What About the Rule of Law?

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Unlike Professor Issacharoff, I am not a constitutional lawyer. Unlike Professor Roux I know little about South Africa. If, nevertheless, I allow myself to participate in this symposium, it is not merely because I was asked. For Issacharoff's article raises issues that go well beyond questions of South African constitutional law. Among these are where challenges to an emerging constitutional democracy might lie, what some of them might be, what might be at stake, and how a constitutional court might respond to them. In this brief response to that wide-ranging article, I will touch on a few such challenges, relaxed in the knowledge that my more learned partners in this exchange have comprehensively dealt with every question that needs to be asked and answered about the constitutional law of this Republic.

I The Argument

Issacharoff draws on a line of argument he has elaborated elsewhere, both alone and with Richard Pildes. In some writings he has also applied it to constitutional courts in well-established democracies, including the United States. However, he believes it is particularly important where democratic institutions are nascent and weak, more particularly still where they are challenged by the rise of 'dominant party democracy'.[1]

Such systems typically have a basic feature that many take to be defining of democracies: formally free and fair elections. That said, the quality of the democracy is rendered vulnerable by the fact that one party continues to win those elections. Whatever the reasons for that fact, Issacharoff believes, one-party dominance is likely to spawn manifold, predictable institutional consequences: however innocently – maybe even honourably – the party's hegemony has arisen, incontestability is almost bound, sooner or later, to cause trouble.

The people's representatives rule, in the sense that the people elected them, but they do so in ways increasingly unhampered either by the reality or prospect of competition from realistic alternative rulers, or by contestation from sources of power, checks and balances, anchored in agencies and institutions independent

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[1] See, eg, 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; H Klug 'Finding the Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in the Court's Decision-making' (2010) 3 *Constitutional Court Review* 1; T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106; T Roux *The Politics of Principle: The Constitutional Court of South Africa, 1995 – 2005* (2013).

of the ruling party. Indeed, such independent sources of competition, check, and balance are likely to be progressively colonised by the dominant party in such states. That in turn has predictable consequences for the vitality of democratic competition and popular engagement in politics. Issacharoff thinks constitutional courts need to take these consequences into account.

The way to do so, he argues, is to look beneath and beyond the constitutionality of what he and Pildes elsewhere call 'first order' decisions, specific legislative acts, interference with constitutionally enshrined rights, and so on, which might all be formally unexceptionable. It is necessary also to explore what is happening to underlying 'second order' structural conditions, 'basic structures'. If what dominant parties do threatens the basic conditions of constitutional democracy then, whatever the apparent legal tidiness of their measures, the Constitutional Court should be alert to safeguarding such conditions. Among them are institutional structures and practices that enable and secure the independence of important agencies from dominant party control, such as 'arm's length' conditions of appointment, tenure and dismissal of their members; or ones whose tendency is to encourage, rather than suffocate real political contestation, for example floor-crossing rules, electoral arrangements and so on. In short, constitutional courts should be open to tending the democracy-generative qualities of the 'basic structure' of the democracy in which they are key agencies, and weeding out democracy-degenerative ones, even if such consequences are not immediately apparent on the formalistic legal face of things.

In this article, Issacharoff focuses his larger argument on South Africa. He distinguishes three phases in the Court's developing jurisprudence. In the first moments after liberation, the Constitutional Court was on the money, as shown in the *First Certification Judgment* (1996),[2] that 'had been noteworthy precisely for its attentiveness to the problem of structural limitations on the exercise of political power.'[3] In the second phase, unfortunately, the Court came to ignore basic structural issues for more formal, superficial, 'first order' ones: it 'retreated to a formalist account of the Constitution as guaranteeing primarily procedural norms and individual rights'.[4] Put in question by the Court's 'second phase' judgments, 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'.[5]

In its current, third, phase, the Court appears to have become aware of some of the dangers involved, as the ANC continues to consolidate its control. The problem is that the Court brings to bear on these dangers an inadequately furnished theoretical understanding of their nature and character. It thus finds it hard to transcend '[t]he limitations of not having a robust theory of constitutional protection of democracy against democratic manipulation'.[6] Its heart, it appears,

[2] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC)('*First Certification Judgment*').

[3] S Issacharoff 'The Democratic Risk to Democratic Transitions' (2013) 5 *Constitutional Court Review* 1, 7.

[4] Ibid at 8.

[5] Ibid.

[6] Ibid at 29.

is returning to the right place, but its head is not yet full of the right ideas. Thus, whereas '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,'[7] '[t]he 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'.[8]

What sort of jurisprudence would that be? It would have two key elements. First, it would concern itself with 'basic structures'. And second, the test of these structures would be the extent to which they are, or are not, democracy-generative. This is what the Colombian Court did, in 'the greatest constitutional confrontation in Colombia's history,'[9] when it rejected President Uribe's attempt to amend the constitution to allow a referendum to approve his running for a third term. The court struck down the amendment, not on formal or procedural grounds (which did not stand in its way), but on 'the basis of deeper commitments to the base requirements for democratic rule'.[10]

Issacharoff praises the Colombian Court's decision, warmly but faintly. The problem with it was not its tendency, which was correct, but its intellectual grounding which was too thin. He complains of 'the paucity of reasoning in the opinion denying Uribe a third term'.[11] More particularly, the Court failed to draw on proper or adequate theoretical resources; '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'.[12]

