The Constitutional Court of South Africa and jurisdictional questions: In the interest of justice?

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When South Africans went to the polls in 1994 in their country's first election by universal suffrage, they did so under an interim constitution. That text—the product of months of difficult and often contentious deliberations among the ruling National Party; its likely successor, the African National Congress (ANC); and a host of other political parties—incorporated human rights guarantees in a bill of rights and also created a Constitutional Court.

The new Court represented a rupture with the apartheid order, which had bound judges to the doctrine of parliamentary supremacy. In the years that followed, however, the Court rendered multiple conflicting decisions on the question of access. It also took a restrictive view of the nature of constitutional matters and the scope of judicial review. As a result, few cases were brought before it. While the interim constitution's successor, in force since 1997, took a broader view of such questions, it would be years before they were reflected in the opinions of the Constitutional Court. Even then, the decisions left great uncertainty as to which cases the Court would hear. The Court also has manifested a similarly narrow approach in the field of socioeconomic rights, thus failing to create a major role for itself in this area.

The result has been an unhappy one for potential litigants as the Court's docket remains small. The restrictive approach may prove unhappier still for the Court itself, which, unless it jettisons its jurisprudential caution, soon may find itself abolished by the government, as will be discussed below. For a society desperately in need of institutional stability and continuity, dispensing with the Court would be disastrous.

1. The political setting

When F. W. De Klerk succeeded P. W. Botha as state president in 1989, the South African political situation was at an impasse. The country had been

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under an almost continuous state of emergency since 1985, its economy was in shambles, and neither the ruling National Party (NP), which had been in power since 1948, nor any black liberation movement had any hope of winning a decisive victory in the struggle for political control. In a move that stunned the world, De Klerk, sensing that a negotiated settlement was South Africa's best hope, De Klerk announced that he would:

- unban the African National Congress (ANC), the Pan-Africanist Congress (PAC), the South African Communist Party (SACP), and other political groups;
- lift restrictions on thirty-three other organizations, including the powerful Congress of South African Trade Unions (COSATU);
- release most political prisoners; remove restrictions on 374 previously freed detainees; limit detention without trial to six months, with provision for legal representation and medical treatment during detention; and
- end hangings until further notice.

De Klerk also indicated that he would free ANC leader Nelson Mandela, perhaps the world's most famous political prisoner, who had been incarcerated for twenty-seven years.

De Klerk was true to his word. Mandela walked free in February 1990. The political transformation had begun. The ANC held meetings with the government on "talks about talks" and opened offices throughout the country. Organizing by other unbanned groups also proceeded apace. In June, De Klerk announced the lifting of the four-year-old state of emergency for all of South Africa except Natal province, where seemingly interminable fighting between those loyal to Chief Mangosuthu Buthelezi's largely rural Zulu Inkatha movement, now renamed the Inkatha Freedom Party (IFP), and supporters

1 Black in South African parlance refers to all members of oppressed groups, i.e. Africans, Coloureds or people of mixed descent, and Indians.


4 The transition is described in detail in David Ottaway, Chained Together: Mandela, De Klerk, and the Struggle to Remake South Africa (1993); Marina Ottaway, South Africa: The Struggle for a New Order (1993); Allister Sparks, Tomorrow is Another Country: The Inside Story of South Africa's Road to Change (1995); Patti Waldmeier, Anatomy of a Miracle: The End of Apartheid and the Birth of New South Africa (1997); and Leonard Thompson, A History of South Africa (Yale University Press 3d. ed., 2000).

of the broad-based anti-apartheid coalition known as the Mass Democratic Movement (MDM) continued to claim large numbers of African lives.

Despite the unprecedented occurrences, the main pillars of apartheid—the Natives Land Act, the Group Areas Act, the Population Registration Act, and the Bantu Education Act—had yet to be rescinded. At the same time, the government steadfastly refused to release prisoners sentenced for offenses such as murder, terrorism, and arson on behalf of political organizations. To make matters worse, by November South Africa risked collapsing in internecine convulsions as Africans, in conflicts driven by urban-rural, class, and ethnic tensions, brutalized and murdered each other throughout the country—allegedly armed and incited, in many instances, by members of the police.

Even as De Klerk commenced an investigation into the situation in response to ANC accusations of government involvement, it was clear that any new social order somehow would have to provide sufficient human rights guarantees if a new South Africa were not to be baptized in blood. Eventually, the government's negotiations with the ANC and other political groups about a new dispensation led to the establishment of a Convention for a Democratic South Africa (CODESA), comprising representatives of eighteen political organizations, including the parties in the Coloured and Indian parliamentary bodies and in all ten African homelands, began work in December 1991. Representatives of the NP, the ANC, and the small Democratic Party (DP) took the main role in CODESA. The NP and the ANC soon agreed on several points. A new constitution should provide for universal adult suffrage, a bill of (first-generation civil and political) rights, an independent judiciary with the power to test the validity of legislation, and the reincorporation of the "independent" homelands into the new state. By June 1992, CODESA had drafted a set of principles for a democratic constitution. Shortly thereafter, however, negotiations ceased.

The ANC withdrew because it suspected the government of connivance in a particularly vicious episode of violence in June at Boipatong in the southern

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6 Natives Land Act, 1913 (Act No. 27 of 1913).
7 Group Areas Act, 1966 (Act No. 36 of 1966).
10 The government had created these in the early 1980s to satisfy its critics. The members of these bodies drew the ire of most black South Africans, who branded them collaborators. See, e.g., La Guma, Apartheid and the Coloured People of South Africa, available at http://www.anc.org.za/ancdocs/history/misc/laguma12.html.
11 The government had created these so-called homelands for Africans as part of its program of separate development. It had even granted four of them—Transkei, Bophuthatswana, Venda, and Ciskei—nominal independence that no other state recognized. See, e.g., http://www.zum.de/whkmla/region/southafrica/ciskei.html.
12 CODESA, Draft Constitutional Principles.
Transvaal. The carnage continued in September, with deadly shootings in the so-called Bisho Massacre in Bisho, the capital of the “independent” homeland of Ciskei; and with ongoing fighting among Africans in KwaZulu-Natal and on the East Rand, which many attributed to a government-directed “third force.”

Despite the hostilities and after much political drama, talks resumed but the NP and the ANC differed in many respects. Previously, in the absence of black voters, the NP had exploited the unitary and flexible character of the 1909 constitution and its 1960 and 1983 successors. Now, expecting to run second to the ANC in an election with universal suffrage, the NP proposed a set of extraordinary provisions that would have ensured the maintenance of white power. Besides an enforceable bill of civil and political rights, it demanded regional governments with vast and irremovable powers, a central cabinet consisting of members from every party that won a substantial number of seats, with a rotating chair and a requirement that all decisions be made by consensus or special majorities.

Virtually certain that it would win most of the parliamentary seats, the ANC favored a unitary state with effective power in the hands of a majority. While it downplayed the socialist emphasis of the 1955 Freedom Charter, which through the decades had remained the basis for its political platform, the ANC still sought to curb the power of the great South African monopolies, such as the Anglo-American Corporation and De Beers, and to include second-generation social and economic provisions and even third-generation solidarity rights in the bill of rights.

By February 1993, the government and the ANC had agreed on a timetable for change; there was to be an election in April 1994 for a new parliament which would act both as a legislature and as a constituent assembly. A new Multi-party

13 South Africa Act of 1909. This document created the Union of South Africa from the British colonies of the Cape and Natal and the former Afrikaner Republics of the Transvaal and the Orange Free State. The process of union is described in detail in LEONARD THOMPSON, THE UNION OF SOUTH AFRICA (Oxford University Press 1960).


16 In 1955, the ANC enlisted the support of the South African Coloured People’s Organisation, the South African Indian Congress, the tiny, predominantly white Congress of Democrats, and the multiracial South African Congress of Trade Unions in a campaign to gain the support of the black masses and to bring the cause of racial equality to the world. On June 26, a 3,000-member Congress of the People, met in an open area of Kliptown, outside Johannesburg, and adopted the Freedom Charter. The document began with the assertion that “South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people.” See also TOM LODGE, BLACK POLITICS IN SOUTH AFRICA SINCE 1945 (1983); FROM PROTEST TO CHALLENGE, VOL. 3, CHALLENGE AND VIOLENCE, 1953–1964 56–69 (Thomas Karis and Gwendolyn Carter, eds.,1977).
Negotiating Forum (MPNF), composed of even more political organizations than were represented in CODESA, then met and, in November 1993, De Klerk, Mandela, and the leaders of eighteen other parties endorsed an interim constitution, which was to come into effect on April 27, 1994, the first day of South Africa's first nonracial, democratic election by universal suffrage, and to operate until the new parliament had created a final constitution. The old South African parliament then passed the necessary legislation ratifying the interim constitution, thus providing legal continuity between the old and new political orders.

The election was beset with controversy and corruption. Despite irregularities that would have caused consternation in Western democratic elections, international election observers had no doubt that the election would have to be declared free and fair. To do otherwise, they feared, would likely plunge South Africa into civil war. Once the Independent Electoral Commission, created to run the election, finally announced the results on May 6, a full week after the end of what the media had by then dubbed "the endless election," it was clear that there had been a pattern of voting along ethnic and racial lines. The ANC had won 62.65 percent of the votes and 252 seats in the National Assembly; the NP, which had received a boost from more than a million Coloured voters who shared with Afrikaners their language, religion, culture, and many of their genes, had garnered 20.39 percent of the votes and 82 seats; and the IFP had won 10.54 percent of the votes and 43 seats. The right-wing Afrikaner Freedom Front had won only 2.17 percent of the vote and 9 seats; the white, English-speaking liberal Democratic Party had won only 1.73 percent and 7 seats; and the radical African PAC had won but 1.25 percent and 5 seats. In the regional elections, the ANC had won seven of South Africa's nine provinces. The NP had taken the Western Cape and the IFP had dominated in KwaZulu/Natal.

On May 10, 1994—342 years after the Dutch East India Company established the settlement at the Cape of Good Hope that marked the beginning of South Africa's tragic racial story—Nelson Mandela took the oath of office in Pretoria with the world looking on. With the election finally over and President Mandela inaugurated, the parliament cum constitutional assembly set about drafting the Constitution.

