First Certification Judgment*, the Court had to address various constitutional provisions protecting minority parties. Beyond the protections of proportional representation, the Constitution contained an 'antidefection' principle in which a member of Parliament would have to resign if he or she attempted to switch parties.[27] The provision was an

[21] Ibid at paras 12–13.

[22] Ibid at paras 149–150.

[23] Ibid at paras 299–302 and 482. The Court found uncertifiable those provisions that failed to provide the required 'framework for LG [local government] structures,' as well as the failure to ensure the fiscal integrity of political subdivisions. Ibid at para 240. The Court explains that the CPs mandate that legislative powers should be allocated predominantly, if not wholly, to the national government where national uniformity is required.)

[24] Ibid at paras 152–154 (These CPs required that a certifiable text possess 'special procedures involving special majorities' for constitutional amendments that would alter the content of the substantive provisions found in the Bill of Rights and constitutional guarantees of rights found elsewhere in the draft or 'new' text.).

[25] Ibid at paras 157–159.

[26] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24, 1997 (2) SA 97 (CC)('*Amended Text*').

[27] Ibid at paras 180–188 (Court considered whether the antidefection principle could be certified.)

express subject of negotiations in the transition from apartheid, reflecting fears that the likely parliamentary majority of the ANC could be used to woo minority legislators and overconcentrate political power. South Africa joined other countries that formalised such antidefection concerns through legal prohibitions on floor-walking or floor-crossing.[28]

But that did not end the debate over floor-crossing in the South African Parliament. Once in office and once its political power was consolidated, the ANC used its legislative supermajority to repeal the antidefection provision. Under the new law, defection was permitted so long as the defecting group constituted at least ten per cent of the party's legislative delegation.[29] This proviso did little to placate critics. For, while it would pose a large hurdle to defections from the ANC, it would leave defection an individual choice for any party with fewer than 10 members of Parliament.[30]

The constitutional amendment prompted a second constitutional challenge, this time a claim that the amendment would violate the principles of party integrity and separation of powers inherent in the entire constitutional structure.[31] Though not an issue of overriding historical significance, the antidefection question nonetheless challenged the Constitutional Court's role in guaranteeing the structures of democracy. The *First Certification Judgment* had been noteworthy precisely for its attentiveness to the problem of structural limitations on the exercise of political power, something that was certainly in the air in the immediate aftermath of the South African negotiations. The question was whether the Court would continue to use the democracy-promoting metric as the analytic foundation for evaluating efforts by the ANC to consolidate power.

Viewed after the passage of apartheid, and after the first generation of leadership left office, the antidefection question could have been a watershed moment in the history of South Africa under the ANC. The robust political exchange at the time of transition assumed that there would be black majority rule, that the ANC would emerge as the dominant political actor, and further that constitutional guarantees would serve as a bulwark against the overcentralisation of power. The political shakeout of post-apartheid politics had not yet occurred, and even the ascension of the ANC into increasing political hegemony was tempered by the calibrated leadership of Nelson Mandela. As the founding generation moved off the historic stage, however, and as less-broad-minded functionaries took the reins of power, the heroic ANC emerged as the head of an increasingly one-party

[28] New Zealand similarly prohibited party switching by members of parliament in the Electoral (Integrity) Amendment Act, 2001, but the prohibition was statutory and sunsetted in 2005. See MSR Palmer 'Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution' (2006) 54 *American Journal of Comparative Law* 587, 610 and note 64.

[29] The Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 s 23A(2)*(a)* repealed by the Constitution Tenth Amendment Act of 2003 (previously the Constitution of the Republic of South Africa Amendment Act 2 of 2003).

[30] CM Fombad 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from South Africa' (2007) 55 *American Journal of Comparative Law* 1, 32.

[31] *United Democratic Movement v The President of the Republic of South Africa & Others (No 2)* [2002] ZACC 21, 2003 (1) SA 495 (CC) at paras 26–27, 115–118 ('*United Democratic Movement*').

state, with all the attendant capacity for antidemocratic abuse.[32] South African democracy entered a period of what is termed 'dominant party' democracy, a term that may simply connote the imminent collapse of real democratic contestation.[33] From this perspective, the question of the day is whether the ANC will turn into the PRI, the Mexican Institutional Revolutionary Party, which was similarly the inheritor of a romantic revolutionary struggle, but which then imposed one-party rule to suffocate Mexico for almost the entire Twentieth Century.[34]

Translated into the context of constitutional adjudication, the antidefection issue offered the Court the ability to reassert the structural underpinnings of the *First Certification Judgment*. Instead, the Court retreated to a formalistic account of the Constitution as guaranteeing primarily procedural norms and individual rights. Thus, the Court rejected the challenge both on the procedural ground that the mechanisms of constitutional amendment had been adhered to, and on the grounds that no individual voter could claim a right of faithful representation after the election:

> The rights entrenched under s[ection] 19 [of the Constitution] are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives. They cannot dictate to them how they must vote in Parliament, nor do they have any legal right to insist that they conduct themselves or refrain from conducting themselves in a particular manner.[35]

In the words of Theunis Roux, the 'Court's political rights jurisprudence thus represents one of the most disappointing aspects of its record,' one marked by the failure 'to devise doctrines that might have counteracted the potentially pernicious effects of the ANC's dominance – doctrines that construed political rights in a way that helped to transform South Africa's democracy into one more closely resembling the liberal constitutional ideal[.]'[36]

Perhaps the Court could have drawn deeper structural authority not only from the negotiated history of South Africa's transition from apartheid, but also from the text of the South African Constitution. This Constitution contains a unique provision guaranteeing some form of effective minority party participation consistent with the aims of democracy. As set out in the Constitution, the rules and orders of the National Assembly must provide for 'the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy'.[37] Within the sections establishing the structure of the legislative bodies at the various levels of the federal system, parallel language requires that the rules for the National Assembly,

[32] The extent of the threat posed by the ANC's electoral dominance is still uncertain. See R Southall 'The "Dominant Party Debate" in South Africa' (2005) 39 *Africa Spectrum* 61, 61 (Southall contends that although 'the ANC's electoral and political hegemony does carry threats to democracy, … the ability of the ANC to extend its dominance is subject to considerable limitations.')

[33] For the best account of this process in South Africa, see generally Choudry (note 1 above).

[34] I am indebted to Pablo de Grieff for the analogy to the Mexican PRI.

[35] *United Democratic Movement* (note 31 above) 49.

[36] T Roux *The Politics of Principle: The First South African Constitutional Court 1995–2005* (2013) 335.

[37] Constitution of the Republic of South Africa, 1996 ('FC' or 'Final Constitution'), s 57(2)*(b)*.

the National Council of Provinces,[38] and the provincial legislatures provide for minority party participation 'in a manner consistent with democracy.'[39] Instead, the Court deferred to the ANC to define the rules of governance. Thus, the antidefection provision was allowed to stand until the ANC itself decided to abandon it, believing the provision had served its purpose and no longer yielded any hoped-for political benefits.[40]

II An Indirect Gaze

South Africa represents a high point in the sweep of democratisation that gripped the world stage more or less contemporaneous with the collapse of the Soviet Union. The exact connection, if any, between the transition from apartheid and the collapse of the Soviet bloc remains tenuous, though both the National Party and the ANC historically relied on now-diminished support from the contending great powers.[41] But South Africa's democratisation did coincide historically with what Samuel Huntington describes as the third wave of democratic ascendancy.[42] What follows is a step back from the immediacy of the South African context to examine some parallels from the post-Soviet period.

A Courts and the Boundaries of Democracy

The reference to the Mexican PRI in the preceding section invites a comparative assessment of the risks involved in democracies without electoral competition. Particularly for a foreign observer trying to assess constitutional developments

[38] FC s 70(2)*(c)*(States that the rules and orders of the National Council of Provinces (NCOP) must provide for 'the participation in the proceedings of the Council and its committees of minority parties represented in the Council, in a manner consistent with democracy'). In addition, the allocation of delegates to the NCOP 'must ensure the participation of minority parties in both the permanent and special delegates' components of the delegation in a manner consistent with democracy'. See FC s 61(3).

[39] FC s 116(2)*(b)*(The rules and orders of a provincial legislature must provide for 'the participation in the proceedings of the legislature and its committees of minority parties represented in the legislature, in a manner consistent with democracy').