Such wellsprings could be tapped, Issacharoff suggests, were both the Colombian and the South African Courts to draw upon a theoretically richer model of the sort elaborated by the Indian Supreme Court, 'whose democratic jurisprudence extends as well to the striking down of constitutional amendments that threaten the basic underpinnings of democratic contestation'.[13] The Indian Court's great accomplishment was that it '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'.[14] As a result of these judgments, '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'.[15] The Court 'held itself out as a bulwark against excessive majoritarianism that threatens to overwhelm India's fragile state institutions'.[16]

[7] Ibid at 32.
[8] Ibid at 24.
[9] Ibid at 16.
[10] Ibid at 18.
[11] Ibid at 18–19.
[12] Ibid at 19.
[13] Ibid.
[14] Ibid at 21.
[15] Ibid at 22.
[16] Ibid.

Issacharoff's argument raises issues of judicial competence and policy, both in the round and in the specific context of South Africa, many of which are addressed in Theunis Roux's response. It also draws attention to questions, less strategic than ontological, of the existence and character of challenges to constitutional democracies in one-party-dominant states. I address two of these latter matters. They are ontological in the sense that they focus, first, on whether problems of the structural sort Issacharoff describes are likely to be found in one-party-dominant states and, second, what the specific nature of such problems is.

First, then, does Issacharoff draw attention to a significant kind of problem, specifically one that occurs at the underlying structural levels that he indicates, and that might be missed by exclusive act/rights court scrutiny? Secondly, what *kind* of problem is it? Or, if there is more than one problem, what kinds of problems are they?

II Basic Structures

As to the first question, it seems to me clear that to think of political power *without* recognising the sorts of underlying structural levels Issacharoff addresses is truly to stage Hamlet without the Prince of Denmark. More accurately still, it is to stage it without *Denmark*, that is without the specific shaping context that frames whatever goes on within. This is merely to echo a point about power made a very long time ago. Power has at least 'two faces'. One is what is done, day to day: what is decided, who wins, who loses. In a competitive encounter, who prevails? However, in all but the most utopian of circumstances, none of this happens on a level playing field, and some fields are more uneven than others. There are always deeper structures that have systematic and systemic influence on who the major players are, what resources are available to them, whose issues come up for decision, what matters don't need to be decided because they're already pre-empted, what doesn't get to be decided because dominant interests want to let them lie, who is in a position to compete for power, and if in position, who is advantaged, who is handicapped, and so on. This was a point made a long time ago by the political scientists, Bachrach and Baratz, in their critique of American pluralist students of community power, who concentrated 'not on the sources of power but on its exercise'. Bachrach and Baratz recommended a recalibration of attention:

> Of course power is exercised when A participates in the making of decisions that affect B. But power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A. To the extent that A succeeds in doing this, B is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolution be seriously detrimental to A's set of preferences.[17]

If one person or group or institution can alter the basic frames of interaction, so that underlying constraints on their power become progressively weaker, formally

[17] P Bachrach & MS Baratz 'Two Faces of Power' (1962) 56 *American Political Science Review* 948.

competitive elections are decreasingly so, discretions are less and less reviewable, and the independence of institutions from incumbents is ground down, then we have structural issues of the sort to which Issacharoff's argument alerts us. Public acts, and the ways they manifestly exercise powers from time to time, might appear, or indeed be, pure as the driven snow, and yet something is deeply awry from the point of view of constitutional democracy and the rule of law.

Should this concern a constitutional court? In principle, yes. Of course, a court is not there to remake the world. However, to the extent that what political leaders and organisations do reshapes and moulds the structures within which power is exercised, in ways designed to perpetuate that power irrespective of opposition and contestation, and in ways that violate fundamental constitutional values, then there is a public interest in overseeing such reshapings and remouldings. It is arguable, though of course it needs arguing, that independent constitutional courts might be well placed to exercise such oversight. According to Issacharoff, when it comes to the structural conditions of electoral democracy, the South African Constitutional Court does not exercise enough of that. Were it furnished with a richer 'democratic jurisprudence', it could do more.

This is not something I am in a position to assess, but I wonder whether, if the ambition is 'a structural jurisprudence directed at the concentration of power',[18] there might already be resources closer at hand, in the Court's existing 'rule of law jurisprudence', about which Issacharoff has nothing to say, than in carryovers from the Indian Court. After all, here we are not asking for anything outlandish. The Constitution enshrines 'supremacy of the constitution and the rule of law' among the founding values of the Republic, and the Court has made of it a justiciable principle.[19] The derivative tests of rationality and reasonableness are supposed to serve it. Many of the considerations Issacharoff raises could be addressed with this principle and those tests. In section III below I will suggest some substantive reasons of political principle to encourage looking in that direction, and not only to matters of electoral democracy. Another good reason is that the Court already looks there.[20] What I don't address here is how best they, or other institutions, might develop means of useful oversight. That must depend on the substantial matters of specific competence, context, circumstance, and strategic response on which Roux's contribution elaborates.