2. The interim constitution

An eclectic and somewhat confused 222-page document emerged from the bargaining process with ideas borrowed from American, Canadian, German,

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Indian, and Namibian sources, among others, as well as from South African practice.\textsuperscript{20} In one major respect, this was a victory for the ANC; its leaders, as potential beneficiaries of constitutional change, had succeeded in defeating the confederational or consociational aspirations of the NP and other parties.\textsuperscript{21} The interim constitution provided for a unitary state with the legislative power of the national government superior to the powers of the provincial governments, universal suffrage for all those eighteen and over, and a central bicameral parliament comprised of two houses—a national assembly of 400 members elected on party lists by proportional representation and a senate with ninety members, ten elected from each provincial legislature.\textsuperscript{22}

The executive system drew heavily on South African experience and the German model but it also gave expression to the concept of a government of national reconciliation. The president, who was the head of state and commander-in-chief, came from the members of the National Assembly and was to act in consultation with a multi-party cabinet.\textsuperscript{23} However, certain NP successes tempered the ANC victory. For example, amendments to most sections of the interim constitution required the assent of two-thirds of the members of both houses of parliament sitting together.\textsuperscript{24}

Given the history of human rights abuses under apartheid, the drafters of the interim constitution devoted considerable effort to the protection of human rights. Chapter 3, “Fundamental Rights,” borrowed substantially from the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the International Covenant on Civil and Political Rights, promulgated by the United Nations in 1966.\textsuperscript{25} The list of fundamental rights was mainly an elaborate statement of first-generation civil and political freedoms, such as equality before the law and equal protection under the law; the right not to be detained without trial; freedom of conscience and religion, thought and opinion; freedom of speech, the press, and other media; freedom of assembly, demonstration, and petition; freedom of movement; the right to form political parties; and the right of access to courts. Against the background of the abuse of power by the NP, there was a long section on the rights of detained, arrested, and accused persons. There also were several sections that included second- and third- generation rights, such as the right

\textsuperscript{20} S. Afr. Const. Act (Act No. 200 of 1993) (hereinafter Interim Const.)

\textsuperscript{21} See generally supra note 4.

\textsuperscript{22} Interim Const., supra note 20, at Ch.4, sec.48(1).

\textsuperscript{23} Id. at Ch.6, sec. 77.

\textsuperscript{24} Id. at Ch.4, sec. 62.

to a healthy environment and the right of children to security, basic nutrition, and to basic health and social services.\textsuperscript{26}

The rights conferred by chapter 3 were not absolute. Presumably recognizing the concern of many scholars, judges, and practicing attorneys that second-generation social and economic rights and third-generation solidarity rights were not justiciable, the chapter had a general limitation clause. It sanctioned limits on entrenched rights provided that these limits were reasonable; justifiable in an open, democratic society with freedom and equality as its core values; and not contrary to the essential content of the rights. Finally—and ominously in view of precedents established during the apartheid era—there was a section providing for the proclamation of a state of emergency and the suspension of rights under an act of parliament when “the security of the Republic is threatened by war, invasion, general insurrection or disorder at a time of national disaster, and if the declaration of a state of emergency is necessary to restore peace or order.”\textsuperscript{27}

An independent judiciary with the power to strike legislation as unconstitutional was to buttress the nascent human rights culture.\textsuperscript{28} Accordingly, the interim constitution called upon those interpreting the constitution to “promote the values which underlie an open and democratic society based on freedom and equality.”\textsuperscript{29} In order to further this rights culture, the interim constitution, in line with the views of contemporaneous commentators,\textsuperscript{30} directed the courts to consider relevant international law when construing the bill of rights.\textsuperscript{31} The courts also had the discretion to examine foreign law.\textsuperscript{32} There remained the old system consisting of the Supreme Court, with provincial and local divisions, as well as the Appellate Division—now renamed the Supreme Court of Appeal (SCA)—to signal a break with the past. The SCA was to become the highest court for nonconstitutional matters, enjoying apparently equal status with the new Constitutional Court whose creation represented a still more significant departure from the old order.

According to the interim constitution, the Constitutional Court was to hear cases by appeal, referral, or direct application.\textsuperscript{33} It was to be “the court of final instance over all matters relating to the interpretation, protection and enforcement of the provision of the Constitution, including any alleged violation or threatened violation of any fundamental right . . . ; [and] any dispute over the

\textsuperscript{26} Interim Const., supra note 20, at Ch.3, sec.30(1).
\textsuperscript{27} Id.
\textsuperscript{28} Id. at sec. 34(1)
\textsuperscript{29} Id. at Ch. 3. sec. 35(1).
\textsuperscript{31} Interim Const., supra note 20, at Ch.7. sec.35(1).
\textsuperscript{32} Id.
\textsuperscript{33} Id. at Ch.7, sec. 98.
constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state; . . . [and] any inquiry into the constitutionality of any law . . ."\(^{34}\) The Court also was to have exclusive jurisdiction to resolve disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers, or function of any of those organs of state. It was likewise empowered to determine the constitutionality of any parliamentary or provincial bill; certify a provincial constitution; and construe the constitutionality of an act of parliament.\(^{35}\)

Whenever a case in another court involved a matter within the Constitutional Court’s exclusive jurisdiction, the other court had a duty to refer that issue to the Constitutional Court.\(^{36}\) The referral rules were very complex. Any provincial or local division of the original Supreme Court, except for the supreme courts of the former “independent” homelands, was to refer relevant matters directly to the Constitutional Court.\(^{37}\) Issues arising in lower courts or tribunals were to go first to the Supreme Court and then to the Constitutional Court.\(^{38}\) The Supreme Court was to make such a referral when a matter it considered to be a constitutional issue might be determinative in a particular case and if it thought it in the interests of justice to do so.\(^{39}\) If the Supreme Court refused to make a referral, the party who had sought the referral could appeal the decision to the Supreme Court of Appeal, which was to refer the matter to the Constitutional Court when it deemed a decision on the constitutional question to be essential.\(^{40}\)

Regarding direct access, section 100(2) provided nebulously that “[t]he rules of the Constitutional Court may make provision for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction.”\(^{41}\) The Constitutional Court rules of 1995 refined this statement in a conservative fashion providing for direct access “in exceptional circumstances only.”\(^{42}\) These “will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.”\(^{43}\)

\(^{34}\) Id. at sec. 98 (2)(c).

\(^{35}\) Id. at sec. 98.

\(^{36}\) Id. at Ch. 7, sec. 102.

\(^{37}\) Id. at Ch. 7, sec. 103.

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) Id. at ch. 7, sec. 100(2).

\(^{42}\) Matthew Chaskalson et al., Constitutional Law of South Africa sec. 7, at 23 (1996).

\(^{43}\) Id.
In terms of composition, the Court was to have eleven members headed by a president and deputy president. All cases were to be heard by at least eight justices, and the Court always was to sit en banc. Justices were to serve a single seven-year term, with a mandatory retirement age of seventy. The president was to appoint four of the justices from among the existing judges of the Supreme Court after consulting the cabinet and the chief justice. After the same consultative process, the president also had to appoint the president of the Constitutional Court. The president would also make the remaining appointments, this time following consultation with the cabinet and the president of the Constitutional Court and drawing from nominees recommended by the Judicial Service Commission, a body created by the interim constitution to advise the national government on all matters relating to the judiciary and the administration of justice.

The interim constitution also required the Judicial Service Commission to take cognizance of "the need to constitute a court which is independent and competent and representative in respect of race and gender." In its zeal to create transparency, in October 1994, the Commission conducted public hearings with twenty-four candidates before recommending six finalists, all of whom were appointed by Nelson Mandela; the Court’s initial membership was six white men, one white woman, two African men, one Asian man, and one African woman.

The interim constitution included immutable principles to which the final constitution was to adhere. Moreover, in an extraordinary conferral of power upon the Constitutional Court, the final constitution would come into effect only once the Court certified it as in accord with those principles. Thus, the compromises reached by the MPNF would prefigure the final constitution. Symbolic of the interim document’s role as a link between the two orders, the interim constitution had a “postamble” that appealed to humane and specifically

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44 Interim Const., supra note 20, at Ch. 7, sec. 98.
46 Id. at 99(1).
47 Id. at Ch. 7, sec. 99 (3).
48 Id. at sec. 99(1) and (2).
49 Id.
50 Id.
51 The hearings are described in some detail in Brice Dickson, South Africa’s Constitutional Court, 145 New L.J. 246 (1995). In what was regarded by many as dirty political dealing, John Dugard, South Africa’s greatest living legal scholar and tireless human rights advocate did not receive an appointment. See Sunday Times, (Johannesburg). August 30, 1998, quoting Constitutional Court Judge Albie Sachs, who claimed the Commission had “failed” Dugard.
African values and stressed the necessity for national reconciliation.\textsuperscript{52} The postamble also formed the basis for the Promotion of National Unity and Reconciliation Act of 1995\textsuperscript{53} that authorized the creation of the Truth and Reconciliation Commission (TRC).\textsuperscript{54}

3. The Constitutional Court under the interim constitution

3.1. Difficulties of access

Especially problematic were the interim constitution’s provisions on direct access to the Court.\textsuperscript{55} These were at issue in the Court’s very first decision in \textit{S v Zuma}.\textsuperscript{56} which dealt with the admissibility of confessions. The question before the Court was whether the language on admissibility in section 217(1)(b)(ii) of the Criminal Procedure Act of 1977\textsuperscript{57} was consistent with the interim constitution. The Court determined that the litigation should not have come before it because the parties had relied on section 101(6) of the interim constitution to ask the Supreme Court to decide the case. Moreover, the Supreme Court had erred in rejecting the request. However, instead of sending the case back to the Supreme Court for decision, the Constitutional Court ruled on the substantive issue. In response to a request from the Natal attorney general, the Court, under section 100(2) of the interim constitution, granted direct access on the grounds that speedy resolution of the issue was in the interest of justice. The Court then proceeded to strike down the section of the Criminal Procedure Act in question.