[40] For a fuller account of the efforts of the ANC to secure the right to woo opposing legislators and the role that floor-crossing played in ANC maneuvers at the provincial level, see Choudhry (note 1 above). In December 2007, the ANC concluded at its Polokwane National Conference that floor-crossing should be abolished. The Democratic Alliance characterised the ANC's decision as one of political expediency, claiming the ANC relented only because it no longer needed the tactic. See 'Days Numbered for Floor-Crossing' *Mail & Guardian Online* (20 August 2010) <http://www.mg.co.za/article/2008-08-20-days-numbered-for-floorcrossing>. The result was the constitutional abolition of floor-crossing in the Constitution Fourteenth Amendment Act of 2008. Paradoxically, in 2010 Independent Democrats and Democratic Alliance discussed allowing party members to claim dual membership, which would functionally bring back floor-crossing. See 'ANC Riled by ID, DA Tango' *Independent Online* (5 May 2010) <http://www.iol.co.za/business/business-news/anc-riled-by-id-da-tango-1.815561>.

[41] I thank Martin Krygier for forcing to my attention the interplay between the anti-apartheid struggle and broader geopolitical trends. Although the relation is not nearly so clear as the emergence of democracies in Eastern Europe from nations under direct Soviet control, the historic proximity of the two events in time – and, more importantly, the end of the proxy war between the West and the Soviet Union over South Africa – puts in question any suggestion that these historical moments were mere coincidence.

[42] SP Huntington *The Third Wave: Democratization in the Late Twentieth Century* (1991).

in South Africa, it is useful to analyse the courts indirectly, seeing what looks familiar from afar even if some of the internal attributes may be missing. South Africa is neither the first nor the last of the post-1989 third wave democracies to face the problem of a democratic process yielding a consolidation of political power that defies electoral accountability. The task is to find a constitutional sextant, an instrument able to take measurements indirectly by triangulation. Toward that end, allow me to offer some distant points of comparison before returning to South Africa proper.

My comparisons begin in an unlikely place for any democratic revival, and one that was decidedly an unpropitious site for the development of constitutional doctrine addressing the boundaries of strong-party democracy: Colombia. The issue to be addressed is the role of constitutional courts under conditions of democratic governance compromised by the absence of competitive electoral accountability. Throughout the countries of the third wave of democracy, the problems of today would have seemed an unimaginable gain of freedom prior to the transitions after 1989. So it was for the countries of the Soviet bloc, and so it was for South Africa while still under apartheid.

So too it was for Colombia. The problem there was not an authoritarian state, but the disintegration of civil institutions under conditions of civil war and increasing domination by drug cartels. Perhaps no event more clearly showed the absence of order than the assault on 6 November 1985, by leftist guerrillas from the Colombian 19th of April Movement that overran the Colombian Supreme Court building. The rebels took the Justices of the Court as hostages, and in the ensuing shoot-out with the military, 12 of the judges were killed, along with more than 100 other civilians. The shootings at the Supreme Court were but the most visible signpost that the country's background of war and strife could overwhelm even the central institutions of state in Bogota, the capital. Colombia was for much of the last half of the twentieth century a state struggling for control of its territory against powerful private militias, and the resulting loss of state authority left open the terrain for one of the highest murder rates in the world, pervasive and extreme poverty, and a stubbornly flourishing drug trade.[43] After a civil war that left more than 200,000 people dead during the Gran Violencia of the 1950s, and then the militant uprisings and drug wars of the following decades during which even more succumbed to violence, any prospect of peace and stability seemed nonexistent.

Yet in 1991, in the face of overwhelming odds, a democratically elected constituent assembly promulgated a new constitution that served as part of the 'profound constitutional moment throughout the Americas'.[44] The fall of military dictatorships across much of South America, most notably in Argentina, Brazil, Chile and Uruguay, unleashed a democratic revival in the region and a new commitment to limitations on the powers of government. In many ways, the

[43] See MJ Cepeda-Espinosa 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 *Washington University Global Studies Law Review* 529, 532 note 2.

[44] M Schor 'An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia' (2009) 16 *Indiana Journal of Global Legal Studies* 1, 12.

democratic surge in South America paralleled the broader democratic expansion in Eastern Europe and Asia following the fall of the Soviet Union. In each case, central to the desired democratic restoration was the idea of constraint in the exercise of state authority. Authoritarian rule allowed the direct translation of political power into the raw exercise of arbitrary and repressive governmental conduct. In response, the democratic revival sought both to restore civilian authority and to enshrine the primacy of a rule of law.

In one sense, Colombia fit well within the movement to create effective democratic governance in focusing not only on the security of civil and human rights that had been compromised, but also on the structures of governmental authority to secure such rights. The constitution sought to overhaul many of the institutions of Colombian government, but none so much as the judiciary. Among the constitutional innovations was the creation of a constitutional court, and one that 'must be by any measure one of the strongest courts in the world.'[45] In the words of then President Cesar Gaviria, the Court was integral to the new democratic order, an institution with the 'mission of preventing any other powerful authority from hampering the transformations you are encouraging with laws, decrees, resolutions, orders, or any other administrative decisions or happenings. … The new Constitution requires, in order to be adequately applied, a new system of constitutional judicial review.'[46]

While Colombia's immediate challenges came from armed opponents of any governing authority, the Constitutional Court's greatest conflict came from within democratic governing power in a form that should be recognisable to a South African audience. Indeed, the Colombian experience exemplifies the post-1989 new constitutional order in which apex courts once and again confront excess concentrations of power in emerging and generally weak democratic states.

The critical question is the role to be played by these constitutional courts as they emerge from a process of reformation of states in the aftermath of civil strife or the overthrow of authoritarian rule. The model for modern constitutional courts comes from Germany whose newly created post-War constitutional court served to oversee a series of state institutions compromised by their integration into Nazism – including the existing judiciary. No country emerging from an authoritarian past is likely to have the human resources to purge from office all individuals tainted by prior association with the deposed government. Positions requiring advanced education degrees and professional certification almost invariably bring individuals into contact with the state and likely compel either membership in the ruling party or other forms of acquiescence with state authority. Efforts at complete lustration not only would deplete the society of those with experience in the technical administration of the society, but would likely force large parts of the society into active opposition to the attempted democratisation, as the United States learned to its chagrin in Iraq.

[45] D Landau 'Political Institutions and Judicial Role in Constitutional Law' (2010) 51 *Harvard International Law Journal* 319, 339.

[46] Cepeda-Espinosa 'Judicial Activism in a Violent Context' (note 43 above) at 550–551.

Judges are no exception to this dilemma. Of necessity, they require legal training which brings them into close proximity to the ruling regime, oftentimes no doubt much closer than they truly desire. Yet even authoritarian regimes need some form of legal regularity in the everyday lives of the citizens.[47] There are still marriages and divorces, exchanges of goods or services as permitted by law, and the settling of affairs at death. Certainly these same judges might be conscripted to enforce laws that no democratic society could tolerate. But in the great run of cases, the state had no particular stake in the resolution of the domestic woes of any particular family, and matters of divorce or child custody had to be resolved with the accumulation of knowledge and experience that is the judge's craft.

Germany most clearly presented both the problem and potential resolution. Pre-war Germany was home to one of the world's most sophisticated legal cultures, replete with first-rate legal instruction in its universities and a centuries-old body of jurisprudence. Few, if any, societies could rival the rectitude of German legal proceedings, nor the integrity of the judicial system. At the same time, German legal doctrine was highly formalistic and boasted a strong positivistic commitment to the application of the law as the command of the sovereign, not as reflecting normative aspirational claims. In the familiar jurisprudential debate on the 'is/ought' divide in legal authority, German jurisprudence defined law as that which 'is' as commanded by the sovereign, rather than any transcendent command of a normative 'ought' in what laws must guarantee. With the beginnings of the Third Reich in 1933, the judiciary as an institution, and overwhelmingly the judges as individuals, allowed their legal positivism to deliver their technical expertise to the service of the legal rules of the new totalitarian order.

In an advanced country such as Germany, there were still contract disputes and accidents yielding injury and all sorts of quotidian legal matters that required equitable resolution. Some might be infected by Nazism, especially if one of the parties was a Jew or was for some other reason a political enemy. But many were not. The great moral dilemma was that the German judiciary attended to both sets of cases with the same positivistic dispatch, looking to formal law to command who should win and who should lose, even if it meant enforcing the worst of Nazi racialism.

Post-War Germany sought to preserve the judiciary as an institution, even as a handful of the most notorious Nazis in the system might be put on trial for their crimes. These few trials changed nothing fundamental. The entire judiciary was compromised as an institution such that any defensible system of moral reckoning would have demanded the removal from office of those who lent any manner of legalistic cover for Nazism. The blunt fact, however, was that after 12 years of fascist rule, there were not enough judges untainted by the past that would still have been left available to administer West Germany, a pattern that carries over fairly directly to South Africa.