This might all appear too abstract, maybe speculative. So let me enlist a cautionary contemporary parallel, perhaps parable, to illustrate the significance of the themes Issacharoff raises. One cannot of course draw directly on such parallels to show that if there, then here. As Roux emphasises, contexts are too variable for such automatic transference to be persuasive. However, one can draw on similarities that occur in diverse conditions as alerts to immanent institutional

[18] Issacharoff (note 3 above) at 25.

[19] See FI Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2008) Chapter 11.

[20] I have been instructed in these matters by one of the anonymous reviewers of this article, and by the exchange between Michael Bishop and Alistair Price on rationality in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 1–74.

logics. Thus, in his classic, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy*,[21] Robert Michels drew primarily on a study of the German Social Democratic Party of the late nineteenth and early twentieth century, to identify one such logic, which he called the 'iron law of oligarchy', and which he predicted would be found in all ostensibly democratic organisations. Michels was wrong to think of pressures to oligarchy as law-like; they can be resisted.[22] But he was right to explore what institutional conditions generated such pressures, because in many conditions they can be counted on to occur. It is important to be aware of such conditions and pressures.

Reflection on parallels can reveal immanent logics and tendencies, then, though rarely laws. Specific behaviours are never the results of such logics standing alone because in reality they never do stand alone. Institutions are embedded in particular histories and societies, always encountered in particular circumstances, are offered specific and variable opportunities, and meet with specific and variable obstacles. What actually happens is a result of the combination of logic and circumstances, which often include other, frequently contending, logics and many varied circumstances. And yet to say that a party-dominant democracy generates pressures and possibilities harder to find in established multi-party democracies with strong independent institutions, and likely to be hard to resist, is to point to something significant.

My example comes from post-communist Hungary. It is an instance of what David Landau has called 'abusive constitutionalism', a modern technique of white-anting constitutional restraint by constitutional means, whereby actors 'rework the constitutional order with subtle changes in order to make themselves difficult to dislodge and to disable or pack courts and other accountability institutions'.[23] Hungary is a particularly poignant example, since her constitutional jurisprudence after 1989 was, for a time, the talk of the constitutional world. It is again, but for different reasons.

From 1989 to 2012, the Hungarians were governed, not under a wholly new constitutional text, but by the old Stalinist constitution of 1949, subject to numerous post-1989 amendments which transformed it from a communist constitution to a strongly democratic one. The new polity included an array of independent checks and balances, including four Ombudsmen, and a slew of significant and significantly independent institutions: an independent central bank, state audit office, prosecutor-general's office, national election commission and media board. The showpiece of all this unprecedented independent scrutiny was the new Constitutional Court.

Like all its neighbours, Hungary got a constitutional court after the collapse of communism. There were only two in the region before, in Yugoslavia and Poland, and they had nothing much to do. Now every post-communist state has one, and some are quite busy. But Hungary's was special, at least for the first nine

[21] R Michels *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (1911) (trans 1962).

[22] The best commentator on such matters remains Philip Selznick. See P Selznick *The Moral Commonwealth* (1992) 244–250 and M Krygier *Philip Selznick: Ideals in the World* (2012) Chapter 1.

[23] D Landau 'Abusive Constitutionalism' (2012) 47 *UC Davis Law Review* 189.

years of its life. If the Colombian Court was, as Issacharoff tells us, one of the strongest courts in the world, then the first Hungarian Court, under its powerful President, László Sólyom, was a very close rival. It could be approached by *anyone*, through the *actio popularis* that Issacharoff mentions (but that no longer exists), which allowed any person, including non-citizens, to petition the Court. It struck down an enormous amount of legislation, developed an impressive jurisprudence and, novelty of novelty in that part of the world, governments obeyed it, if often unhappily. The Court was famous, for its boldness and creative, constructive constitutional imagination, throughout the constitutional world.

True, it became somewhat less adventurous after its first nine-year term when, though Sólyom made it plain he was keen to serve a second term, a vengeful government failed to reappoint even *one* of the members of the first court. Still, it probably remained true, as Issacharoff wrote in 2011, that:

> Even among the active Eastern European constitutional courts, the leader is probably the Hungarian Constitutional Court, which has also been among the most receptive to emerging international standards of democratic intervention. The Hungarian Court was one of the first to begin work and has been handing down important decisions since the early 1990s. And, having had an early start, it has been unusually successful in gaining widespread legitimacy, despite (or perhaps as a result of) striking down one third of all legislation passed between 1989 and 1995.[24]

That was then, this is now. It's been a long two years. From 1989–2010, Hungary had a relatively stable, routinely oscillating, multi-party government. In 2010, the nationalist authoritarian Fidesz Party, under the leadership of the charismatic and supremely ambitious Viktor Orbán, won 53 per cent of votes cast. Owing to the peculiarities of the Hungarian electoral system, this gave them 68 per cent of parliamentary seats. That is more than the two thirds needed to amend the Hungarian Constitution. The rest unfortunately is history. The new government does not see itself as simply one entrant into the revolving door of democratic politics. On the contrary, as one Hungarian political scientist has observed:

> Orbán's notion of a 'central arena of power' eliminates the idea of competition endorsed during the transition to democracy. He wants to create a system based on the monopolization of the most important elements of political power. Orbán does not need economic, cultural and political alternatives; he strives to establish a unitary, dominant system of values (ie, his own system of values).[25]

To my knowledge, the term 'dominant party democracy' is not used in East Central Europe, but there is a place for it: Budapest. For while there might be controversies over the *democratic* character of what Orbán has done since 2010, given his two thirds majority and a quite parcellised and ineffectual opposition, there can be none over his dominance. Kim Lane Scheppele records the institutional set-up now largely dismantled:

[24] S Issacharoff 'Constitutional Courts and Democratic Hedging' (2011) 99 *Georgetown Law Journal* 961, 972–973.