At issue in \textit{S v Mhlungu},\textsuperscript{58} which the Court heard on the same day as \textit{Zuma}, was whether the same section of the Criminal Procedure Act discussed in \textit{Zuma} was applicable to cases pending at the time the interim constitution came into force. The Court insisted that the effect of the interim constitution on pending cases was interpretive. As interpretation was not the Constitutional Court’s exclusive domain, referral to that Court by the Natal Provincial Division judge was incorrect. Although the Court indicated that the Natal judge should have decided the issue, it nevertheless treated the case as a

\textsuperscript{52} Interim Const., \textit{supra} note 20, postamble.
\textsuperscript{53} Promotion of National Unity and Reconciliation Act of 1995 (Act 34 of 1995).
\textsuperscript{54} The TRC held the nationally-televised hearings that became a central feature of the early political culture of the new South Africa. A kind of national soap opera with sometimes circus-like media coverage, it is dubious as to whether the TRC revealed much truth about the atrocities of the apartheid era or achieved much reconciliation between victims and perpetrators. The full text of the hearings appears in Truth and Reconciliation Commission Report, 5 vols. (Cape Town 1998).
\textsuperscript{55} Interim Const., \textit{supra} note 20 at secs. 98, 100–03.
\textsuperscript{56} 1995 (2) SALR 642 (CC) [hereinafter Zuma].
\textsuperscript{57} Criminal Procedure Act of 1977 (Act No. 51 of 1977).
\textsuperscript{58} 1995 (3) SALR 867 (CC) [hereinafter Mhlungu].
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direct-access application under section 100(2), even though here, unlike in Zuma, no official had made such an application. The reason for the Court's conclusion is not revealed in the judgment. Justice Kentridge's opinion asserts only that a lower court should refer a case to the Constitutional Court, under interim constitution section 102(1), when the issue "might be decisive of the case," the referral is "in the interest of justice," and there is a reasonable chance that the Constitutional Court would declare the disputed law or provision invalid. How a lower court judge could predict the behavior of such a new institution, in order to satisfy the reasonableness requirement in particular, is difficult to imagine.

However, in the merged case of S v Vermaas, S v DuPlessis, which considered an accused's right to counsel, the Court refused to act on a faulty referral. Interim constitution section 25(3)(e) guaranteed the right to legal representation "where substantive injustice would otherwise result." Justice Didcott wrote that the Court would permit direct access only in exceptional circumstances. It would not permit it in this instance because the Court was "ill-equipped for the factual findings and assessments which the enquiry entails." Unfortunately, Didcott did not elaborate on the criteria by which circumstances might be deemed exceptional, thus offering no clear direction as to when the Court would grant direct access. Further, this omission invited the inference that the Court was loath to interfere in cases where this might impose an economic burden on the state, a conclusion borne out by the Court's timid approach to cases involving the economic rights provisions of the interim constitution and its successor. The Human Rights Committee of South Africa criticized the Court at the time for failing to behave more proactively.

In S v Mbatha, which examined the presumption of innocence for persons charged with possession of firearms, the Court reverted to its earlier behavior regarding access. Once more, it ignored a faulty referral and granted an unopposed oral request from counsel that it treat the case as if it were a direct-access application. The Court emphasized the need for certainty on this issue and proceeded to invalidate the disputed legal provision.

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59 Mhlungu, supra note 58 at 889–90, atr.
60 Id. at 892–93.
62 Interim Const., supra note 20, at ch. 3, sec. 25(3).
63 1995 (7) BCLR 851, 876 (CC).
64 Interim Const., supra note 20 at Ch. 3, sec. 26.
66 1996 (2) SALR 464 (CC) [hereinafter Mbatha].
67 Mbatha, supra note 66 at 475.
To an extent, the Court followed *Mhlungu in Luitingh v Minister of Defence*,68 where a former undercover employee of the Ministry of Defence sued for monies allegedly owed to him under a contract. The ministry rejected the claim on the grounds, inter alia, that the statute of limitations barred recovery. In the view of the judge in the court below, interim constitution sections 26 and 27, which protected the rights to engage freely in economic activity and to reap the benefits of fair labor practices, were at issue. That judge, however, had not been precise about the relevance of those sections. The Constitutional Court struck the referral, holding that the referring judge had determined neither that the question was “decisive for the case” nor that a referral was “in the interest of justice.”69 Moreover, the Court denied direct access on the grounds that there was no urgency for a final decision on the issue. The issue was, in fact, a vexed one in many cases around the country, and the absence of Constitutional Court resolution of this question created unnecessary uncertainty. It is unclear why the Court did not feel the need for certainty in these problematic economic cases when it felt the need for one in *Mbatha*, which dealt with an equally contentious area of the law. Presumably, as in *S v Vermaas, S v Du Plessis*,70 the Court here, too, was reluctant to become involved in matters that could place an economic burden on the state. More perturbing for litigants was the Court’s determination that the respondents should bear their own costs because they had not opposed the referral to the Constitutional Court. Surely this rule would act as a powerful deterrent to litigants who otherwise would have sought access to the Constitutional Court. Combined with the Court’s ill-defined pronouncements on direct access and contradictory behavior, it is not surprising that the Court had and, to this day, has relatively few cases before it.

In *Brink v Kitshoff NO*71 the Court distinguished *Luitingh*72 and permitted direct access despite a defective referral. The case, which dealt with equal rights for women, involved a question of insurance law. The issue was whether section 44 of the Insurance Act of 194373 conflicted with the interim constitution to the extent that it discriminated against married women. The Act denied women some or all of life insurance benefits conferred on them by their husbands if the husbands subsequently became insolvent. The Act did not deny husbands the insurance benefits in the reverse situation. In his opinion, President Chaskalson wrote that the case had come to the Constitutional Court prematurely because the lower court had not determined whether the

68 1996 (2) SALR 909 (CC), 1996 (4) BCLR 581 (CC) [hereinafter Luitingh].

69 Luitingh, supra note 68 at (4) BCLR 581, para. 4.

70 See *S v Vermaas, S v Du Plessis*, supra note 63 and accompanying text.

71 1996 (4) SALR 197 (CC), 1996 (6) BCLR 752 (CC)[hereinafter Brink].

72 See Luitingh, supra note 68.

73 Insurance Act of 1943 (Act No.27 of 1943).
estate in question had become entitled to the deceased husband’s life insurance policy before or after the interim constitution took effect. While it is difficult to see how the Court’s intervention here met even the nebulous “in the interest of justice” requirement of Mhlungu75 and Luitingh,76 the Court nevertheless permitted direct access on the grounds that the Brink application had been made before the Court had given any guidance on direct access, as in, for example, the decision in Zuma.77 This logic is weak because—even if the application had been made after Zuma—the Luitingh application had been made one month later than the Zuma decision. By the time Brink came before the Court, there was no consistent treatment of applications for direct access. The Court proceeded to find that section 44 of the 1943 Act contravened the equality provision of section eight of the interim constitution. Such a contravention, it continued, was not a permissible limitation under interim constitution section 33(1).

The Court applied Brink’s logic78 about the timing of the application to Besserglik v Minister of Trade, Industry and Tourism,79 which dealt with the constitutionality of section 20(4)(b) of the Supreme Court Act of 1959.80 That act required appellants to apply for leave to appeal their cases to the Appellate Division. Justice O’Regan justified the Court’s granting of direct access on the grounds that the newness of the constitution and its procedures may have been responsible for the applicant’s failure to follow “the correct procedures.”81 Since it was unlikely that the applicant would “obtain relief elsewhere,”82 the Court decided to grant the application. While this may have been the case in Besserglik, it most certainly was not in Brink83 where the Court admitted that the case had come to it prematurely. In that instance, the Court could have chosen to send the case back to the lower court for resolution.

In Gardener v Whitaker,84 the Court reverted to its position in Luitingh.85 In dispute was whether the interim constitution’s fundamental rights provisions

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74 See Brink, supra note 71, at 208-09 (CC).
75 See Mhlungu, supra note 58.
76 See Luitingh, supra note 68.
77 See 1995 (3) SALR 867 (CC), supra note 56.
78 See Brink, supra note 71.
79 1996 (4) SALR 331 (CC), 1996 (6) BCLR 745 (CC).
81 See Besserglik, supra note 79, 1996 (6) BCLR 745 at para 7.
82 See id.
83 See Brink, supra note 71.
84 1996 (4) SALR 337 (CC).
85 See Luitingh, supra note 68.
affected the common law of defamation. The Court refused to entertain the substantive question. Per Justice Kentridge, it determined that the case involved more than just the constitutional issue and that, therefore, the application for leave to appeal should have gone from the Provincial Division of the Eastern Cape to the Appellate Division.\(^{86}\)

The Court reasoned similarly in *Tsotetsi v Mutual and Federal Insurance Co.*\(^{87}\) At issue was whether provisions of the Multilateral Vehicle Accidents Act of 1989\(^{88}\) breached the equality clause of section 8 of the interim constitution because the provisions limited the damages payable to certain classes of individuals injured in automobile accidents. The Court remanded the case to the Transvaal Provincial Division on the ground that the issue was not dispositive for the case since the accident in which the applicant had been injured occurred before the interim constitution was in force.\(^{89}\)

In *Transvaal Agricultural Union v Minister of Land Affairs*,\(^{90}\) the Court dismissed a direct-access application regarding the validity of portions of the Restitution of Land Rights Act of 1994.\(^{91}\) The Court justified its action on the ground that there was no case yet in which resolution of the validity question would be determinative.\(^{92}\) Then, in *Motsese v Commissioner for Inland Revenue*,\(^{93}\) the Court refused a referral from the Transvaal Provincial Division. The lower court sought a ruling on the constitutionality of various provisions of the Income Tax Act of 1962.\(^{94}\) The Constitutional Court refused direct access not only because the applicant could have utilized the appeal provisions of the act itself but, in addition, counsel for the applicant had not made a formal application for direct access as required by Constitutional Court rule 17.\(^{95}\) Moreover, the Court indicated that any ruling it made on the substantive issue would not alter the legitimacy of the commissioner’s sequestration proceedings against the applicant.

The Court’s next ruling on direct access came in *S v Bequinot*.\(^{96}\) In that case, a magistrate’s court had ruled that under section 37 of the General Law

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\(^{86}\) See Gardener, *supra* note 84 at 346.

\(^{87}\) 1997 (1) SALR 585 (CC). 1996 (11) BCLR 1439 (CC).


\(^{89}\) See Tsotesi, *supra* note 87, 1997 (1) SALR 585 at 590.