[47] Inga Markovits tells a compelling account of the efforts at humanity and decency of East German family court judges under communism, even in the face of ideological intolerance from above. See I Markovitz *Imperfect Justice: An East-West German Diary* (1995).

Germany then was the primary source of the new constitutional model, although the Italian Constitutional Court emerged at the same time. The German solution was to allow the judiciary to largely remain intact, but to create a new constitutional court composed of individuals who had largely been in exile or had, in some sense, become opponents of the Nazi regime. Unlike the US Supreme Court, which sits as the final appellate chamber for all legal disputes in the United States, the constitutional court model assumed a separation between the ordinary workings of the law and the fundamental guarantees of the democratic order. The first category would attend to contracts, domestic relations, property, and all manner of legal oversight of the daily life of the citizenry. By contrast, the constitutional domain would oversee the exercise of state authority, whether in the form of violations of the rights of individual citizens or the exercise of governmental power beyond that allowed by the constitution.

The division of the application of the laws from the oversight over democracy allowed Germany to retain an experienced judiciary, despite its complicity in the Nazi horrors, including in the application of the Nuremberg laws on racial ordering. The ordinary judiciary could continue to apply the laws of the new democratic order which would have to be purged of remnants of Nazi rule, even if the judges were not. But the judges operated under the oversight of a democratic reorganisation of law, including the ability of their decisions to be reviewed by the Federal Constitutional Court on questions of fundamental liberties. The independence of the Federal Constitutional Court from both the stains of the past and the normal working operation of the laws served as a bastion against any threatened return of the authoritarian regime. Again, this is a familiar story in South Africa.

B The Colombian Court and Democratic Governance

On most measures, Colombia appeared an unlikely candidate for an exemplary use of a new constitutional court to protect democratic authority. Unlike post-War Germany, or South Africa and Eastern Europe which command far greater academic attention around the world, the creation of a constitutional court in Colombia did not correspond to any great social transition, as with the defeat of Nazi Germany, or the fall of Communism, or the end of apartheid. Rather, the new constitutional order created in 1991 was at best aspirational, a hope that state authority could be wrested from the armed bands and drug lords that dominated much of the country. Yet even without a functioning consolidated democracy, the Colombian constituent assembly attended to the creation of a new constitutional court with claims to guarantee democratic rule.

The prospects for a stable democratic order improved dramatically after President Alvar Uribe took office in 2002 and dedicated his administration to 'democratic security'. Uribe proved capable of marshalling weak and compromised state institutions to recapture the basic forms of governance, in no small measure militarily. Government exertions against insurgent forces stemmed the tide of violence and stabilised civilian authority over almost the entirety of Colombia. Not surprisingly, the security gains were wildly popular with an embattled population who suddenly were able to reclaim the public spaces of towns and

cities for civilised life. As kidnappings and murders declined, and as a prosperous normality blossomed, Uribe's popularity soared. The prospect of Uribe being forced to retire at the end of his term left Colombians with the prospect of a loss of stable civilian rule. The obstacle was not democracy, but the constitutional mandate of only one term in office.

In the confrontation between a democratically popular president and the rigidity of the constitution, the popular will prevailed, as it is likely to do. The Constitution was amended in 2004 to permit Uribe to seek a second term as President, a departure from the Latin American norm of single-term presidencies. The Constitutional Court readily upheld the constitutional amendment allowing Uribe to seek a second term as procedurally and substantively valid, notwithstanding the unprecedented length of Uribe's tenure in office.[48] Unsurprisingly, Uribe won easily.[49] This public affirmation marked the first time in Colombian history that a chief executive had won a second term in office, and meant that Uribe's eight years in office would become the longest period any chief executive remained in power since Colombia gained its independence in 1819.[50]

As Uribe consolidated power, the trappings of excess began to appear. Democratic security, the greatest conquest of the Uribe administration, began to fade. The military leaders were compromised by their association with paramilitary groups who had moved in as local lords of power when the drug gangs and guerrillas were dislodged. The paramilitary groups and the government itself developed a propensity for retaliation against all enemies, insurgent or not. Corruption and wiretaps of political enemies filled out the picture of democracy ceding to strongman rule. Increasingly, the new democratic order narrowed to the person of the President. Perhaps not surprisingly, Uribe rallied his supportors, pressured his opponents, and forced a reluctant Congress to permit him to run for a third term as President.

The stage was set for the greatest constitutional confrontation in Colombia's history. A third term raised the spectre that Colombia would succumb to the Latin American tradition of *caudillos,* the strongmen who hold on to power indefinitely and become the gravitational centre of political life. Democracy recedes when entrepreneurial sectors 'depend on close personal relationships with the government to obtain permits or public contracts'[51] and when state institutions, even outside the executive, are staffed entirely by individuals who depend on the incumbent president for their appointment.

Incumbent power tends to feed on itself, creating an expanding state bureaucracy with ever greater control of the economy. The pathology of clientelism then rewards incumbent politicians for an expansion of the public sector in a way that facilitates sectional rewards to constituent groups. The phenomenon was described by Mancur Olsen in his classic work on the pressures toward the growth

[48] International Crisis Group 'Uribe's Possible Third Term and Conflict Resolution in Colombia' *Latin America Report No 31* (18 December 2009) 8.

[49] Ibid.

[50] E Posada-Carbo 'Colombia After Uribe' (2011) 22 *Journal of Democracy* 137, 138.

[51] International Crisis Group (note 48 above) 2.

of both the size and complexity of government.[52] Politics becomes not a matter of electoral contests for power but of connections to government. The ensuing clientelism, the organising of power to protect incumbent sinecure by dispensing state benefits and contracts to loyal followers, suffocates the opposition. Elections lose their quality of being choices among parties or ideologies, and instead become means of access to control of state resources, a battle in which incumbent authority is paramount. The concentration of executive power benefits those with connections to the state. The freedoms and ambitions unleashed by popular sovereignty 'intensely politicise all areas of organised collective existence' as connections to the state begin to define all means of social and economic advance.[53] The greater the scale of government enterprise the more it rewards those who can master its by-ways in a process that is non-transparent to the public and that resists either monitoring or accountability.

The mobilisation of the state under Uribe was the perfect medium for an elected president at the height of his popularity to pull up the gangplanks of electoral accountability. At the same time, in the Colombian situation, there was no escaping the fact that the constitutional reform allowing Uribe a third term was approved by a constitutional plebiscite and by the Congress, seemingly as mandated by the text of the Constitution itself. Given the continued citizen support for Uribe, the popular endorsement was hardly surprising. But the victory of Uribe was not simply a moment of popular approbation of the manifest improvement of daily life in Colombia. The ability of Uribe to mobilise popular support overwhelmed the opposition of the weak Congress. The prospect of a presidential third term was a painful confirmation of the failure of democratic restraints to have taken hold. Despite efforts to block the amendment legislatively, Congress did indeed succumb and passed this second constitutional amendment extending the time that Uribe could potentially serve as President.

Under these circumstances, the Court emerged as the sole check on the prospect of increasingly unilateral executive power. The difficulty is that the judiciary has no independent democratic mandate, particularly as compared to a popular ruler such as Uribe. Nor could the Constitutional Court intervene in the name of a narrow procedural limitation on governmental power; from a technical point of view, the procedures taken to permit a third term seemed unassailable. Instead, as David Landau sustains, any judicial intervention had to draw upon a more deep-rooted conception of the reconstitution of civilian rule after decades of violence: '[t]he public sees the Court, rather than the legislature, as the best embodiment of the transformative project of the 1991 constitution'.[54] While not a democratic mandate in the electoral sense of the term, the Court could assert itself as the guardian of a popularly accepted constitutional order which had to restrain the momentary desires of popular majorities, perhaps even if expressed in constitutional amendment. In one of its earliest decisions, the Court explained its constitutional role along these lines:

[52] M Olson *The Rise and Decline of Nations* (1982) 69–71.
[53] PB Mehta *The Burden of Democracy* (2003) 6.
[54] Landau (note 45 above) at 344 (footnotes omitted).