[25] A Bozóki 'The Crisis of Democracy in Hungary 2012' *Deliberately Considered* (3 February 2013) available at <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

> There were so many different checks instituted after 1989 on the power of the prime minister and his parliamentary majority that the post-1989 constitutional system worked reliably to ensure that the operation of majoritarian political power didn't ride roughshod over democratic guarantees and constitutional limitations. By contrast with this robust system of complementary powers, however, the new 'Fidesz constitution' has removed virtually all of the checks added to the prior communist constitution after 1989.[26]

An important central tool in this programme has been constitutional transformation. It's been a busy time, as Scheppele deftly summarises:

> In its first three years in office, Fidesz has used its reliable two-thirds vote in the Parliament to amend the old constitution 12 times, mostly to remove obstacles to what it had planned to do next, which was to enact a wholly new constitution [which, since it came into force in 2012, it has already amended four times] designed to keep the party in power for the foreseeable future. And over three years, it enacted more than 600 new laws, changing everything from the civil code to the criminal code to the law on virtually everything else. In three years, Fidesz launched a legal revolution, less charitably described as a constitutional coup.[27]

This was all done, as Scheppele also emphasises, in a legally unimpeachable, or at least legally arguable, manner. In fact this turned out to be inevitably so, because whenever anyone, including the Constitutional Court, had a thought to impeach it, say on constitutional grounds, the government re-enacted, by constitutional amendment, laws formerly declared unconstitutional by the Court.[28] This, said the Venice Commission Draft Report on the Fourth Amendment to the current constitution, has been a 'systematic approach' of this government.[29] So much so, that the Tavares Report to the European Parliament, on 'the situation of fundamental rights: standards and practices in Hungary', concludes that 'in light of the systematic amending of the Fundamental Law at political will, the Constitutional Court can no longer fulfil its role as the supreme body of constitutional protection, especially since the Fourth Amendment explicitly

[26] KL Scheppele 'All's Not Quiet on the Eastern Front' (Paper at panel on Law and Development after the Financial Crisis, Law and Society Conference, Boston, 2013). Professor Scheppele's collection of blogs, articles, translations and documents are available at <http://lapa.princeton.edu/newsdetail.php?ID=63>. Of course, Scheppele's account is not accepted by partisans of the Hungarian government. But I have not seen credible evidence to refute it. See also M Bánkuti, G Halmai, & KL Scheppele 'Hungary's Illiberal Turn. Disabling the Constitution' (2012) 23 *Journal of Democracy* 138; K Kovács & GA Tóth 'Hungary's Constitutional Transformation' (2011) 7 *European Constitutional Law Review* 183; AJ & P Sonnevend 'Continuity with Deficiencies: The New Basic Law of Hungary' (2013) 9 *European Constitutional Law Review* 102.

[27] Scheppele (note 26 above) at 13.

[28] Committee on the Honouring of Obligations and Commitments by Members States of the Council of Europe 'Request for the Opening of a Monitoring Procedure in Respect of Hungary (Opinion)' (2013) 21–22 available at <http://www.assembly.coe.int/Communication/amondoc08_2013.pdf>.

[29] European Commission for Democracy Through Law (Venice Commission) 'Draft Opinion on the Fourth Amendment to the Fundamental Law of Hungary' (2012) available at <http://www.scribd.com/doc/145369295/Venice-Commission-draft-opinion-on-Hungary-s-fourth-constitutional-amendment>.

prohibits the Court from reviewing constitutional amendments that contradict other constitutional requirements and principles.'[30]

The rash of laws passed in the contemporary parliament is protected on the way in and on the way out. Many are formally introduced by private members so as to avoid the scrutiny required of government bills. And then many of them are rendered not just unimpeachable but, because it is very unlikely any time soon that any other party will gain a two thirds majority, they are virtually unamendable, unless by this government itself. And this applies not merely to the Constitution itself, but also to many so-called 'Cardinal' Acts, and cardinal provisions of normal Acts used, in the word of the Venice Commission, to 'cement' the government's policies. Cardinal laws require a two thirds majority to change, and before Fidesz, only one post-communist Hungarian government has had that. Such laws are designed to structure the future when and if, despite all, the present government is ever voted out of office.

I won't track all the changes here, but they are many, various and substantial. They have hit the major independent agencies, among them the ordinary courts, the ombudsmen (now ombudsman – reduced from four to one), the central bank, the media, the electoral commission, the senior judiciary, and electoral system. Many members of the old elites have been purged, not in old-fashioned coercive ways, but by sacking – some of it wholesale – and/or non-reappointment. In their place, as the ANC might put it, cadres are being systematically deployed throughout the country. Imposition of new (lower) retirement ages for senior judges effectively cleaned out a swathe of them from their former positions; notwithstanding their formally successful subsequent protests, few could return to their reoccupied positions.