\(^{90}\) 1997 (2) SALR 621 (CC) [hereinafter Transvaal].


\(^{92}\) See Transvaal, *supra* note 90, at 630.

\(^{93}\) 1997 (2) SALR 898 (CC). 1997 (6) BCLR 692 (CC) [hereinafter Motsese].


\(^{95}\) See Motsese, *supra* note 93, 1997 (2) SALR at 909, 1997 (6) BCLR at para 25.

\(^{96}\) 1997 (2) SALR 898 (CC). 1996 (12) BCLR 1588 (CC) [hereinafter Bequinot].
Amendment Act of 1955, the appellant was guilty of receiving stolen property. Under section 37, the burden of proof was on the accused to show that he reasonably believed the goods were not stolen. In his appeal to the Witwatersrand Local Division of the Supreme Court, the appellant did not raise the question of section 37's constitutionality. The local division judges took the initiative and referred the issue to the Constitutional Court. The Court, presumably determined not to open the floodgates to large numbers of referrals, insisted, as it had in Luitingh, Gardener, Tsotetsi, and Transvaal Agricultural Union, that cases referred to it should be only those where the issue for resolution was essential to the outcome of the case. The Court looked askance at the fact that the parties did not raise the issues themselves. Justice Kriegler's objection that there were "sound policy reasons why constitutional questions should not be anticipated" would prove to be hollow in notable decisions in other spheres where the Court would take it upon itself to answer questions other than those asked by the litigants.

The Court, it may be surmised, did considerable damage to its reputation with this line of cases. It castigated applicants for not applying correctly the interim constitution's provisions on the Court's appellate and referral jurisdiction even as it ignored those admonitions in certain cases and heard applications under the direct access provisions anyway. The multiple, relatively unspecific, and contradictory rulings on the direct access provisions underscored the need either for elaborated Court rules to set forth, in precise detail, the criteria for direct access or for a Constitutional Court judgment rationalizing its jurisprudence and performing the same clarifying function.

3.2. Constitutional issues and judicial review: narrow construction

Given the lack of clarity from a practical perspective as to when the Constitutional Court would grant direct access, and, given the Court's avowal in some of those cases that such access would be exceptional, it would come as no surprise if the constitutional issues the Court did entertain were construed in the narrowest fashion. Thus, in Zantsi v Council of State, Ciskei and Others.

98 See supra note 68 and accompanying text.
99 See supra note 84 and accompanying text.
100 See supra note 87 and accompanying text.
101 See supra note 90 and accompanying text.
102 See Bequinot, supra note 96. 1997 (2) SALR at 887.
103 Id. at 896.
104 See generally infra s.7.
105 1995 (10) BCLR 1424 (CC) [hereinafter Zantsi]. Changed to BCLR as orig citation (SALR) incorrect.
the Court examined the Supreme Court’s authority, under interim constitution section 102(8), to refer to it constitutional issues of “public importance,” even though the Supreme Court had already resolved the matter in which that question had arisen. The Court insisted that this power was one that the Supreme Court should use rarely. Quoting from the 1885 United States Supreme Court decision in *Liverpool, New York and Philadelphia Steamship Co. v Commissioners of Emigration*, supra note 106, the Court articulated the rule “never . . . anticipate a question of constitutional law in advance of the necessity of deciding it; . . . never . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” The Court held that this tenet, which also illuminated its position on the interim constitution’s referral rules (although the judgment did not say so), was a “salutary” one. Moreover, this modus operandi “allows the law to develop incrementally. In view of the far reaching implications attaching to constitutional issues, it is a principle which should ordinarily be adhered to by this and all other South African courts before whom constitutional issues are raised.”

This same narrow approach informed the Court’s perspective on the relationship between the bill of rights and the common law. With regard to the contentious issue of whether the interim bill of rights had horizontal application—that is, whether it covered the actions of private individuals and juristic persons or whether it only worked vertically against the state—the Court continued in its restrictive mode. Horizontality was a major subject of debate because much discrimination in South Africa had been private rather than official and, with the end of formal apartheid, the potential for private discrimination remained. The interim constitution was silent on horizontality. It indicated only that the interim bill of rights was binding on the executive and the legislature. It applied to administrative actions as well as to “all law in force.” At issue, therefore, was the meaning of this phrase. If it included private law, then the interim bill of rights would have horizontal application. Moreover, section 35(3) required a court interpreting any law, or applying the common law and customary law, to have “due regard to the spirit, purport and objects of the Bill of Rights.”

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106 113 U.S. 33 (1885).
107 See Zantsi, supra note 105, at para 2, quoting 113 U.S. 39 (1885). The Court would rely on this idea again in the direct access case of *S v Bequinot*, supra note 97, where Justice Kriegler wrote: “There are sound policy reasons for why constitutional questions should not be anticipated.” *Id.* at 896.
108 *Id.* at para 5.
109 *Id.* at sec. 7.
110 *Interim Const*, supra note 20, ch. 3, sec. 7 (1).
111 *Id.* at sec. 7.
112 *Id.* at sec. 35 (3).
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The 1996 case of *Du Plessis v De Klerk*\(^{113}\) dealt with the horizontality question. The Constitutional Court did not take an activist stance in preventing discrimination. Instead, on the ground that it did not want to disrupt the common law, it decided in favor of direct vertical and indirect horizontal application. This meant that the interim bill of rights was without general direct horizontal application but that it could and should influence the development of the common law regarding relations between individuals.

The Court also took a timid approach in *Du Plessis v De Klerk* to the retroactivity of the interim constitution. Before that document came into force, the defendants had published newspaper articles that the plaintiffs claimed were defamatory. In a reply filed before April 27, 1994, the day the interim constitution took effect, the defendants denied that the articles were defamatory. In an amended response of October 1994, they argued that section 15 of the interim constitution on free speech protected the articles.

The Court, in its order listing the matters for argument, framed the question before it as whether the defendants were entitled to invoke the provisions of the interim constitution even though the publication of the offending materials occurred and/or the action was instituted or all relevant facts occurred prior to that document’s coming into force. However, the Court then proceeded to ignore the very question on which it had ordered argument. Instead, it answered a different one about retroactivity and denied its own agency.

Acting Justice Kentridge held that the plaintiffs’ right to damages, if any, vested when the alleged defamation took place. However, the more obvious question for decision, which Kentridge never reached, was whether a government operating under the interim constitution could grant rights to plaintiffs based on conduct that happened before the interim constitution took effect. In a circular argument, Kentridge made his conclusion his premise and unquestioningly accepted that, because there had been no constitution yet in place to guarantee such a right, the defendants could not base their claim on the right to freedom of expression. Merely to assert that the plaintiffs’ rights had vested before April 27, 1994, the date the interim constitution took effect, was not enough; the Court’s opinion would have profited by an explanation of this assertion to show exactly why a cause of action arising before the interim constitution took effect was defective.

Subsequently, the South African parliament found the Court’s position on horizontality unacceptable. Thus, the bill of rights in the Constitution provided for its horizontal application “if, and to the extent that” any of its provision were applicable to a private natural or juristic person.\(^{114}\) The Constitution also prohibited unfair, private discrimination on various grounds.\(^{115}\)

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\(^{113}\) 1996 (3) SALR 850 (CC) [hereinafter Du Plessis v. De Klerk].

\(^{114}\) REP. S. Afr. Const. (Act No. 108 of 1996) [hereinafter S.AFR. Const.].

\(^{115}\) See S. Afr. Const. supra note 114, at Ch. 2, sec. 9.
4. The Constitution

Looking forward to a permanent constitution, it was parliament's task, as the constituent assembly, was to "produce a consensus constitution that reflects the concerns and values of a broad cross-section of both the political spectrum and society as a whole as much as possible."\(^{116}\) To this end, it instituted a program of public participation. It established a community liaison program that included constitutional public meetings around the country, a sectors program that worked with civic and nongovernmental organizations, and a constitutional education program. There also was a media campaign and a call for written submissions from the public both at the beginning of the drafting process and again when there was a working draft.

The hope was that the program would make South Africans feel that the Constitution was an expression of their desires and values and, thus, legitimate. Its other purposes were to validate the constitution-making process by providing opportunities for popular participation in the deliberations of a democratically elected body—something the Multi-party Negotiating Forum had not been—and to protect the interests of the white minority, which was the sine qua non of that group's relinquishing power.

The assembly received over two million submissions from individuals and organizations out of an estimated population of some forty million, although many of the views expressed found no place in the Constitution.\(^{117}\) For example, multiple petitions, representing the beliefs of great numbers of people, supported the death penalty and opposed both abortion rights and a "no discrimination on the basis of sexual orientation" clause. Public opinion polls confirmed that the submissions reflected the views of the vast majority of South Africans and not just activists skewing the replies in their favor. Many groups criticized the lack of responsiveness on these and other issues. In the end, although committee members took umbrage at criticism that they had not acceded to the popular will, the Constitution was not a product of the wishes of the people. Rather, it reflected the views of the constitutional committee and its subcommittee, comprising twenty powerful politicians, six theme committees (each with a technical committee that relied on well-known lawyers), and a panel of constitutional experts.

Like the interim constitution, the lengthy document that emerged had various internal contradictions, some of which, if tested, had the potential to precipitate great social conflict. Thus, although full of laudable rights principles, it surely was not what American legal scholar Cass Sunstein enthusiastically termed "the most admirable constitution in the history of the world."\(^{118}\)


The preamble to the Constitution essentially reprised the postamble of the interim constitution.119 Accordingly, it acknowledged “[t]he injustices of our past,” lauded “those who suffered for justice and freedom in our land,” and honored “those who have worked to build and develop our country.”120 It echoed the 1955 Freedom Charter’s affirmation that “South Africa belongs to all who live in it.”121 Now, “united in our diversity,” the people adopted the Constitution as “the supreme law of the Republic” to accord equality to all and to build a state that was a full partner in the community of nations.122

Chapter 2, the Bill of Rights, had four more sections than its counterpart, chapter 3 of the interim constitution. Notably, section 7(2) of the Constitution revealed the philosophy that “[t]he state must respect, protect, promote and fulfill the rights in the Bill of Rights.” This represented a departure from the view, long held by Western legal scholars, that the purpose of a constitution is to shield its citizens from state power and interference. Here, the directive to protect had to be balanced with the instruction to promote and fulfill. Hence, the Constitution created a tension between so-called first-generation rights—the guarantees of civil and political freedoms—and the goals of second- and third-generation rights—furthering equality and uplifting the socially-disadvantaged. For the judiciary, it meant that there had to be an accommodation of the sometimes irreconcilable tasks of protecting and promoting rights. Other new sections included the rights to health care, food, water, and social security and the rights of cultural, religious, and linguistic communities.