> The difficulties deriving from the overflowing power of the executive in our interventionist state and the loss of political leadership of the legislature should be compensated, in a constitutional democracy, with the strengthening of the judicial power, which is perfectly placed to control and defend the constitutional order. This is the only way to construct a true equilibrium and collaboration between the powers; otherwise, the executive will dominate.[55]

Claiming such broad authority to check the exercise of executive power put the Colombian Court in a situation outside the boundaries of immature constitutional courts. Although the German Federal Constitutional Court ('FCC') is heralded as the model for the subsequent establishment of comparable courts in other countries, its history actually shows tentative caution. Recall that the mandate of the FCC was primarily as a check against incipient forms of authoritarianism, defined by the Nazis in the past and by the Soviets to the East. The early watershed cases of the FFC involved either remnants of Nazi political organisations or the German Communist Party itself. In neither case was there a claim of a constitutional constraint being asserted against incumbent state authority in the name of the Court's constitutional mandate. Although the FFC is now renowned, famously so, for its sophisticated proportionality test in assessing the legitimacy of state conduct, this was not always so. As Niels Petersen has well chronicled, the proportionality form of review, weighing the significance of the state's objective against the private harm ensuing and the efficacy of the means chosen to realise that objective, developed slowly.[56] Early proportionality cases involved Constitutional

[55] Ibid at 346.

[56] N Petersen *The Rise of Balancing in German Fundamental Rights Adjudication* (unpublished manuscript) (on file with author). Conversely, the South African Constitutional Court, with clear textual direction designed to address the 'countermajoritarian problem', has employed robust limitations analysis, or a strong proportionality test, from its inception. See S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 34. Two-stage analysis (rights analysis and limitations analysis) appears in the Interim Constitution. Of greater interest, however, is the Constitutional Assembly's decision to adopt the Constitutional Court's substantially more expansive gloss on the limitations clause in *Makwanyane* when it recast the actual wording of the limitation clause in the Final Constitution. *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC)('*Makwanyane*'). Over time, the judgments of the FCC and the SACC have shown a palpable degree of convergence with respect to both rights and limitations analysis. The Constitutional Court is often inclined to eschew giving discernible content to rights (by assuming for the sake of argument that a violation has occurred) and leaving hard questions as to whether the limitation of a law of general application is reasonable and justifiable in terms of broad criteria laid out in FC s 36(1). See, further, S Woolman 'The Right Consistency: *Beinash v Ernst & Young*' (1999) *South African Journal on Human Rights* 166. Proportionality and limitations analysis becomes a critical, if not optimal, backstop for robustly reasoned decisions.

However, the South African Constitutional Court, while not averse to substantive reason-giving for its decisions, also tends to avoid the direct application of substantive provisions of the Bill of Rights through the indirect development clause found in FC s 39(2)(Statutory provisions or rules of common law must be interpreted or developed in light of the general 'spirit, purport and object of the Bill of Rights'). On the Court's aversion to direct application, see I Currie 'Judicious Avoidance' (1999) 15 *South African Journal on Human Rights* 138. On the problems that flow from the thinness associated with such avoidance, see *True Motives 84 (Pty) Ltd v Mahdi and Another* [2009] ZASCA 4, 2009 (4) SA 153 (SCA), 2009 (7) BCLR 712 (CC) citing S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Review* 762; (SCA raises directly problems associated with the thinness in the Constitutional Court's reasoning when addressing similar issues in subsequent cases). See also *Makhanya v University of Zululand* [2009] ZASCA 69, 2010 (1) SA 62 (SCA) at paras 81–88 (According to

Court review of adjudications between private parties in which the conduct at risk of constitutional overhaul was that of the ordinary judiciary, not the political branches. Indeed, in the famous *Lüth*[57] case that heralded proportionality, the parties were a social critic seeking to denounce a filmmaker as a former Nazi, and the filmmaker seeking freedom of expression without condemnation – in other words, two private parties disputing the meaning of the Nazi legacy.

Moreover, as the FCC developed its jurisprudential moorings and its authority, the fate of Germany was never at issue. West Germany remained under the oversight of the Allied powers, whose sizeable military presence would quickly be brought to bear against any overt efforts to restore Nazism or invite occupation by the troops of the Warsaw Pact. The FCC was not going to be displaced through internal repudiation so long as the German constitutional order was patrolled by foreign troops. Moreover, those troops were also committed to the proposition that, regardless of the rulings of the German Court, neither the Nazis nor the followers of the Warsaw Pact were going to take control in West Germany.

This was not so in Colombia in 2009. The Colombian Court had no external allies and its confrontation with the executive put to the test the role of the self-proclaimed judicial power under the Constitution. With the approach of the end of Uribe's second term in 2010, the Court was called upon to review a second constitutional amendment allowing an extension of the presidential term of office, this one permitting Uribe a potential third term. In a surprisingly short opinion, the Court cited numerous procedural defects in the congressional vote and in the endorsing popular referendum. None of these defects alone was of sufficient magnitude to justify overturning what appeared a clear popular mandate. To its credit, the Court reached further and struck down as unconstitutional the proposed constitutional amendment on the basis of deeper commitments to the base requirements for democratic rule: 'The Court finds that [the proposed amendment] ignores some of the structural axes of the Political Constitution, such

Nugent JA, the Constitutional Court had come to two 'mutually destructive findings' with respect to the content of the rule to be followed in lower courts and by other social actors because it had given no express statement as to the true ratio for its decisions.) Academic opinion supports the concerns of the Supreme Court of Appeal. See C Hoexter 'Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court (2008) 1 *Constitutional Court Review* 209; M Brassey 'Back Off, but Back Up: Administrative Law Rightly Yields to Labour Law' (2009) 2 *Constitutional Court Review* 209; J Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79. However, the thinness of (some) Constitutional Court judgments is, as Frank Michelman has noted, not to be confused with a flight from substance. See F Michelman 'On the Uses of Interpretive Charity: Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 term of the Constitutional Court' (2008) 1 *Constitutional Court Review* 1.

The resort to both balancing and indirect application bear a strong, family resemblance: and each strategy courts thinness, if not a flight from substance. See S Woolman 'Between Charity and Clarity: Kibitzing with Frank Michelman on How to Best Read the Constitutional Court' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy on the South African Constitution* (2012) 391. However, such strategies, grounded in the text, may be extremely useful in avoiding direct confrontations with decisions rendered by the executive and the legislature.

[57] *Lüth* 7 BVerfGE 198 (1958) 215–219.

as the principle of separation of powers and the system of checks and balances, [and] the rule of alternation in office according to pre-established time periods.'[58]

Despite his strong popular mandate, Uribe acceded to the Court's decision and immediately withdrew his candidacy for office, both to his great credit and to the benefits for the prospects of further democracy in Colombia. More problematic immediately is the paucity of reasoning in the opinion denying Uribe a third term. The principles of separation of powers and checks and balances may well be desirable, indeed indispensable, in a stable democracy. But much more work needs to be done before these translate into something as concrete as holding a particular reform unconstitutional. The United States well survived three terms and a fourth election of Franklin Roosevelt as president with its democracy intact, even strengthened, in the face of overwhelming military challenge. Subsequent United States constitutional amendment limited the presidential term of office, but no claim could be made that this particular amendment was mandated by deeper democratic requirements in the American context.

Perhaps the Colombian Court could have distinguished the affirmative step of amending the constitution to enshrine incumbent power from the use of already established pathways, as with Roosevelt's successful re-election bids in the absence of any constitutional prohibition. A court wary of incumbent abuse of power could perhaps address the capacity of 'abusive constitutionalism'[59] to thwart the democratic accountability of established political power. But such alternative claims would also require a deeper constitutional theory to justify the Court's legal intervention.

C Toward a Theory of Judicial Constraints

Missing in the Colombian context was not only an account of the structural role of the Colombian Court in securing democratic governance, but the deeper jurisprudential wellsprings that would justify its role. While the immediate issue in Colombia was the process of constitutional amendment undermining democratic contestations of power, the broader issue goes well beyond simply the use of constitutional amendment to achieve this end.

The Colombian Constitutional Court could have looked to another apex court with a more robust account of the protection of democracy as falling within its mandate. Perhaps the best jurisprudential account is found in the work of the Supreme Court of India, whose democratic jurisprudence also extends to the striking down of constitutional amendments that threaten the basic underpinnings of democratic contestation.

A short review of Indian constitutional history may begin shortly after the 1950 ratification of the Constitution, when early populist governments sought to use legislative majorities to limit certain rights guarantees, most notably a limited

[58] Corte Constitucional de Colombia [C.C.] [Constitutional Court] Sentencia C-141/10 (26 February 2010) (Colombia) <http://www.corteconstitucional.gov.co/comunicados/No.%2009%20Comunicado%2026%20de%20febrero%20de%202010.php> (translation by author).