These are not just momentary events. As the Monitoring Committee to the Parliamentary Assembly of the Council of Europe put it, the changes 'will allow the current ruling majority to exert de facto control over, inter alia, the media regulator, the central bank, the budgetary council, the judiciary, the ombudsman, after its current mandate has ended, as well as the constitutional court.'[31] Particularly the Constitutional Court.

A key instrument of the new regime is the new constitution. The government – not the parliament, but the government – drafted the Basic Law, which came into force on 1 January 2012. It is a highly ideological document, and it is one party's ideology, since the opposition had no part in composing it, or even voting for it. According to the monitoring committee, the procedure by which the Constitution and Cardinal Acts were adopted 'was opaque, disrespected proper democratic procedure and was not based on wide consensus between, and consultation with, the widest possible range of political forces in the Hungarian society'.[32]

[30] European Parliament Committee on Civil Liberties, Justice and Home Affairs 'Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012' (2013), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0229+0+DOC+PDF+V0//EN>.

[31] Monitoring Committee to the Parliamentary Assembly of the Council of Europe (note 28 above) at 34.

[32] Ibid.

Ostensibly guardian of the new Constitution, as of the old, is the Constitutional Court. However, perhaps someone in the government read Issacharoff's 2011 article extolling the virtues of constitutional courts as 'democratic hedges,' because almost immediately they began to trim their hedge. Whereas Constitutional Court judges used to be nominated by a committee drawn from members of each parliamentary faction in a procedure that sought to generate intra-party consensus, then elected by two thirds of the Parliament, now committee members are nominated by parties according to their share in parliament, with no provision for multiparty agreement. In present circumstances that means they are government appointees. The number of members of the Court has been raised from 11 to 15, to allow immediate dilution of the existing court. Nine of the current 15 judges now on the court are Fidesz appointees. The *actio popularis* has been abolished, and the agents that can apply to the court narrowed. The Court's jurisdiction over financial, tax and budgetary matters has also been drastically limited.

The enduring legal effect of all the Court's case law before the coming into force of the 2012 Basic Law is annulled, even where provisions are unchanged; its immediate effect stands but it has no further legal significance. And if the Court thinks to respond to any of this with Issacharoff's and Choudhry's[33] Indian solution, the Fourth Amendment to the new constitution, of March this year, got there first: the Court cannot void a constitutional amendment for conflict with substantive constitutional principles, only for procedural irregularities. And this Amendment paved the way, since several of its provisions are reinstated ones that the Court had earlier declared unconstitutional.

This has all happened under the close and unhappy scrutiny of several European agencies, with a remit unparalleled anywhere else in the world.[34] In April 2013, the Monitoring Committee recommended that the Parliamentary Assembly of the Council of Europe establish a monitoring procedure in relation to Hungary. Had the Assembly agreed, that would be the first time an established member of the European Union (EU) had ever been subject to such a procedure. The Assembly listed many concerns, of which it said:

> [Art. 13] The Assembly considers that each of the concerns outlined above is inherently serious in terms of democracy, the rule of law and respect for human rights. Taken separately, they would already warrant close scrutiny by the Assembly. In the present case, however, what is striking is the sheer accumulation of reforms that aim to establish political control of most key institutions while in parallel weakening the system of checks and balances.[35]

[33] 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.

[34] See European Parliament Committee on Civil Liberties, Justice and Home Affairs 'Working Document 5: On the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the EP resolution of 16 February 2012)' (2013) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-508.190%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>.

[35] Committee on the Honouring of Obligations and Commitments by Members States of the Council of Europe 'Request for the opening of a monitoring procedure in respect of Hungary (Report)' (2013) 5 available at < http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19777&Language=en>.

The Assembly concluded that these developments have 'raised serious and sustained concerns about the extent to which the country is still complying with these obligations'. In the event, they resolved not to take the humiliating step of opening a monitoring procedure in respect of Hungary but resolved 'to closely follow the situation in Hungary and to take stock of the progress achieved in the implementation of this resolution'. [36]

More recently still, and unprecedentedly, on 3 July 2013, the Parliament of the European Union voted by a considerable margin (370 to 248 with 82 abstentions) to endorse recommendations of the report of its Committee on Civil Liberties, Justice and Home Affairs, on 'the situation of fundamental rights: standards and practices in Hungary' ('Tavares Report').[37] This report listed in detail the ways in which the Hungarian government over the past three years had failed to meet European values and recommended that the Parliament set up a monitoring procedure. To the vociferous protests of the Hungarian parliament,[38] the European Parliament endorsed the recommendations of the report.

Because of the substantial benefits of EU membership, the Hungarian government is keen to placate or hoodwink European officials, though it is not above abusing them and determined not to bow to them. So far the government's momentum has not been stopped – giving a bit here, trading a bit there, but progressively and substantially tightening their institutional hold. It will be interesting to see if anything has changed with this latest, and apparently most determined, European development.