Most notable among the revisions to the text was the new section 12, on freedom and security of the person, which added the right to make decisions about reproduction, the right to control one’s body, and the right not to be subject to scientific experiments without informed consent. The new section 21, on freedom of movement, gave every citizen a right to a passport. The new section 35, dealing with the rights of the arrested, detained, and accused, provided for the right to remain silent, while the right to a fair trial found in section 35(3)—also new—listed fifteen variants of that right instead of the interim constitution’s ten.

A new limitation clause in the Bill of Rights, section 36, was more stringent than its interim constitution counterpart, insisting that any limitation have regard for human dignity rather than just equality and freedom. However, this was counterbalanced by the removal of requirements that the limitation not negate the essential content of the right in question and that, for some rights, the limitation must be necessary. New section 37, on states of emergency, now required that legislation promulgated as a result of the declaration of a state of

120 See S. Afr. Const., supra note 114 at Preamble.
121 Compare text with Freedom Charter of 1955, supra note 16.
122 See Constitution, supra note 114 at Preamble.
emergency could derogate from the Bill of Rights only if it were consonant with South Africa's obligations under international law regarding states of emergency. Section 8 now insisted that courts rendering decisions under the bill of rights apply or, when necessary, develop the common law to the extent that existing legislation did not give effect to a particular right. Conversely, a court could generate common law rules to circumscribe a right as long as that limitation comported with section 36.

The Constitution required courts to consider international law but accorded them discretion to examine foreign law, repeating the language of the interim constitution. Section 233 demanded that a court construing legislation "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."123 Read together, these provisions appeared to ensure that the courts would rely upon international norms and their interpretation by international courts and other bodies.

The Constitutional Court saw the scope of its power altered by the new Constitution. The Court continued to fill its docket in three ways: by appeal; by referral; or, rarely, by direct application. Added to the Court's exclusive jurisdiction was the provision for it to decide that "Parliament or the President has failed to comply with a constitutional duty."124 Omitted was its previously exclusive authority to determine the constitutionality of an act of Parliament. Rather, section 167(5) provided that the Court "makes the final decision whether an Act of Parliament, a provincial Act or conduct of the president is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."125

The Constitution retained the procedure regarding matters under the Court's exclusive jurisdiction. If such an issue arose during proceedings in another court, that court was to refer it to the Constitutional Court for decision. The Constitution omitted the interim text's direct access provisions, offering little clarification of that process. Section 167(6) indicated only that "[n]ational legislation, or the rules of the Constitutional Court, must allow a person, when it is in the interest of justice and with leave of the Constitutional Court, (a) to bring a matter directly to the Constitutional Court or (b) to appeal directly to the Constitutional Court from any other court."126

Regarding judicial appointment and tenure, the Judicial Service Commission was to create a list of nominees. Except for the Court's president and deputy president, the president of the state was to appoint all of the

123 See id. at Ch. 14, sec. 233.
124 See id. at Ch. 8, sec 167(4) (e).
125 See id. at sec. 167(5).
126 See id. at sec. 167 (6).
Court's justices "after consulting the President of the Constitutional Court and the leaders of parties represented in the National Assembly." The only other restriction was that four members had to be drawn from the ranks of sitting judges. The Constitution also extended the tenure of justices to a single twelve-year term. The mandatory retirement age of seventy remained, although a subsequent constitutional amendment would dispense with that limitation. The Constitutional Assembly adopted the Constitution on May 8, 1996, thus complying with the interim constitution's directive that it do so no later than two years after its first meeting or else have the document put to a referendum. Once certified by the Constitutional Court, which had first convened on February 15, 1995, certified it, the text came into force on February 4, 1997. By then, what was known commonly as "the honeymoon" was over. Gone was the general euphoria of the immediate postelection period and the willingness of much of the populace to defer their clamant demands for economic betterment while the new government became accustomed to ruling.

5. The Constitutional Court: a new perspective?

The interim constitution had created a distinction between constitutional and other issues, along with the institution of a constitutional court to construe the former. The new Constitution retained the Constitutional Court as a special court but, because of the transformation in judicial structure that the text mandated, the Court was now at the apex of a unified legal system, rather than a somewhat awkward appendage grafted onto the old judicial order.

While the legal and structural changes should have led the Court immediately to rethink, in an appropriate case, its jurisdiction and its assessment of what matters were suitable for constitutional adjudication, the Court took more than three years to act. Finally, in *Pharmaceutical Manufacturers Association of SA and Another: In re: Ex parte President of the Republic of South Africa and Others*, the Court greatly augmented the scope of constitutional adjudication. At issue was the South African Medicines and Medical Devices Regulatory Authority Act of 1998. Although Parliament passed the legislation in 1998, section 55 of the Act provided that it "comes into operation on a date to be determined by the President." A 1999 Presidential Proclamation erroneously declared that the Act was in force in the absence

127 See id. at sec. 174 (3).
128 See id. at sec. 176 (1).
129 2000 (2) SA 674 (CC) [hereinafter Pharmaceutical Manufacturers Assn].
131 Id.
of regulations classifying medications into various categories. As the Act's predecessor had been repealed, there was no scheme governing medicines.

The Pretoria High Court invalidated the proclamation by applying the common law ultra vires doctrine. Accordingly, it found that the president had acted "prematurely and without having any authority to do so."\textsuperscript{132} There was no constitutional requirement that the Constitutional Court confirm the High Court's order. Under section 172(2)(a) of the Constitution, "the Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."\textsuperscript{133} In this case, there was no order regarding the constitutional validity of the president's behavior.

The Constitutional Court, however, refused to accept this interpretation. In a move contrary to its earlier narrow approach to constitutional adjudication, it insisted:

The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The question whether the President acted \textit{intra vires} or \textit{ultra vires} in bringing the Act into force when he did is, accordingly, a constitutional matter. The finding that he acted \textit{ultra vires} is a finding that he acted in a manner that is inconsistent with the Constitution.\ldots The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law principles. Since the adoption of the interim Constitution such control has been by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.\textsuperscript{134}

This holding also overturned the logic of a line of cases in which the Supreme Court of Appeal (SCA), presumably because it functioned under the interim constitution as the highest court dealing with ordinary matters, had altered the common law without any reference to the interim constitution.

\textsuperscript{132} See Pharmaceutical Manufacturers Assn. \textit{supra} note 129.

\textsuperscript{133} See S. AFR. CONST., \textit{supra} note 114, at Ch. 8 Sec. 172 (2) (a).

\textsuperscript{134} See Pharmaceutical Manufacturers Assn. \textit{supra} note 129.
These cases included *S v J*,135 on the abolition of the cautionary rule in sex offense cases, *National Media Limited and Others v Bogoshi*,136 on media liability for defamation, and *S v Smile*,137 on the fairness of criminal trials. The most important was the 1999 case of *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd.*138 The case was an appeal of a decision by the commissioner in which, it was alleged, he had not properly used his discretionary powers as permitted by relevant legislation. The SCA insisted that there were two types of judicial review and legal systems—common law and constitutional. The court argued that because “judicial review under the Constitution and the common law are different concepts,” administrative action could be questioned on the basis of the common law alone.139 Moreover, “to the extent that there is no inconsistency with the Constitution, the common-law grounds for review were intended to remain intact.”140

The Constitutional Court in *Pharmaceutical Manufacturers* rejected the SCA’s reasoning:

[We] cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.141

Thus, the Court dispensed with the common law as a basis for judicial review of administrative action, substituting the Constitution in its stead. Therefore, all challenges to administrative action had to assert a violation of one of the constitutional rights to lawful, procedurally fair, and reasonable administrative action—rights subsequently codified in the Promotion of Administrative Justice Act of 2000.142 The Court unveiled this broader conception of judicial review and the common law in relation to a case involving administrative law; there remained the problem of the horizontal application of the Bill of Rights, which the Constitution had tried to address.

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135 1998 (2) SA 984 (SCA) [hereinafter *S v. J*].
136 1998 (4) SA 1196 (SCA) [hereinafter *Bogoshi*].
137 1998 (8) BCLR 519 (SCA) [hereinafter *Smile*].
138 1999 (3) SALR 771 (CC) [hereinafter *Container Logistics*].
139 *Container Logistics*, *supra* note 139 at para. 20.
140 *Id.* at para. 20.
141 See *Pharmaceutical Manufacturers Assn.*, *supra* note 130.
Even though the Court's much criticized decision in *Du Plessis*\textsuperscript{143} had prompted the drafters of the Constitution to ensure that the document had direct horizontal application, the language chosen was problematic. Section 8 provided that the Bill of Rights applied to private actors "where applicable."\textsuperscript{144} After the Constitution took effect, it was four years before the Constitutional Court dispensed with indirect application in this sphere and its attendant assumption that the common law somehow could continue to serve as an intermediary between the subjects of that law and the Constitution. In *Carmichele v Minister of Safety and Security v Another*,\textsuperscript{145} plaintiff brought a claim in delict against the state, alleging that it had failed to protect the plaintiff from a dangerous criminal. The Cape High Court and the SCA, which heard the appeal and affirmed the judgment of the court below, relied on the common law doctrine of wrongfulness to absolve the state of responsibility. Neither court made reference to the Constitution.

The Constitutional Court, in contrast, insisted that the case demanded an examination of whether the common law had to be developed with reference to the Bill of Rights as provided by section 39(2) of the Constitution. The Court construed as mandatory that section's requirement that the Court develop the common law with regard to the Bill of Rights. This requirement obtains in all cases, even if the parties have not asked it of the Court. By relying on the pre-Constitution law on the wrongfulness of omissions in delict action, the two other courts had acted without due regard for section 39(2). The Court then set out a two-part analysis that courts were to conduct in such cases. First, by examining the common law in relation to the goals of section 39(2), they were to determine if the common law had to be developed in accordance with those goals. Second, if the conclusion was affirmative, they were to decide how to harmonize the law with the section's demands.