[59] The term comes from D Landau 'Abusive Constitutionalism' (2013) *UC Davis Law Review* (forthcoming) <http://ssrn.com/abstract=2244629>.

commitment to just compensation for expropriation of private property.[60] In a series of early cases, the Indian Supreme Court obstructed land redistributions without recompense to the owners, invoking its authority as guardian of constitutional commitments to individual rights. The Court's early property rights decisions thwarted efforts by the Nehru government to redistribute land to the broad mass of destitute Indians, but without any state obligation to compensate the prior owners. The Court's claimed authority prompted a confrontation in a 1967 property rights case, *Golak Nath v State of Punjab,* in which the Court declared that property, as a fundamental constitutional right, was immune from any amendment process.[61]

While the early property rights cases set up a significant confrontation with the government, they were limited in scope and the Indian Supreme Court did not attempt to interfere more broadly in the exercise of political power in the founding days of Indian democracy. As a result, the Court played a secondary role in the early years of Indian democracy and constitutional law had little independent traction in defining the political powers of India. In large part this reflected the Indian Court's inability to break from its jurisprudential attachment to the Westminster tradition of parliamentary supremacy and its concept of narrow procedural review of government action. But, in large part, the Indian Court operated in a world without strong traditions of judicial review of the political process, the American experience at that time being no exception.

This began to change when the Indian Court was faced with efforts to amend the Constitution of India to restrict constitutional commitments to property rights and judicial review. For all the inherited traditions of Westminster, the fact was that India operated under a written constitution with fairly specific guarantees to citizens and limitations on government. At the same time, under Article 368 of the Indian Constitution, a liberal amendment process requires only a majority vote in both houses of Parliament with two thirds of its members present and presidential agreement[62] – a comparatively easy standard internationally where the amendment process typically requires either a supermajority or concurrent majorities over successive sessions of the legislature.

The constitutional confrontation dates from the Supreme Court's ruling in 1967 that the Indian Parliament's power to amend the Constitution was limited, and that Parliament could not abridge any fundamental rights inherent in the substantive provisions of the Constitution.[63] In broad strokes, the emergence of a substantive doctrine of democratic protection allowed the Indian Supreme Court to break from its relatively deferential role in the development of Indian

[60] N Robinson 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 *Washington University Global Studies Law Review* 1, 29–31.

[61] *Golak Nath v State of Punjab* (1967) SCR (2) 762, 819 ('*Golak Nath*').

[62] The Constitution of India, Art 368. Some provisions of the Constitution also require approval by the legislatures of more than half the states before presentment to the President.

[63] See *Golak Nath* (note 61 above). For a discussion of the limitations on amendment trenching on structural protections in the Indian Constitution, see M Khosla 'Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate' (2009) 32 *Hastings International and Comparative Law Review* 55, 93–94.

democracy after independence and through the increasing use of emergency decrees as the central form of governmental authority.[64]

With the rise of the Indira Gandhi government, the property cases prompted an early confrontation with an assertive expansion of executive authority. Indeed, the Indian Court's property rulings became major electoral issues which, in turn, strengthened the government's claimed authority for constitutional change. In a 1975 opinion reminiscent of the shrewd politics of Marshall CJ in declaring judicial review in the US Supreme Court case of *Marbury v Madison,*[65] a case upholding governmental conduct, the Indian Court refined its vision on constitutional limitations on even the amendment process. In a fractured opinion that ran more than 1,000 pages, the Indian Supreme Court overturned its own decision in *Golak Nath* and rejected the presumed inviolability of all constitutional rights guarantees, property included. The Court in *Kesavananda Bharati v State of Kerala* held that core rights, including property security, were amenable to constitutional amendment.[66] However, the Court reserved a category of the 'basic structure' of constitutional rule that stood apart from the normal legislative processes of constitutional amendment.

The critical moment came in the aftermath of the landslide victory by the Congress Party in 1971 when Indira Gandhi's party pushed through The Constitution (Twenty-fourth Amendment Act), 1971, purporting to vest constitutional supremacy in the legislature and eliminating the right of constitutional judicial review.[67] In one sense, this amendment was consistent with the English colonial tradition of parliamentary sovereignty and the absence of judicial review of legislation. At the same time, the Twenty-fourth Amendment was inseparable from the consolidation of increasingly unchecked government authority and the assertion of one-party political power that would ultimately lead to the state of emergency of 1975–1977.[68]

In the wake of this state of emergency, the modern Supreme Court of India emerged as a central force challenging the use of electoral majorities to consolidate one-party rule. The Court began to intercede much more heavily in the core organisation of the Indian political process, no doubt in response to its acquiescence to Indira Gandhi's broad use of emergency powers to shut down internal political opposition.[69] In response, and over a series of highly

[64] See SP Sathe 'Judicial Activism: The Indian Experience' (2001) 6 *Washington University Journal of Law and Policy* 29, 43–49.

[65] *Marbury v Madison* 5 US 137 (1803).

[66] *Kesavananda Bharati v State of Kerala* (1973) Supp SCR 1.

[67] See SP Sathe *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2002) 68.

[68] See LI Rudolph & S Hoeber Rudolph 'To the Brink and Back: Representation and the State in India' (1978) 18 *Asian Survey* 379, 397–399.

[69] As well formulated by Upendra Baxi, '[j]udicial populism was partly an aspect of post-emergency catharsis. Partly, it was an attempt to refurbish the image of the court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power.' U Baxi 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in R Dhavan et al (eds) *Judges and the Judicial Power* (1985) 289, 294. The emergence of the Indian Supreme Court, though no doubt a direct response to the emergency period, also corresponds to the increasing delegation of governmental authority outside the traditional division between courts, legislatures and the executive. See generally B Ackerman 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633,

controversial cases, the Supreme Court gave teeth to the doctrine of the 'basic structure' which served to limit even procedurally proper alterations to the Constitution to rein in the emergency decrees.[70]

In many ways the decisive moment came in *Minerva Mills Ltd & Others v Union of India & Others*. In *Minerva Mills* that the Court expressly struck down amendments attempting to curtail the judicial power of review.[71] At issue was a finding by a state agency acting under the aegis of the Sick Textile Undertakings (Nationalisation) Act, 1974, to determine that nationalisation was needed because the confiscated enterprise was 'managed in a manner highly detrimental to the public interest'. Key to the Indian Court's approach was the idea that even constitutional amendments could not alter the deeper commitment to democratic governance, including amendments that restricted the ambit of judicial review of the application of new legislation.[72] The concurring opinion of Bhagwati J expressly tied the idea of structural limitations on governmental power, existing beyond the formalities of the procedural requirements for constitutional amendment, to the role of judicial review in enforcing those limits.[73] According to Bhagwati J, 'the limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure, for if the limited power of amendment was enlarged into an unlimited power the entire character of the Constitution would be changed', and the result would be to 'damage the basic structure of the Constitution because there are two essential features of the basic structure which would be violated, namely, the limited amending power of the Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers'.[74]

As Professor Mate well argues, the effect of the basic structure doctrine was to 'entrench' the Indian constitution as a blueprint for democratic governance: 'Through the development and entrenchment of the basic structure doctrine, the Court helped assume a "guardian" role in protecting and preserving basic features of the Constitution from being altered by political majorities.'[75] The object is far different from Bruce Ackerman's theory of American constitutional moments, in which a confluence of political demands unfolds a process of constitutional adaptation to new political realities, as with the rise of the modern administrative state. Instead, the Indian Court held itself out as a bulwark against excessive majoritarianism that threatens to overwhelm India's fragile state institutions. That power of constitutional review by now extends to the amendment process

688–690 (Puts forth the need for 'functional specialization' as part of the constitutionally constrained exercise of parliamentary authority).

[70] M Mate 'Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective' (2010) 12 *San Diego International Law Journal* 175, 185.

[71] *Minerva Mills Ltd & Others v Union of India & Others* (1981) 1 SCR 206 at paras 22, 59–61 ('*Minerva Mills*').

[72] See GJ Jacobsohn 'An Unconstitutional Constitution?: A Comparative Perspective' (2006) 4 *International Journal of Constitutional Law* 460, 483.

[73] *Minerva Mills* (Bhagwati J concurring in part and dissenting in part).

[74] Mate (note 70 above) 190.

[75] Ibid.

itself,[76] in effect recreating a Basic Law of democratic governance as has emerged in other countries, notably Germany and Israel.

A basic-structure approach, modelled on the Indian Supreme Court's doctrine, could potentially have provided the Colombian Constitutional Court a structural lever for evaluating the effect of a third term of office for President Uribe. Such a theoretical account would have given the Court a deeper doctrinal foundation for its otherwise compelling account of the vulnerability of Colombia's new democracy to descend into single-party political consolidation, if not outright single-person consolidation.