Despite its membership in such institutions as the African Union or the South African Development Community, South Africa is unlikely, any time soon, to have the regional oversight that Hungary currently 'enjoys'. So what does this tell those of us persuaded that dominant party democracy presents challenges to constitutional democracy? That the Constitutional Court should ignore Issacharoff and pull its head in, lest it be chopped off? It might be argued that the earlier boldness of the first Hungarian court gave hostages to fortune, that are now being punished, or that clashes between the Hungarian court and earlier governments made the present one determined to clip its wings. But then it has clipped many other wings as well. It is hard to blame the Constitutional Court for what has happened to the media or the Ombudsman, for example.

Moreover, an independent court can still be a significant institution even in a dominant party democracy, harder in normal circumstances to emasculate than many institutions, and in any event of potentially enormous symbolic significance. This appears to be the case in Hungary more recently, where even as it is being emasculated it has recently begun to emit noble yelps from time to

[36] Ibid.

[37] European Parliament Committee on Civil Liberties, Justice and Home Affairs (note 30 above).

[38] See V Gulyas 'Hungary Resolution Slams European Parliament Criticism' *The Wall Street Journal* (4 July 2013) available at <http://blogs.wsj.com/emergingeurope/2013/07/04/hungary-resolution-slams-european-parliament-criticism/?mod=WSJ_LatestHeadlines>.

time,[39] which are taken up by supporters of constitutional democracy within and without Hungary.

The Hungarian story does suggest, however, that even a strong and determined constitutional court, with a tradition of alertness to 'basic structures' might face challenges from an ascendant and determined dominant party that it is institutionally unable to overcome head-on. Thus, perhaps some of the variable and dynamically-oriented strategies of what might be called honourable indirection, that Roux commends, might in particular circumstances have better purchase than the direct engagement with issues of basic structure.

Issacharoff is, then, right to stress that the prospects for constitutional democracy depend in considerable measure on what happens at the level and in the kinds of structures, to which he directs attention. Whether that automatically implies that a constitutional court should be the agency of choice to monitor the problem, and even if so, how it should respond, are as Roux argues, complex questions to which answers might vary from one legal order to another, and over time. But as is often the case in matters of design, identifying the *source* of problems is a necessary condition for, even if not a sufficient means to, solving them.

III What is at Stake?

I agree, then, with Issacharoff's *location* of important challenges to constitutional democracy in party dominant systems at the level of basic political and legal structures. I am, however, less persuaded by his *characterisation* of them purely in terms of conditions of electoral democracy. For identifying *where* problems arise is not always the same as identifying what sort of problems they are. And here I think Issacharoff has cast his net too narrowly. Indeed, it's not a net; more a spear. It has one target: conditions of democracy, where that in turn is conceived of primarily in terms of conditions for political contestability. His concern, as he makes repeatedly plain, is 'the relation between democratic vitality and the fact of one-party political domination'.[40] The issue is 'the basic underpinnings of democratic contestation',[41] 'the relation of consolidated one-party rule to the prospects for democracy',[42] and 'the broader principles of democratic governance'.[43] The problem is one of 'not having a robust theory of constitutional protection of democracy against democratic manipulation',[44] and so on. Not just in this article but in his several writings on these themes we are left in no doubt what the goal is: the preservation of the conditions for democracy, conceived of primarily in terms of securing the conditions in which competition for votes can be real. As Issacharoff and Pildes term it elsewhere, the issue is 'the proper construction

[39] See R Uitz 'The Return of the Hungarian Constitutional Court' *Verfassungsblog on Matters Constitutional* (15 July 2013) available at<http://www.verfassungsblog.de/en/the-return-of-the-hungarian-constitutional-court/#.UlCV8ySnpYk>.

[40] Issacharoff (note 3 above) at 32.

[41] Ibid at 19.

[42] Ibid at 23.

[43] Ibid at 30.

[44] Ibid at 29.

of background "markets for control" in the area of democratic politics',[45] 'the architecture of democratic institutions'.[46] In all matters, the Court is urged 'to use *the democracy-promoting metric* as the analytic foundation for evaluating efforts by the ANC to consolidate power'.[47]

Democracy is an important thing, to be sure, and it is a good thing too. However, it is not the only good thing that one party dominant democracy threatens. It also threatens another value, often more directly, which also has complex and underminable structural conditions and is also enshrined in s 1 as one of the fundamental values of the South African Constitution: the rule of law.

A lot has been written about the rule of law, particularly over the past 20 years, and it has not made the term clearer. Like democracy and other important public values, what precisely is meant by the term is deeply, perhaps essentially, contested. And yet, though I do not want to engage in a disquisition on the rule of law here,[48] I think it is fairly uncontroversial that, whatever else one wants to say about it, one of the central antitheses to the rule of law is arbitrary exercise of power. That is what the rule of law is supposed, perhaps not solely but perhaps above all, to guard us against. The contrast between rule of law and arbitrariness is relatively uncontroversial, and it is key. Partisans of the rule of law are hostile to arbitrary power. Rule of law traditions seek ways of institutionalising that hostility.