Perhaps the friction with the SCA, occasioned by its *Pharmaceutical Manufacturers*\textsuperscript{146} decision among others, explains why the Court did not take it upon itself to develop the common law in this instance. Instead, it referred to the need for a "close and sensitive interaction" between the high courts and SCA, on the one hand, and itself, on the other.\textsuperscript{147} Accordingly, it reversed the decision and remanded the case to the Cape High Court for trial, directing that court to consider the Constitution's "objective, normative value system."\textsuperscript{148}

\textsuperscript{143} See note 61 *supra* and accompanying text.
\textsuperscript{144} S. AFR. CONST., *supra* note 114, at sec. 8.
\textsuperscript{145} 2001 (4) SA 938 (CC). 2001, (10) BCLR 995 (CC) [hereinafter Carmichele].
\textsuperscript{146} See Pharmaceutical Manufacturers Assn, *supra* note 129 and accompanying text.
\textsuperscript{147} See Carmichele, *supra* note 145, (10) BCLR at para. 55.
\textsuperscript{148} Id.
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The Court was further emboldened in *S v Boesak*,\(^1\)\(^49\) in which it interpreted sections 167(4)(a) and 172(1)(a) of the Constitution to confer upon itself the authority not only to determine whether any behavior or law comport with the Constitution but also to examine the status, power, and functions of a state institution from a constitutional perspective. The Court took section 167(7) to mean that interpreting, applying, and upholding the Constitution were also constitutional issues. Similarly, following section 39(2), it held that constitutional matters included those related to the indirect application of the Bill of Rights, namely, how developing the common law or interpreting legislation promoted the spirit and object of the Bill of Rights. Following this logic, direct application of Bill of Rights to the common law also would be a subject for constitutional review.

However, the Court did not address the Constitution's direct horizontality provisions until 2002. When it finally did so in *Khumalo and Others v Holomisa*,\(^1\)\(^50\) the Court effectively ended indirect application of the Bill of Rights to the common law by holding, in somewhat nebulous language, that, whenever appropriate, courts were to apply the Bill of Rights directly to the common law. Presumably, this meant that many horizontality situations which the courts had treated as indirect application cases, specifically those where private parties relied on the common law, now demanded the direct application of the Bill of Rights. Unfortunately, the Court, as with its direct-access cases, gave little guidance regarding what those cases would be.

Given the Court's broadening of the scope of constitutional matters, a concomitant rise in the number of cases brought before it would be expected. However, that has not happened. Despite its theoretical change in perspective, the Court has continued to cling to the same restrictive and ill-defined concept of a constitutional issue that it first used in the direct-access cases—namely, that a constitutional issue is one that it is "in the interest of justice" for the Court to hear.\(^1\)\(^51\) Also, following those early cases, it has persisted in the view that, if a case involves other non-constitutional questions, courts should resolve those before any constitutional questions become relevant, thus avoiding constitutional adjudication whenever possible. For example, in *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others*,\(^1\)\(^52\) the Court maintained that a constitutional matter was one where the success of the plaintiff's case depended upon whether governmental action contravened the Bill of Rights. Likewise, in the criminal case of *Ex parte Minister of Safety and Security and Others: in re S v Walters and Another*,\(^1\)\(^53\) the Court insisted that

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\(^{149}\) 2001 (1) SA 912 (CC) [hereinafter Boesak].

\(^{150}\) 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) [hereinafter Holomisa].

\(^{151}\) See generally supra s. 3.1.

\(^{152}\) 2002 (2) SA 693 (CC) [hereinafter Fredericks].

\(^{153}\) 2002 (4) SA 613 (CC) [hereinafter Minister of Safety and Security].
a constitutional issue not be heard unless its resolution was essential for
deciding the fate of the accused.

The fact that the Court's conceptual shift did not result in a large increase
in the size of its docket appears to threaten the Court's very existence, as
discussed below.^{154}

6. Socioeconomic jurisprudence

The timidity that has characterized the Constitutional Court's approach
to questions of jurisdiction has also been evident in its jurisprudence of
socioeconomic rights. This has meant, as critics wrote at the time they were
enacted, that the social and economic guarantees of the bill of rights are little
more than fine-sounding statements of intent. Indeed, there has been little in the
Court's jurisprudence that has made a positive difference in the lives of ordinary
South Africans—the vast majority of whom remain desperately poor.

The Court has been seemingly loath to advantage those seeking to enforce
their ostensible rights in any way that would burden the state or require the
Court to oversee state action. Arguably it would have been unwise for a court
in a new and fragile polity to be too energetic in its advocacy of the weak and
marginalized when this would entail repeated confrontation with the other
branches of government and create a climate of discord. However, the Court
has adopted a position at the other extreme, declining to create a serious role
for itself in the area of social and economic rights and even, it may be argued,
calling into question the legitimacy of the socioeconomic provisions of the
Constitution.

6.1. The inclusion debate and the separation of powers

The Freedom Charter, and ANC thinking over the decades since its adoption,
had included not only first-generation civil and political rights but also second-
and third-generation social and economic rights. The incorporation of the
latter into the interim and final constitutions may be seen as a controversial
concession to the ANC's position. Indeed, at the time of South Africa's polit-
cical transformation, some scholars maintained that these guarantees meant,
at a minimum, that a court called upon to construe them would have to ensure
that the government distributed available resources in an equitable, non-
discriminatory manner. However, many jurists criticized the incorporation of
social and economic rights into the Constitution on the ground that the
involvement of the courts in that sphere would be an inappropriate intrusion
on the executive and the legislature. Many submissions to the Court at the
time of the constitutional hearings expressed these very reservations.^{155}

^{154} See infra notes 182–206 and accompanying text.

^{155} See e.g., Jeremy Sarkin, The Drafting of South Africa's Constitution from a Human Rights
But at the time the Constitutional Court itself found no bar to its ability to render judgments in these areas. In the 1996 judgment in which the Court certified the constitution, it wrote:

It is true that the inclusion of socioeconomic rights may result in Courts making orders which have direct implications for budgetary matters. However, even when a Court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A Court may require the provision of legal aid, or the extension of State benefits to a class of people who formally were not beneficiaries of such benefits. In our view, it cannot be said that by including socioeconomic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that results in a breach of the separation of powers.\(^{156}\)

Moreover, the Court continued. "[t]he fact that socioeconomic rights will almost inevitably give rise to such [budgetary] implications does not seem to us to be a bar to their justiciability."\(^{157}\)

7. The Constitutional Court's approach

It was not until 1998 that an economic rights case came before the Constitutional Court. In *Soobramoney v Minister of Health (KwaZulu-Natal)*,\(^{158}\) the appellant suffered from renal failure. After his diagnosis in 1996, he paid for private, thrice-weekly dialysis until his finances were exhausted. Then he sought dialysis from a state hospital in Durban, which refused him on the ground that it provided dialysis solely to patients who would be cured by the treatment or who were waiting for a kidney transplant. It rejected appellant's request because he had ischemia, which made him an unsuitable candidate for a transplant. The hospital, already treating eighty-five patients in a program whose maximum capacity was sixty, declined to treat seventy percent of all those with irreversible renal failure. Soobramoney was one of those turned away.

Appellant then asked the Durban High Court to order the hospital to admit him under section 27(1)(a) of the Constitution, which provides that everyone has "the right to have access to ... health care services ... " and section 27(3), which states that "[n]o one may be refused emergency medical treatment."\(^{159}\) The High Court refused Soobramoney's request; he then appealed to the Constitutional Court.

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\(^{156}\) 1996 (4) SA 744, para. 77 (CC) [hereinafter In re Certification of SA Constitution].

\(^{157}\) In re Certification of SA Constitution. *supra* note 156 at para. 78.

\(^{158}\) 1998 (1) SA 765 (CC) [hereinafter Soobramoney].

\(^{159}\) S. AFR. CONST., *supra* note 114 at sec. 27(1)(a).

\(^{160}\) Id. at sec. 27(3).
The Court rejected the appeal on the ground that the right to access to medical treatment depended upon the availability of scarce resources. In this instance, the hospital authorities, in reaching their administrative decision, had acted in good faith and so could not be compelled to provide services to those in Soobramoney's position. President Chaskalson further maintained that the phrase “emergency treatment” in section 27(3) should be accorded the popular meaning of immediate treatment in the face of some traumatic or life-threatening condition of sudden onset. Thus, life-extending measures in the case of a chronic malady would not qualify as life-saving.

Chaskalson's interpretation of the phrase may be criticized on the grounds that Soobramoney did not call on the Court to construe the right to bodily and psychological integrity or the right to life. Instead, he used it in the context of the right of access to health care. Given the situation, the phrase more likely required a broad rather than narrow interpretation. Had the Court adopted this view, it still could have decided that the right had limitations such as those demanded by the facts of the case and so declined to enforce the right.

Instead, the decision suggests that the Court's view of socioeconomic rights was ruled solely by the availability of resources. This renders the constitutional guarantees meaningless in any situation where the relevant authorities can show that there are insufficient resources to satisfy demand. Such an approach threatens to undermine the legitimacy of both the Constitution and its guardian, the Constitutional Court, especially from the perspective of the segment of the population for whom the guarantees matter most—the poorest of the poor, who, although not necessarily aware of the Court's existence, would doubtless become so were it rendering judgments that improved their economic lot, and were those judgments being implemented by the government, in contrast to previous policy. Moreover, the Court's approach lends support to the position of those who opposed the incorporation in the Constitution of social and economic rights on the grounds that there was little point in guaranteeing these rights in a country with such scarce resources.

Two years after Soobramoney, the Court took on its next socioeconomic rights case and made its first attempt at crafting a jurisprudential framework in this sphere. In Government of the Republic of South Africa and Others v Grootboom and Others,161 Grootboom and 899 others—390 adults and 510 children—appealed an eviction from the squatter camp they had built on private land that was slated for a low-cost housing development. Government officials claimed that the squatters were trespassing and ordered that the shanties be bulldozed, destroying the occupants' meager possessions. The applicants, many of whom had been on a waiting list for subsidized low-cost housing for years, sought to have their access to the land restored and emergency housing provided. At issue before the Cape High Court was the right to housing under section 26 of the Constitution, which provides: "[e]veryone has the right to

161 2000 (11) BCLR 1169 (CC) [hereinafter Grootboom].
have access to adequate housing . . . . The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right." The Cape High Court found that finite resources placed a limitation on the right to housing so that the government was not always bound to shelter the homeless. Nevertheless, the High Court, relying on section 28(1) (c) on the right to shelter for children, found that children had an absolute right to shelter and that the children's parents had a right to reside with their progeny. Accordingly, the High Court ordered the government to give the Grootboom group basic shelter, such as “tents, portable latrines, and a regular supply of water (albeit transported).”