III Further Contestation in South Africa

A return to South African constitutional politics deepens our sense of the struggle faced by the Colombian Constitutional Court and heightens one's appreciation for the conceptual framework offered by the Indian Supreme Court. When the Colombian Court had to confront the proposed constitutional amendment the characteristic disabilities of uncontested rule, even when backed by elections, had become manifest. Without rotation in office, the three 'C's' of consolidated power take hold: clientelism, cronyism, and corruption. The Colombian courts stepped up to maintain democratic accountability even if compelled by a poorly elaborated theory of its constitutional mandate.

In South Africa, the floor-crossing case, while interesting jurisprudentially, proved not to be a watershed in terms of ANC consolidation of power; indeed, the entire experiment with trading parliamentary blocs was abandoned once it did not yield the desired results in party-raiding.[77] But if one is to judge by the cases that have reached the Constitutional Court in the past few years, the relation of consolidated one-party rule to the prospects for democracy continues to be present. Despite the limits of the empirical methodology, it is nonetheless striking that the Court has confronted attempts by the ANC either as a party, or as the government or through the executive to wall itself off from accountability and institutional constraints on its power.[78]

The comparison between Colombia and India returns us to the question of how a court is to fashion the divide between improper political judgments and necessary judgments about politics. Political dominance by a single party places inordinate pressure on any top court unable to carve out a space for judicial independence amid political uncertainty. Parties that have uncertain long-term

[76] See, eg, *IR Coehlo v State of Tamil Nadu* (1999) 2 Supp SCR 394, 396–398.

[77] But see Choudhry (note 1 above) at 37–44 (Details the political backdrop and the Court's decision in *United Democratic Movement* and states that 'floor-crossing enhanced the ANC's dominant status at the national level and in all nine provinces').

[78] See *Ramakatsa* (note 6 above); *Oriani-Ambrosini, MP v Maxwell Vuyisile Sisulu, MP & Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC)('*Oriani-Ambrosini*'); *Democratic Alliance v President of the Republic of South Africa & Others* [2012] ZACC 24, 2013 (1) SA 248 (CC)('*Democratic Alliance*'); *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* [2012] ZACC 18, 2012 (6) SA 223 (CC)('*National Treasury*'); *Premier: Limpopo Province v Speaker of the Limpopo Provincial Legislature & Others* [2011] ZACC 25, 2011 (6) SA 396 (CC) and [2012] ZACC 3, 2012 (4) SA 58 (CC)(*Limpopo I and II*); *Mazibuko v Sisulu & Another* [2013] ZACC 28, 2013 (6) SA 249 (CC); *Glenister v President of the Republic of South Africa* [2011] ZACC 6, 2011 (3) SA 347 (CC)('*Glenister*').

horizons and fear of losing power to their rivals are less likely to confront the judiciary as an institution than is a confident dominant party for whom the hazy political legitimacy conferred by judicial independence is likely forsaken for the hard-and-fast claims to power from an electoral mandate.[79] While the one-party dominance of the ANC has commanded the attention of political scientists,[80] only recently has attention turned to the jurisprudential implications of one-party rule for constitutional oversight of the democratic process.[81]

Recent cases reveal that the South African Constitutional Court still confronts the question of how to evolve a structural jurisprudence directed at the concentration of power, and that a more critical jurisprudence is emerging than that which marked earlier watershed cases such as *United Democratic Movement*.[82] In *Democratic Alliance,* for example, the Court confronted what is clearly a matter of political appointment generally outside the bounds of judicial review in most if not all democratic countries.[83] The particular issue was the appointment of someone with a history of dishonesty to the post of National Director of Public Prosecutions. The Court lacked doctrinal mooring for assessing what seemed to be a power grab by the Executive, eroding one of the few checking sources on political power. The Court agonised over the standard of review, seeking guidance in cases such as *Affordable Medicines*. The *Affordable Medicines* Court stressed the importance of holding policy decisions to only a rational relations standard of review:

> The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society.[84]

To an outside observer, the South African rational relations standard of review seems a poor institutional choice for addressing the distinct problems presented by the entrenchment of a dominant political party. The American version of rational relations review is designed to be deferential to the policy discretions of the modern administrative state. Although there have been some recent examples

[79] Sujit Choudhry advances this argument, and explores the pressures from electoral mandates on judicial autonomy based on claims to constitutional authority. See, generally, Choudhry (note 1 above) ('This reflects the Court's inadequate understanding of the concept of a dominant party democracy, its pathologies, the pressure it puts on what is otherwise a formally liberal democratic system because of the lack of alternation of power between political parties, and how this pressure is generating constitutional challenges.')

[80] See, eg, H Gilomee & C Simkins (eds) *The Awkward Embrace: One Party Domination and Democracy* (1999); R Southall 'Opposition in South Africa: Issues and Problems' (2001) 8 *Democratization* 1.

[81] See, eg, Choudhry (note 1 above)(Discusses the 'characteristic set of pathologies' present in 'dominant party democracies' and the effects of such on the Constitutional Court); Klug (note 7 above) (focusing on the problem of 'unipolar' democracy); Roux (note 36 above) at 334–364; Choudhry (note 1 above) at 32–34 ('[T]he domination of the ANC means that the Court cannot rely on the risk of losing power as a check on the abuse of public authority.')

[82] See *United Democratic Movement* (note 31 above) at 115–118.

[83] See generally *Democratic Alliance* (note 78 above).

[84] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3, 2006 (3) SA 247 (CC) para 86 ('*Affordable Medicines*').

of rationality review being used to evaluate the substantive merits of congressional enactments,[85] the basic role of rational relations review is to provide a wide swath of governmental power without judicial intrusion.[86]

The South African version of rational relations review seems designed to interdict a different set of concerns over sectional legislation; that is, rewards to discrete groups of people that are disconnected from the broader aims of governmental policy. Hence, the South African case law imposes a higher burden of justification on legislative decision-making than the American version. But the justification requirement is designed to tease out impermissible benefits along classifications that could, in the American context, give rise to strict scrutiny as the predicate for judicial action. According to one well-known formulation of the South African test:

> In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.[87]

The Court's rational relations jurisprudence distinguished the aims of government from the classifications used to get there, with a much broader swath given to the former than the latter. As Roux observes, the latitude given to the ANC government to evolve in the policy domain was critical to not forcing the Court into a premature, and likely unwise, confrontation with the political branches.[88] This core approach continues in recent decisions that have steered clear of involvement in outwardly policy questions involving the discharge of conventional governmental authorities. For example, in *National Treasury & Others v Opposition to Urban Tolling Alliance & Others,*[89] a lower court injunction against the system of collecting highway tolls was reversed by the Constitutional Court because of the extent to which 'the restraining order will probably intrude into the exclusive

[85] See *United States v Windsor* 570 US 12 (2013), 133 S Ct 2675 (2013)(Supreme Court strikes down the Defense of Marriage Act); *Shelby County v Holder* 570 US (2013), 133 S Ct 2612 (2013)(Supreme Court strikes down the formula for administrative preclearance under s 4 of the Voting Rights Act).

[86] The rational relation standard of review begins with 'a strong presumption of validity' for governmental decision-making, including the use of classifications necessary for legislation or regulation: *Heller v Doe* 509 US 312 (1993) 319. The US Supreme Court has made clear that it does not hold the legislature to a standard of express fact-finding or clear articulation of a single legislative purpose; rather, any conceivable legislative purpose satisfying the lax standard of judicial review is sufficient to uphold challenged legislation. See *FCC v Beach Communications, Inc* 508 US 307 (1993) 313. On this standard, 'judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted.' *Vance v Bradley* 440 US 93 (1979) 97.

[87] *Prinsloo v Van der Linde* [1997] ZACC 5, 1997 (3) SA 1012 (CC) at para 25.

[88] Roux (note 36 above) at 3–11, 390–391, 392 (Notes that the Court was successful in 'negotiating the law/politics tension to avoid political attack' in part by 'defer[ing] to the ANC's primary policy-setting role'); and at 72–111 (Describes a conceptual framework to understand the political constraints on court systems in different kinds of democracies and the strategies used by judges to work within those political confines).