So too of course, does Issacharoff. Though he explicitly invokes the rule of law only once in his article, this value is central to his argument. Thus he notes that in 'the democratic surge in South America', like 'the broader 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.[49]

This is accurate, both as description and diagnosis, but note how 'constraint in the exercise of state authority', 'the primacy of a rule of law', figure in the argument. Within the conceptual repertoire that Issacharoff deploys, arbitrary power is objectionable because and to the extent that it undermines *democracy*, which, I should add, it does. However, to understand dangers to the rule of law as important, only insofar as they affect the availability of democratic contestation, can misdirect us, for at least two reasons.

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

[46] Ibid at 650.

[47] Issacharoff (note 3 above) at 8.

[48] I have tried to do so elsewhere. See, eg, M Krygier 'The Rule of Law: Teleology, Sociology, and Legality' in G Palombella & N Walker (eds) *Relocating the Rule of Law* (2009) 45; M Krygier 'Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?' in JE Fleming (ed) *Getting to the Rule of Law* (2011) 64; M Krygier 'The Rule of Law' M Rosenfeld & A Sajó (eds) *Oxford Handbook of Comparative Constitutional Law* (2012) 233; and M Krygier 'Why the Rule of Law is Too Important To Be Left to Lawyers' (2012) 2 *Prawo I Więź* [*Law and Social Bonds*] 30.

[49] Issacharoff (note 3 above) at 8, 11–12.

A The Rule of Law

First of all, the rule of law is an institutional accomplishment distinct from democracy, and it serves values other than, and as well as, that of ensuring democratic contestability. It is an old notion, known and to some extent instantiated in many polities that were not democratic, indeed were anti-democratic. There was more of it, for example, in Britain than in Russia at any time you want to name since, say, the thirteenth century. Still is. But Britain only became democratic yesterday, or thereabouts.

Many political philosophers who were suspicious of democracy, or not especially interested in it, still had positive things to say about the rule of law. Aristotle did, so did Montesquieu, and as for the long English tradition of the rule of law, democracy was a late afterthought. As Fareed Zakaria has emphasised, '[d]emocracy is one public virtue, not the only one, and the relation of democracy to other public virtues and vices can only be understood if democracy is clearly distinguished from the other characteristics of political systems.'[50] As he points out, there have been liberal autocracies, just as there have been – and increasingly are – illiberal democracies. The adjective is independent of the noun.

Well, maybe not independent. Zakaria makes things easy for himself by using a minimalist definition of democracy, which allows it to be satisfied by the most dominant of dominant party democracies. I believe that in contemporary conditions Juergen Habermas is right to argue that the two flourish together rather than apart, and so there's something wrong in saying democracy can *thrive*, though it might exist, without the rule of law. Nevertheless the concepts are analytically distinct, their histories and incarnations have followed different paths, and their specific virtues are not the same. To put it crudely, adapting Isaiah Berlin's (already over-simple) distinction between positive and negative liberty,[51] democracy has to do, at least in the first instance, with *who* governs us, while the rule of law is concerned with *how* we are governed. And what matters greatly for the rule of law is that, whoever governs us, they do so, as Montesquieu emphasised, *moderately*. That's not all you want from power, but the systematic, institutionalised moderation of power, its *tempering*, is a precious thing in its own right. And one of the great threats to the likelihood of stable, reliable moderation in the exercise of power is the existence of conditions that free it to be exercised arbitrarily.

Arbitrary power is not an unambiguous notion. It can refer to power at its *source* – to what extent is the power of the power-wielder subject, as Philip Pettit puts it, 'just to the *arbitrium,* the decision or judgement of the [power-wielding] agent; the agent was in a position to choose it or not choose it, at their pleasure'?[52] We also speak of power being exercised arbitrarily where it is *received*, if those subject to it have no way of knowing how or when or why it will hit them, or with what. It is the job of rule-of-law institutions, among others, to diminish *arbitrium* in the exercise of power, at both ends.

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[50] F Zakaria 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Affairs* 22, 25.
[51] I Berlin 'Two Concepts of Liberty' in I Berlin *Four Essays on Liberty* (1969).
[52] P Pettit *Republicanism: A Theory of Freedom and Government* (1997) 55.

Opposition to arbitrariness in the exercise of power motivates regard for the rule of law and associated attempts to institutionalise ways of reducing the possibility of such exercise. The rule of law is in relatively good order insofar as some possible behaviours, central among them the exercise of political, social, and economic power, are effectively constrained and channelled, so that non-arbitrary exercises of such powers are relatively routine, while other sorts, such as lawless, capricious, wilful exercises of power routinely occur less. The role of law in the rule of law is to contribute to this state of affairs.

Not only is anti-arbitrariness a central rule of law value; it is an *immanent* value, I would argue, internal to the rule of law itself. It is common today to claim all sorts of goods as flowing from the rule of law – economic development, human rights, and of course democracy. These claims are the lifeblood of the international rule of law promotion industry. But I'm not talking about those external, purported, blessings allegedly bestowed by the rule of law. Perhaps it is good for all these things, though the claims so popular in international circles today can be debated.[53] But if it is, it is because of what it *does* immanently, as a conceptual matter as it were, and my claim is that what it does is diminish the possibility of arbitrary power. To the extent that citizens are routinely at risk of arbitrary exercise of power, they lack the rule of law. Simple as that. If their economy is flailing, the rule of law might have something to do with it or not. We'll have to have a look.