On appeal the Constitutional Court rejected the lower court's judgment in part and affirmed it in part. The Court found that article 28’s requirement that children have a right to shelter was one that rested mainly with parents and only secondarily with the state. The Court dismissed the idea that the article 28 right was absolute, particularly if it afforded parents a right they otherwise would not have had. The Court’s reading of article 26 was more expansive than that of the lower court. Although it did not find that there was a right to housing on demand, it interpreted the right to mean that the government must have a “coherent” policy to deal with the needs of the homeless. However, it failed to say what it meant by coherence. Its determination hinged on the issue of reasonableness whether it was reasonable to require state action to afford people housing under section 26. The Court explicitly declined to ask “whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent,” thus according a certain deference to the government in establishing housing policy. Still, the Court maintained that reasonableness did not entail mere examination of statistical data but rather dictated that the government provide evidence demonstrating that it had given adequate attention to the neediest, who, the Court affirmed, should receive priority consideration under any constitutionally acceptable housing policy. While at first glance this standard of reasonableness appears more substantial than the vague one used by the Court in its jurisdictional cases, closer examination reveals that it is not. The Court made no effort to articulate what would constitute acceptable evidence of the government’s adequate attention to a particular group or situation, and made no attempt even to establish minimum criteria for defining the right.

163 Id. at sec. 28(1) (c).
164 Grootboom. supra note 161, at paras. 15–16.
165 Id. at para. 4.
166 Id. at para. 77.
167 Id. at para. 41.
168 Id. at para. 44.
Appellants had asked the Court to follow the language of General Comment Three of the United Nations Committee on Economic, Social and Cultural Rights and articulate "[a]t the very least, a minimum essential level of each of the rights . . .". The Court agreed that "it may be possible and appropriate" to define a minimum core of obligations under the right that would provide a basis for assessing whether the state's actions had been reasonable, but claimed that it did not have before it "sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution." Moreover, "[i]t is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core of the right." Thus, although the Court instructed the government to alter its housing policy to comport with the decision, it neither established a range of circumstances in which the rights of the homeless and other classes of persons should be protected nor set a time frame for implementation.

In the 2002 case of Treatment Action Campaign (TAC) v Minister of Health, the applicants—a physician and the non-governmental Children's Rights Center—challenged the Health Ministry's refusal to distribute widely the anti-retroviral drug nevirapine to HIV-positive pregnant women and their newborns. The drug is known to diminish greatly placental transmission of HIV, an especially desirable outcome in a country whose reported incidence of HIV infection and AIDS is among the highest in the world. The manufacturer had offered the government a free five-year supply of the drug, which, by then, was extremely inexpensive. The government was providing limited quantities of nevirapine at eighteen public health facilities designated as "pilot sites," which served just ten percent of the population, and had given them permission to offer the drug on a trial basis for two years only. The trial period was ostensibly devised because the government was not satisfied that the drug was useful, although the relevant government agency, the Medicine Control Council, had registered nevirapine in April 2001 after finding it "safe and efficacious."

169 Id. at para. 33.
170 Id.
171 Id.
172 2002 (4) BCLR 356 (T) [hereinafter TAC].
174 TAC, supra note 172, at 14–15.
175 See generally TAC, supra note 172.
176 Id.
177 Id.
Applicants claimed before the Transvaal Provincial Division of the High Court, that the government’s policy violated numerous constitutional guarantees. These included access to health care (section 27); provision of basic health services for children (section 28(1)(c)); and the rights to life (section 11), human dignity (section 10), equality (section 9), and bodily and psychological integrity, including the right to make decisions regarding reproduction (section 12(2)(a)). The applicants also alleged that the government had breached the “State’s positive obligation to promote access to health care” in terms of section 27(2) of the Constitution. Finally, they argued that the Constitutional Court’s decision in *Grootboom* should control.

In reply, the government maintained that the case raised issues of health care policy rather than constitutional rights and so was inappropriate for judicial intervention. Moreover, since policy-making is a government function, judicial involvement would violate the doctrine of separation of powers. Finally, the government urged the High Court to follow the Constitutional Court’s ruling in *Soobramoney* and leave decisions about health care to medical professionals.

The High Court limited its decision to the extent of the government’s obligations for health care under sections 27(1)(a) and 27(2) of the Constitution. The Court not only decided that the government was obligated to make nevirapine available at public health facilities but also ordered it to provide it to HIV-positive mothers and their newborns in cases where appropriate testing and counseling showed this to be medically indicated. The Constitutional Court in *Grootboom* had indicated that the standard to be applied to the government’s positive obligations in enforcing socioeconomic rights was one of reasonableness. This left the government free to draw up a specific plan for meeting that standard in implementing its obligations—in that case, to provide the applicants with emergency housing. Here, however, the High Court went beyond the Constitutional Court’s directive and determined that the government had a constitutional obligation to provide a particular drug, nevirapine, in a particular medical context.

On appeal, the government emphasized in its arguments that the High Court’s behavior violated separation of powers and was an impermissible intrusion into the sphere of government policy-making. The Constitutional Court dispensed with this argument, insisting:

> [w]here State policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."^{178}

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178 2002 (10) BCLR 1033 at para. 99 (CC) [hereinafter TAC II].
Nevertheless, the Court rejected the idea that section 27(1) created an enforceable, positive right to health care divorced from section 27(2)'s requirement that the state must take reasonable legislative or other action within its resource limitations to ensure the gradual realization of the right to health care. The Court clung to its Grootboom reasoning regarding section 27(2) and decided that “[t]he policy of confining Nevirapine to research and training sites fails to address the needs of mothers and their newborn children who did not have access to these sites. It fails to distinguish between the evaluation of programs for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to the sites.” In other words, the government’s policy failed to meet Grootboom’s reasonableness requirement. The Court said that “the socioeconomic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. . . . All that is possible, and all that can be expected from the State, is that it act reasonably to provide access to the socioeconomic rights identified in §§ 26 and 27 on a progressive basis.”

The Court further disapproved of the structural interdict granted by the lower court:

The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the court to enable it to satisfy itself that the policy was consistent with the Constitution . . . In appropriate cases they should exercise such a power if it necessary to secure compliance with a court order. That may be because of the failure to heed declaratory orders or other relief granted by a court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.179

The Court’s assertion that the government always honored the Court’s wishes was untrue. By the time it handed down its TAC decision, two years after Grootboom, the government had done virtually nothing to improve the lot of Grootboom and people like her. This failure on the part of the government, having been much publicized, could not have escaped the notice of members of the Court. Critics blamed the government’s behavior on the Court’s having failed to issue an interdict, having opted instead for much weaker prescriptive language with no timeframe for implementation.180

Moreover, the Court’s continued adherence to its weak reasonableness standard in TAC was even less persuasive because, by the time the Court ruled, the government had already bowed to prodigious international pressure over

179 TAC II, supra note 178 at para 129.

its policy on AIDS drugs and departed from its position on limiting distribution of nevirapine.

7.1. Problems with the Court's approach

Perhaps the most serious difficulty with the Court's continued adherence to its vague standard of reasonableness is that, as South African legal scholar D. Bilchitz has observed, "at present reasonableness seems to stand for whatever the Court regards as desirable features of state policy. The problem with this approach is that it lacks a principled policy basis upon which to found decision in socioeconomic rights cases."\(^{181}\) Presumably, the reason for the Court's hesitance in this regard is that it does not wish to impose a significant burden on the state. By relying on the imprecise language of sections 26(2) and 27(2), rather than articulating a minimum core of rights in accordance with international practice, the Court has made certain that litigants can never lodge a claim against the state for failure to deliver any minimally guaranteed right. At the same time, by its reluctance to grant structural interdicts, the Court appears to have divested itself of the task of monitoring the execution of any order it does make. It thereby abdicates a supervisory role over policy implementation. Notwithstanding the Court's holding that its intervention in socioeconomic cases would not violate the separation of powers doctrine, its policy blurs that separation because the Court disadvantages even successful litigants in favor of the executive and legislature, refusing to safeguard the rights of individuals and groups who have effectively prosecuted their constitutional claims to certain socioeconomic benefits.

While it would be undesirable, in a professed democracy such as South Africa, for a court to issue decrees so broad that they usurped the legitimate policy-making roles of the other branches of government, that would not have been the result if, in its socioeconomic cases, the Court had jettisoned its reasonableness requirement in favor of something more concrete and then acted boldly to issue appropriately framed interdicts. No one expected the Court in these cases to oversee government policy indefinitely, or to engage in democracy by decree. Rather, the relief granted should have been adequate to give substance to the very specific rights the Court found to exist in each case. This would have afforded the successful applicants the true protection of a judicial system functioning as it should in a society that adheres to the doctrine of separation of powers. That is to say, once the government had created or amended its policy to comport with the Court's interdict, continuing judicial oversight would have given the applicants another opportunity to be heard. Without this additional layer of protection, the claimant has no recourse for the enforcement of its now judicially recognized rights, except to make demands of the government whose behavior occasioned the litigation in

the first place or to publicize the government's continuing inertia or resistance in the media. Unfortunately, because victorious applicants must wait indefinitely for any concrete improvement in their situation to emerge as a consequence of the Court's ruling, the promise of socioeconomic rights contained in the Constitution has become illusory. Such crushed expectations have done nothing to bolster the legitimacy of the Court.