[89] *National Treasury* (note 78 above).

terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm.'[90] As such, injunctive relief on clearly defined executive or legislative authority may be granted 'only in the clearest of cases'.[91]

As a general matter, this is a wise principle, avoiding a propensity for constitutional courts to get drawn into political skirmishes.[92] The risk of imposing unpopular or elite values on a recalcitrant democracy is always present.[93] The pure Kelsenian model of centralised review[94] yields over time to greater and greater interplay between the political branches and a constitutional court,[95] as questions of appointments and independence become themselves political issues subject to democratic contestation. In practice, few constitutional courts are as rigid as the idealised Kelsenian model. Many perform functions other than reviewing the constitutionality of legislation, including supervising elections, enforcing criminal law against government officials, examining the validity of administrative decisions, and protecting individual complainants alleging violations of basic human rights. There is also variation in terms of which actors may initiate abstract review. It is typical for certain governmental actors to be given access, although which actors are given this power varies from country to country.[96] Some systems allow individual citizens access to abstract review in the form of *actio popularis* – in Hungary, for example, even non-citizens have the right to initiate this process.[97] Constitutional courts also create procedures other than 'abstract review' by which questions may come before a constitutional court, including 'concrete review,' whereby another court suspends proceedings and sends the constitutional question to the constitutional court,[98] and 'constitutional complaint', which occurs when individuals think that one of their fundamental rights has been violated.[99] Finally, there is variation across countries in terms of

[90] Ibid at para 47.

[91] Ibid at para 65.

[92] See VF Comella 'The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism' (2004) 82 *Texas Law Review* 1705, 1707–1708.

[93] R Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

[94] A Stone Sweet 'Constitutional Courts' in Oxford Handbook of Comparative Constitutional Law (2012) 816. According to Stone Sweet, this comprises four distinct components. First, a constitutional court possesses a monopoly on the power to declare laws constitutional. Second, its jurisdiction is restricted to constitutional questions; it does not have the authority to preside over ordinary litigation. Victor Ferreres Comella refers to this feature of a constitutional court as its *purity*. Third, the constitutional court is formally detached from all other branches of the government. Finally, the constitutional court may review statutes 'in the abstract'. Unlike in the United States, where cases must be brought before the Supreme Court in the context of a concrete 'case or controversy', a constitutional court may review a statute before it has been enforced. These third and fourth factors relate to Ferreres Comella's concept of *autonomy*.

[95] S Wright Sheive 'Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review' (1995) 26 *Law and Policy in International Business* 1201, 1204–1208.

[96] W Sadurski *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2005) 5.

[97] Ibid at 6.

[98] Ibid at 5.

[99] Comella (note 92 above) at 1710.

the selection procedures for judges,[100] the binding effect of decisions,[101] and the times at which the courts may review a statute (*a priori* vs *a posteriori*).[102]

One of the striking features of modern constitutional courts is that they typically exercise their power outside the normal processes of adjudication. Most such courts do not serve as part of an adversarial process of adjudication, even allowing that most civil law systems are not as party-centred as the common-law systems inherited from English law. Even with that difference, European-inspired constitutional courts generally practise 'abstract review' of an issue, rather than attempt to resolve a legal question in the context of a dispute between litigants.[103] As a result, most constitutional courts have constrained forms of access with either the government itself or the parliamentary opposition having the unique power to seek resolution of a legal issue.[104]

Interestingly, where the transition to democracy includes active negotiations with the prior regime, there is a greater likelihood that there will be open access to more actors than just the government and the leading opposition. Thus, both South Africa and Hungary have courts that were the product of negotiations between an outgoing regime and an ascending opposition (the Round Table Talks of 1989 being the Hungarian equivalent of the Kempton Park accords),[105] and in both instances the transitional regimes were created by ordinary legislation of the prior government. In Hungary, for example, this resulted in the unusual power of *actio popularis*, a mechanism for direct petitions for constitutional review by private citizens,[106] and in turn led the Court into more immediate and more fateful confrontations with the government. As Donald Horwitz cautions, 'judicial review initiated by political authorities is more apt to insert a constitutional court in politics than is judicial review that is initiated by litigants or by courts when the constitutional question is crucial to the determination of individual cases.'[107]

[100] Wright Sheive (note 95 above) at 1215–1216; Sadurski (note 96 above) at 14–19.

[101] Wright Sheive (note 95 above) at 1214–1215; Sadurski (note 96 above) at 11–12.

[102] DL Horowitz 'Constitutional Courts: A Primer for Decision Makers' (2006) 17 *Journal of Democracy* 125, 128–129; Sadurski (note 96 above) at 74–79.

[103] Wright Sheive (note 95 above) at 1202–1203.

[104] See K Lane Scheppele 'Parliamentary Supplements (Or Why Democracies Need More Than Parliaments)' (2009) 89 *Boston University Law Review* 795, 812–818 (Scheppele notes that '[M]ost constitutional systems only allow certain political actors to ask for abstract review – for example, the president of the country, the head of either chamber of parliament, or a substantial fraction of the members of parliament …')

[105] J Bond 'Concerning Constitutional Courts in Central and Eastern Europe' (2006) 2 *International Public Policy Review* 11.

[106] Ibid at 11.

[107] DL Horowitz 'Constitutional Courts: Opportunities and Pitfalls' (2003) 5 <http://www.constitutionnet.org/files/E24ConstitutionalCourtsOppsPitfallsHorowitz.pdf>. Horowitz adds that over time, the propensity of these courts is to become 'intrusive political actors'. Horowitz (note 102 above) at 128–129. See also Comella (note 92 above) at 1712–1722. But see J Ferejohn & P Pasquino 'Constitutional Adjudication: Lessons from Europe' (2004) 82 *Texas Law Review* 1671, 1692 (Authors argue that deliberative judicial decision-making in Europe may lessen interventionist tendencies.)

While Hungary may serve as a cautionary note, the role of constitutional courts necessitates nuance in the exercise of review.[108] It does not follow that courts owe a duty of deference across all political dimensions, even to legitimate constitutional governments. It is one thing to defer to the policy outputs of a government that is the result of a proper system of electoral choice and accountability. It is another to give deference to the powers that be over the mechanisms of how governments are selected and the powers they should hold while in office. In prior writings, I have looked to the law of corporate governance as clarifying the limits of policy deference. Under the laws of Delaware, the most developed corporate governance code in the US, the business judgment rule insulates from judicial review almost all economic decisions of a firm, absent fraud or some breach of fiduciary duties. At the same time, there is no such rule of deference given to the decisions of management about the organisation or selection of management itself. On this score, courts and regulators must be vigilant lest the insiders insulate themselves from challenge, familiarly known as a lock-up.[109]

Applied in the South African context, the question is whether the discrete problems presented by the risk of self-dealing by a dominant party are well addressed within the rational relations framework under the South African version of proportionality analysis.[110] Looked at from the vantage point of the Colombian engagement with excessive entrenchment of incumbent power, the Court is likely to have to articulate a theory of proper democratic politics in order to discharge a principled role in engaging political process failures that fall under its constitutional mandate.

The limitations of not having a robust theory of constitutional protection of democracy against democratic manipulation is perhaps best seen in the two recent Court cases having to do with independent prosecutorial or anti-corruption authority. Each of these cases addresses the problem of concentrated executive power, a power that is unlikely to be effectively constrained by a legislature controlled by the same dominant party. This is especially true given the unified executive in South Africa, in which the president is both head of state and head of government. Most critically, the South African President is elected by the National Assembly and thus is directly accountable only to the dominant legislative bloc, an unlikely source of strong limitations in the absence of parliamentary contestation.

In *Democratic Alliance* and again in *Glenister*, the issue before the Court was first the appointment of the National Director of Public Prosecutions and subsequently the independence of the Directorate of Special Operations, a specialised

[108] For a fulsome defence of the Hungarian court as resisting excessive demands for austerity and other destabilising pressures from outside and inside the country, see K Lane Scheppele 'Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)' in W Sadurski et al (eds) *Rethinking the Rule of Law in Post Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses* (2005).

[109] S Issacharoff & RH Pildes 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643.

[110] See, generally, S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 34. For a broader account of the role of proportionality in guiding apex courts through fraught confrontations with politically charged cases, see A Barak *Proportionality: Constitutional Rights and Their Limitations* (2012).

prosecutor for political corruption cases better known as the Scorpions. In each case, the Court interceded to roll back executive conduct that would have further insulated the government from anticorruption checks on official misconduct. Strikingly, however, in each case the Court tried to employ the same restrictive rationality review for the structure of government as it had used for the broader policy objectives that are properly the province of Parliament.

In *Democratic Alliance,* the Court found that the President's decision to appoint a tainted candidate in the face of concerns over improprieties in earlier public charges was irrational. The Court found that, procedurally, the President's failure to consider *prima facie* evidence of dishonesty rendered the appointment invalid. *Glenister* is the more far-reaching and interesting decision with a more structural background as the National Prosecuting Authority Amendment Act 56 of 2008 abolished a critical part of the NPA and placed control of anticorruption prosecutions in the hands of the police, rather than the Scorpions.[111] The existence of institutional checks on the executive through the NPA remains an important constraint as political competition ebbs in the face of ANC hegemony.