Thus, one might argue, as Max Weber did, that 'sober bourgeois capitalism' is likelier to get off the ground and stay up there if power is exercised in non-arbitrary ways, but that is a sociological claim about what the reduction of arbitrariness might facilitate. It is not itself a quality of the rule of law itself. Nor are democracy, human rights and other things it is now fashionable to attribute to the rule of law. There are intuitively plausible reasons, and some evidence, to support the belief that lessening the possibility of arbitrary power might support those further good things. But if it were shown that, in an order where the rule of law in the sense sketched here was strongly in evidence, the economy had tanked, this would not be in itself a reason to conclude that there was no rule of law nor that it was worthless.

Arbitrariness is a specific and obnoxious vice when added to power. No one should have to live in circumstances where significant power can be exercised over them in an arbitrary manner. There are many other vices which depend on the *substance* of the law, but arbitrary power is vicious enough even without them and moreover can be vicious even were the substance to be fine. It is true that the more arbitrary the power, the less likely it is that the substance will be fine, but that is a different (and arguable)[54] point. Arbitrary power is a free-standing vice, as it were, to be regarded with suspicion wherever it occurs.

Where arbitrariness is linked with significant power, it tends to: threaten the *liberty* of anyone subject to it; generate reasonable and enduring *fear* among them;

[53] See, eg, S Haggard & L Tiede 'The Rule of Law and Economic Growth: Where are We?' (2010) 39 *World Development* 673.

[54] Lon Fuller argued for the connection; HLA Hart was more sceptical.

and deprive citizens of reliable sources of expectations of, and *coordination* with, each other and with the state. And as Lon Fuller and Jeremy Waldron[55] have emphasised, it threatens the *dignity* of all who find themselves mere objects of power exercisable at the whim or caprice of another. More can be said about all of this,[56] but not here.

These are four good reasons to value reduction of the possibility of arbitrary exercise of power. To the extent that the rule of law can help deliver such reductions, this is reason to value it. This is not, of course, merely a negative matter of removing evils, but can be expressed positively. A society in which law contributes to securing freedom, confidence, coordination and dignity, is some great and positive distance from many available alternatives. There are other things we want from law, and many more things we might want in a good society, but ways of serving these values are goods immeasurably harder to attain without institutionalising constraints on arbitrariness in the exercise of power.

And sure, where power can be exercised arbitrarily, that is likely to prove hostile at least to civilised peaceable political contestation. But even were that not the case, the possibility of arbitrary exercise of power would be important to discourage.

B Courts and the Rule of Law

There is a second reason to focus on challenges to the rule of law in their own terms, and particularly for a constitutional court to do so, rather than merely as subordinate aspects of challenges to democracy. As Issacharoff is fully aware, the democratic credentials of any court – and particularly a constitutional court – are controversial, in ways typically inversely related to those of a dominant party in a democracy. The arguments are competitive. Those who deny courts the warrant to override democratically elected politicians deny the democratic legitimacy of the former and emphasise that of the latter. Such arguments, while not persuasive to everyone, are not obviously spurious. Issacharoff himself acknowledges some of their force in relation to Colombia. Uribe was elected twice. The whole problem was that if his amendment were to be recognised as valid, he was almost certain to be elected a third time. That might be a bad thing, but it's not absurd to consider it democratic. That's precisely the problem. As Issacharoff explains:

> 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.[57]

[55] L Fuller & J Waldron *The Morality of Law* (2nd Edition, 1969); J Waldron 'The Rule of Law and the Importance of Procedure' in J Fleming (ed) *Getting to the Rule of Law* (2012).

[56] I discuss these four reasons more extensively in 'Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?' (note 48 above) at 78–81.

[57] Issacharoff (note 3 above) at 17.

Issacharoff's solution responds to and seeks to override these arguments, but they are not necessarily frivolous. Democracy *does* have a lot to do with elections, and winning them is not a small democratic credential, particularly in comparison with those of a bunch of unelected lawyers sitting on an elevated bench, isolated and insulated from democratic pressures. If there were no other way to defend the position, I would still side with Issacharoff; indeed I do anyway. But there is also another route to this end. Perhaps Uribe has stronger democratic credentials than the Court, anyway significant ones. But his credentials as guardian of the rule of law are no greater than theirs; indeed, since he is effectively judging in his own cause and interest, and since courts are charged – in South Africa, specifically and explicitly, constitutionally, charged – with defending the rule of law, decidedly less than theirs. That is precisely for these reasons that Issacharoff gives:

> 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.[58]

So, for reasons both intrinsic and tactical, that might be something worth stressing in its own right.

To say one is opposed to 'the concentration of power' because the rule of law is good for democracy and concentration of power threatens the former and therefore in turn the latter, is more complicated than saying: it is bad for the rule of law. But it is. It would remain so, and should therefore be resisted, even if it were not also bad for democracy. Unfortunately, it is that too. That's an important but distinct point – worth making but not at the risk of occluding the specific value of, and threat to, the rule of law itself. Particularly since this route to undermining electoral democracy depends upon first undermining the rule of law. And if people disagree on the democracy question, as Victor Orbán undoubtedly does and perhaps Jacob Zuma does too, it will remain harder for them to say that the emasculation of independent institutions is good for the rule of law.

[58] Ibid.