8. Could the Constitutional Court be abolished?

To date, the Court's performance has been mixed and has not fulfilled the hopes of those seeking greater equality in South African society. Under apartheid, although judges were held in minimal or no regard by the majority of the population, they were able nonetheless to cultivate an image of themselves internationally by laboring nobly within the confines of an iniquitous order. So too, under the new dispensation, judges have less credibility at home. One study found that, among South Africans who are sufficiently educated to be aware of its existence, its legitimacy is extremely low, comparing unfavorably to that of high courts in other countries—ranking behind that of such courts in the former Eastern bloc countries of Poland and Hungary, and even in Russia. Moreover, the Court's legitimacy varies among racial groups, giving it only a limited capacity to engender political tolerance by protecting unpopular minorities from the displeasure of the majority. This is ominous in a country where the level of political hostility among opponents runs high. In addition, despite the favorable publicity attending the Court's creation, a significant portion of the South African population has never heard of it, although, it may be added, this is not surprising in light of the desperate conditions in which many Africans live.

Perhaps the most telling indication of the Court's lack of legitimacy is the broad support enjoyed by calls to dispense with it altogether. Many believe that the judicial system is so inefficient that it threatens social stability, giving rise to a need to restore public confidence. Another common refrain is that crime is rising dramatically as disorder in the judicial system grows.


184 Id., at 3.

185 Id., at 3.

186 Id., at 11.

187 Id.

188 Id.
In this national debate, the Constitutional Court is the object of considerable opprobrium because of a perception that it has too much funding and too little work. Enhancing this perception, no doubt, was the recent dedication of a new, multi-million-rand court building in the center of Johannesburg that was not accompanied by a concomitant expansion of funding for other parts of the judicial system. In 1999, Minister of Justice Penuel Maduna, claiming presidential approval, proposed that the Constitutional Court and the Supreme Court of Appeal be merged, reflecting a general belief that the system of two high courts was unworkable. Critics point to considerable tension between the two courts regarding jurisdictional issues, approach to legal questions, and relationship to the Constitution.

Maduna revealed that the Constitutional Court, with some twenty cases per year, has a larger budget than that of the SCA, with more than a hundred on its docket. Maduna inferred that this meant that the Constitutional Court justices were not working hard enough compared to judges in many lower courts who were overwhelmed with tremendous workloads. He criticized the long absences of Justices Kriegler and Goldstone (the former having worked in East Timor and the latter having overseen the war crimes tribunals in the former Yugoslavia and Rwanda). In addition, the National Director of Public Prosecutions argued that the workload of the high courts was completely unacceptable considering that shortage of funds had led to the postponement of thousands of prosecutions thereby crippling the state’s fight against crime.

The Constitutional Court’s deputy president, Pius Langa, widely regarded as a likely successor to Chaskalson as Court President, replied that the minister was incorrect and that the Constitutional Court was overwhelmed with work, often working nights and weekends. He suggested that the justices use the Court recess to prepare their cases and thus speed up the process. This did not satisfy critics. The Superior Courts Bill of 2003, introduced in Parliament, provided for the restructuring of the existing high courts into a single High Court of South Africa, comprising one division in each province.

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189 See infra note 190.


191 See supra note 187.

192 See supra note 190.


194 Editorial, Can Penuell Maduna transform himself?, FINANCIAL TIMES (South Africa), Aug. 31, 1999; South Africa’s Justice Minister faces rebuke over comments, ASSOC. PRESS (South Africa), Aug. 31, 1999.

195 The Superior Courts Bill (No.52 of 2003).
with the exception of Gauteng, where there would be a northern and a southern division.

Neither ideological nor political grounds can be discerned for the government's hostility to the Constitutional Court. The carefully chosen justices are known to be ANC supporters or, at the very least, sympathetic to the liberation movements. Moreover, given these credentials, the justices' decisions have displayed a high degree of unanimity and support for the executive. Perhaps the most substantial evidence that the Court has failed to acquire institutional legitimacy is that the proposal that the Court, in effect, be abolished met with no great public resistance.

The Court's fate is not yet clear. It could be dispensed with through merger, as suggested by Minister Maduna, or through abolition. Merging it with the SCA would yield a surplus of judges that probably would prove bureaucratically unwieldy as well as expensive. It would also occasion the need for multiple revisions to the SCAs rules if the justices from both courts were to be accommodated in a single institution. The SCA presumably could sit in panels or with a single bench and the justices could have rotating schedules so that only a certain required number would hear any case. But merger would have the potential to create the same kind of uncertainty over jurisdictional issues that plagued the Constitutional Court in its early years and helped to undermine its image.

If such a drastic course were pursued, it would be preferable simply to abolish the Constitutional Court and give the powers it now enjoys to the SCA. The financial saving would be great. Not only could the SCA presumably move into the Constitutional Court's expensive Johannesburg quarters, but it could leave the backwater location—in Bloemfontein, in the Orange Free State, where it has sat since 1910 as a compromise associated with Union—thus putting an end to decades of criticism. In terms of the structure of the judicial system, such a change would restore the configuration familiar to generations of South Africans, black and white.

Indeed, when the interim constitution was drafted, many favored maintaining the existing hierarchy and expanding the Appellate Division's authority to include the power to declare legislation unconstitutional. That the ANC and others sympathetic to it preferred the creation of a separate constitutional court. This reflected a concern about the substantive and symbolic problems that were likely if the same judges who one day had supported the apartheid regime would be required on the next day, by virtue merely of the change of

196 See, e.g., Theunis Roux, Understanding Grootboom—A Response to Cass R. Sunstein, 12 CONST. Q. 41 (2002). Statistics on unanimity may be found in the Constitutional Court Survey that has appeared annually in the South African Journal of Human Rights since the Court's founding.

197 Maduna, Opening Address, Justice Colloquium: towards a rationalized, effective and efficient functioning structure for the courts that provide access to justice, October 19, 2000, available at http://www.doj.gov.za/colloquium/opening.htm, (citing the late Chief Justice Ismail Mohamed's criticisms of the impracticality and Isolation of the Supreme Court of Appeal's Bloemfontein location). The choice of Bloemfontein is described in detail in Leonard Thompson, Supra note 13.
regime, to support internationally accepted human rights norms.\textsuperscript{198} Had there been a politically uncomplicated way to replace the Appellate Division justices with individuals whose political views were like those of the Constitutional Court’s members, a constitutional court almost surely would not have been deemed necessary, and a confusing era in South African jurisprudence might have been avoided. As it happened, the interim constitution contained guarantees of security of tenure to civil servants, the vast majority of whom were white, inserted at the insistence of the NP, much of whose constituency was unprepared to move forward otherwise.\textsuperscript{199}

Were the Constitutional Court to be abolished, the SCA would have to decide how to fit the Constitutional Court’s jurisprudence into the SCA’s legal structure. This could prove, initially at least, a source of considerable debate. Ultimately, however, the assignment of all constitutional matters to a single court would obviate the kinds of clashes the two courts have had and leave observers and potential litigants with a clearer idea of the unified court’s role. The change could be advantageous for the smooth administration of justice and could help to bolster the image of the SCA. Given the ANC’s large parliamentary majority,\textsuperscript{200} it easily could effect the constitutional changes altering the judicial structure and pass any necessary legislation clarifying the rules of court under the new scheme.

However, to dispense with the Court would be a grave mistake from a symbolic standpoint. The purpose of its creation was to help overcome the common perception, ingrained over decades, that the rule of law was really the rule of legalism, a front for the interests of whoever happened to be in power, and that the judiciary was but the coy handmaiden of the executive. The Constitutional Court was a prime icon of the break with the past, the death of apartheid, and the aspirations of millions for a better future. Abolishing it would underscore the government’s failure to realize the promise of a new order. It would send a signal that the ANC, which rules a de facto one-party state with some democratic features, can undo even the greatest symbols of the new order at will, thus suggesting that no institution, no law—not even the Constitution itself—is exempt from being bent to the party’s will.

South Africa’s most recent election results, in which the ANC garnered 69.68 percent of the vote,\textsuperscript{201} have made it likely that the ANC, freed of the necessity to compromise on contentious issues, may be emboldened to act more forcefully to push through its programs, even if doing so requires amending the Constitution willy-nilly. Before, falling short of the requisite two-thirds


\textsuperscript{199} See generally supra note 4.


\textsuperscript{201} Id. See also LEONARD THOMPSON, supra note 4.
majority, the ANC could not make major constitutional changes on its own. Now, with a 70 percent majority, it will be able to do, as it sees fit, without being obliged to seek consensus. Already, the ease with which it proposes constitutional amendments is alarming, especially to the opposition parties.202

Justice Goldstone assessed the situation accurately in a speech to the May 2000 law graduation ceremony at the University of the Witwatersrand. He said, “For too many the Constitution is just a piece of legislation which falls to be amended when this or that provision inhibits some or other political or economic action.”203 Since neither the Constitution nor the Constitutional Court are imbued with reverential myths of the sort associated with their sanctified American counterparts, it is likely that, for the foreseeable future, the ANC, should it so desire, would be able to retool them without much resistance. To have created the Court as a symbol of a new legal order only to destroy it in less than a decade would signal that the era of compromise, of the rainbow nation,204 of national reconciliation, is over. This could have tragic consequences for the millions of still-destitute South Africans who do not yet understand the meaning of democracy in a Western sense and who, at this stage, associate it not with political and personal freedom but with economic gain.205 Such a move by the government would reinforce this popular perception, making it likely that the society would remain one in which people are much more likely, in the words of South African political scientists Mattes and Thiel, “to disobey the law, to resort to violence, to tolerate shoddy electoral procedures, to produce undemocratic elites from [their] ranks, to elect undemocratic elites to office, or to acquiesce in the face of elite challenges to democracy.”206

However, an appeal to symbolism will not be enough to ensure the Constitutional Court’s survival. The Constitutional Court will have to cast aside the crippling caution and woolly language, such as “in the interest of justice,” which has left it underemployed. Armed with its more recent judgments on the scope of constitutional review and its own jurisdiction, it must act decisively to resolve the many intractable constitutional issues that plague South African society. To do less could be to consign itself to oblivion with dire consequences for the society it was meant to lead in a brave new jurisprudential direction.

202 See S. Afr. Const., s.74, (laying down a two-thirds majority requirement for most constitutional amendments).


204 The term “rainbow nation” was first used by Nobel Prize winner and Anglican Archbishop Emeritus Desmond Tutu. See DESMOND TUTU, THE RAINBOW PEOPLE OF GOD (Image, 1996). Subsequently, it became fashionable in political and popular parlance to refer to South Africa as the rainbow nation.


206 Id.