The opinion, while ruling against the government, shows the ambivalence of the Court. The Court emphasised that the anticorruption unit need not be formally independent, only that it retain 'an adequate level of structural and operational autonomy'.[112] That, the Court found, was also a question of the reasonableness of the decision, and placing the unit within the Police Service was not *per se* unreasonable, nor was the decision to disband the Scorpions. Still, the Act was deficient both in failing to provide 'secure tenure' for the new Directorate of Priority Crime Investigation employees and in providing for 'direct political oversight of the entity's functioning'.[113] Previously, senior Scorpions personnel enjoyed considerable protection – once appointed, they could be removed only in limited circumstances by the President, who was subject to Parliamentary veto.[114] The Court argued that this provision placed 'significant power in the hands of senior political executives' who might 'themselves … be the subject of anti-corruption investigations.'[115] This, the Court insisted, was 'impossible to square with the requirement of independence'.[116]

When charged with the source of authority for its holding, the Court peculiarly steered clear of the broader principles of democratic governance and instead the Court turned to the relationship between the domestic Constitution and international law. Section 39(1)*(b)* of the Constitution requires that courts 'consider international law' in interpreting the Bill of Rights.[117] Section 231(2) provides that a ratified international agreement 'binds the Republic'. Finally, s 7(2) 'implicitly demands' that steps taken to fulfill the state's obligation to promote the Bill of

[111] On the manner in which the DSO, or 'Scorpions', in particular, and the Security Services, more generally, had or have had their independence undercut, see S Woolman 'Security Services' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 3, 2011) Chapter 23B.

[112] *Glenister* (note 78 above) at para 124.

[113] Ibid at para 213.

[114] Ibid at paras 225–226.

[115] Ibid at para 232.

[116] Ibid at para 236.

[117] Ibid at para 192.

Rights be 'reasonable'.[118] Reading these provisions together, the Court concluded that an anti-corruption programme could not be constitutionally 'reasonable' if it failed to honour South Africa's treaty obligations. South Africa is party to a number of international conventions which require member states to establish anti-corruption agencies that are 'independent from undue intervention' and political pressure.[119]

Placing responsibility for its decision on international law is an interesting judicial expedient. It has the effect of avoiding a direct confrontation with the constitutional underpinnings of democratic authority and turning attention to the commands of foreign engagements. Yet the purportedly compelling international commitments are far too abstract to carry the weight of the exact institutional framework for locating government anti-corruption officials, something which no doubt varies tremendously within the signatories to an international covenant, to the extent that it is not in fact honoured in the breach by most signatories.

On the other hand, when s 8*(a)* of the Judges' Remuneration and Conditions of Employment Act 47 of 2001, which authorised the President to extend the Chief Justice's term of office beyond the 12-year constitutionally prescribed term, was challenged before it, the Court did show it had to reach deeper to protect its own institutional integrity from executive overreach. In *Justice Alliance of South Africa v President of the Republic of South Africa,* the Court relied more heavily on first-order principles of controlling concentrated executive power. 'The term or extension of the office of the highest judicial officer is a matter of great moment in our constitutional democracy,' and by permitting the President to ask the Chief Justice to stay on for an additional term of years, 'the Act threatened judicial independence by implying that the Chief Justice serves at least to some degree at the pleasure of the President, and is thus subject to Executive influence.' [120]

In other cases, the Court has come back to the concentration of legislative power in the hands of the ANC, the issue that previously came to the fore in *United Democratic Movement.* The most significant of these is *Oriani-Ambrosini*, a legislative challenge to an Assembly rule that no bill could be brought to the floor without the prior approval of the Speaker. In effect, the Rule could eliminate the ability of a minority party to even force debate on an issue that the ANC wished to keep off the political agenda, a legislative parallel to the shutting of internal party deliberations presented to the Court in *Ramakatsa*. The Court struck down the rule based upon 'the principles of multi-party democracy, representative and participatory democracy, responsiveness, accountability and openness.'[121] While these principles are abstract, the Court came to the heart of the matter by stressing that forcing debate 'facilitates meaningful deliberation on the significance and potential benefits of the proposed legislation' and is 'designed to ensure that even

[118] Ibid at para 194.

[119] Ibid at paras 184, 183–186.

[120] *Justice Alliance of South Africa v President of the Republic of South Africa & Others* [2011] ZACC 23, 2011 (5) SA 388 (CC) at paras 65, 67–68.

[121] *Oriani-Ambrosini* (note 78 above) at para 46.

those of us who would, given a choice, have preferred not to entertain the views of the marginalised or powerless minorities, listen.'[122]

Together, these and other cases addressing the concentration of power in the absence of political challenge appear to be defining a new agenda for the Constitutional Court. It is by no means an easy role for a court to engage concentrated political power if for no other reason than the inherent weakness of the judiciary before the political branches. The Indian Court developed its basic structures jurisprudence in the face of repeated Congress Party attacks on the judiciary, including using popular antipathy to the Supreme Court as part of the dominant party's electoral platform.[123] The same political backlash occurred in Hungary. The Indian Court survived and plays an important role in Indian democracy; the Hungarian Constitutional Court is, by contrast, a much weakened institution. Already there are ominous signs in South Africa of political attacks on the Constitutional Court as an institution, a disturbing trend no doubt.[124] But the Court remains the only significant institution not under direct ANC control and, for better or worse, that is beginning to define a significant part of its judicial role.

IV Conclusion

History rewards cautious judgments. Had this article been written a couple of decades earlier, at the height of enthusiasm over the fall of apartheid and the most heralded path to democracy of the post-Soviet era, a certain triumphalism would no doubt have accompanied the description of constitutionalism's role in facilitating the transfer of power to a democratic government.[125] Life moves on, however, and the commands of politics are unceasing. South Africa today is not the same body politic as it was when President Mandela took the helm and when

[122] Ibid at paras 59, 43.

[123] See, eg, S Issacharoff 'Constitutional Courts' (note 5 above) at 999–1000 (Details aspects of the evolution of the Indian Supreme Court from independence through the 1977 state of emergency); Mate (note 70 above) at 179–186. See also Part II.C. above and accompanying notes.

[124] For more information on the pressure the ANC is directing toward the judiciary, see Anonymous 'Let's not be Beguiled by Zuma's Charm' *The Star* (Johannesburg) (2 October 2009) 11 ('[T]he ANC is manifestly manipulating the institutions of the constitution to subvert equality before the law in order for it to unscrupulously pursue its own political agenda'); P Mgwaba 'Skip the Charade and Just Appoint Them' *Sunday Tribune* (Durban) (11 September 2011) 22 (Discusses the appointment process of Judge Mogoeng Mogoeng and stating that the 'grand plan appears to be to appoint a compliant JSC, which in turn would endorse politically acceptable judges who could be relied on to rule in ANC's favour in legal disputes.'); C van der Westhuizen 'Murky Waters Lie Ahead for Judiciary' *Cape Times* (Cape Town) (14 May 2013) 9 (discussing the then-recent court decisions overruling key ANC party decisions, the ANC decision to review the courts, and the ANC recommendation that the Superior Courts Bill review and handle the court composition, structure, and jurisdiction). This also is a theme picked up by the political opposition, see H Zille 'ANC is hellbent on subverting the constitution' *Cape Times* (Cape Town) (4 February 2010) 9 (discussing the ANC's 'neutering of the National Prosecuting Authority' and the threatening of the judiciary).

[125] The main themes of *Constitutional Courts and Democratic Hedging* (note 5 above) turn on descriptions of the different roles, and the efficacy of constitutional courts playing these roles, in allowing the parties to negotiate an incompletely realised bargain for a new democratic order. See also A Stone Sweet *Governing with Judges: Constitutional Politics in Europe* (2000) 42–44 (Stone Sweet addresses the incomplete nature of the constitutional bargain in transitions to democracy).

the Court first confronted what limited democratic rule would look like under the Constitution. In the intervening years, and in the periods of constitutional maturation that I try to identify, the task before the Court has been to address the relationship between democratic vitality and the reality of one-party political domination. What one sees in the most recent cases is a renewed pushback against the ANC on a number of issues where governance threatens to collapse to the whim of the powerful. But, despite the need for renewed judicial assertion, the Court's doctrinal hesitation to explain clearly both the problem it faces and the theory underlying its response may ultimately hamper its success in resisting the entrenchment of unaccountable one-party rule. In the early years of the Republic, the South African Constitutional Court spoke more eloquently than any other Court on the task it confronted in democratic consolidation. The time has come for a return to that forthright spirit of public engagement with the problems of democracy under a dominant party.