

Fighting corruption, a constitutional imperative
The case of Hugh Glenister v
President of the Republic of South Africa

by

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Summary

This dissertation explores the case history of *Hugh Glenister v the President of the Republic of South Africa* drawing upon numerous themes that emerge from this litigation and relevant legal theory including: the separation of powers doctrine; judicial review; constitutionalism; the internationalisation of constitutional law; legal legitimacy; democratic experimentalism; constitutional dialogue; the requirement of independence for anti-corruption entities; good governance; accountability and transformative constitutionalism.

The *Glenister* litigation started in 2008, following a challenge to proposed legislation that envisioned disbanding the Directorate of Special Operations (the Scorpions) and relocating its anti-corruption policing capacity from the National Prosecuting Authority to the South African Police Service (*Glenister 1*). This litigation reached the Constitutional Court who in a unanimous judgment found against the applicants based upon a separation of powers argument, noting that Parliament had yet to conclude its work of finalising the proposed legislation.

In 2011, once the legislation was enacted, the applicants again challenged the same legislation, on a similar set of arguments to those put forth in 2008, notably that newly formulated policing unit, the Directorate of Priority Crime Investigations (the Hawks) lacked sufficient safeguards to ensure its independence to function structurally and operationally in manner which is faithful to both constitutional requirements and South Africa's anti-corruption international law obligations (*Glenister 2*). This time, in wide-ranging decision, but only with a slender majority of five judges, the majority found in favour of the applicants. The Court's remedy was a declaration of constitutional invalidity suspended for 18 months to allow Parliament to opportunity to remedy the defects.

Following this order, Parliament revised the legislation. However, the applicants again challenged the new legislation on the basis that it still fell short of the constitutional requirements outlined in the 2011 judgment. In December 2013, a full bench of the Cape High Court again found for the applicants holding that Parliament's revised statute remained inadequate failing to sufficiently address the concerns raised by the *Glenister 2* majority (*Glenister 3*).

In Chapter 2, the dissertation sets out a brief case history of this litigation.

In Chapter 3, the dissertation looks more in depth at the concept of constitutionalism and the separation of powers doctrine and how features in the litigation, specifically in *Glenister 1*.

Chapter 4 explores in greater depth the pivotal findings of the *Glenister 2* majority including the constitutional imperative to fight corruption, the obligation to establish and maintain a corruption-fighting unit, South Africa's anti-corruption obligations under international law and the constitutional requirements in this regard for independence.

Chapter 5 interrogates the impact of the internationalisation of constitutional law upon constitutional adjudication and how this figures in the litigation under review.

Chapter 6 develops an analysis of how the South African Constitutional Court engages in the practice of judicial review in this case and how this shapes the nascent democratic dispensation's approach to constitutional dialogue between the branches of state.

Lastly, Chapter 7 explores how the *Glenister* litigation must be understood within a utopian-pragmatic dialectic where the promise of a transformative constitutional project is juxtaposed to the practical functioning of power politics within a system characterised by a single ruling dominant political party.

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Chapter 1. Introduction

Over the past twenty years, corruption has emerged as one of the most prominent threats to South Africa's burgeoning constitutional democracy. It is difficult to open a daily South African newspaper and not find a major story dealing with corruption. In the most recent period, and particularly in the run up to the 2014 elections, the country has been inundated with the so-called *Nkandla* scandal which has become the subject of numerous investigations most prominently by the Public Protector. Before *Nkandla*, there has been the endless saga of the arms deal, the thwarted prosecution of then citizen Jacob Zuma on corruption charges and the successful prosecution of former National Police Commissioner Jackie Selebi also on charges of corruption.

Coupled with the daily dramas associated with the corruption narrative, particularly over the past ten years, has been a story about the state's responsibility to fight corruption, both from a good governance, and criminal justice perspective. Corruption as the topic of criminal investigations and court judgments has provided South Africa with a rich jurisprudence. This culminated in the landmark 2011 Constitutional Court judgment, *Glenister v President of the Republic of South Africa*¹, referred to herein as *Glenister 2* whose majority judgment provides a sweeping constitutional justification for the fight against corruption and its operational requirements. *Glenister 2*, whose majority judgement and its jurisprudential ramification, are the main discussion of this dissertation was preceded by a 2008 case with the same litigants that reached the Constitution Court, namely *Glenister 1*.² These two cases have subsequently been followed by a December 2013, Cape High Court judgment, *Glenister 3* which continues this on-going constitutional dialogue. The entire case history will be provided in brief in what follows.

For more than a decade, the South African government has been involved in a range of initiatives aimed ostensibly at strengthening its hand in the fight against corruption.³ In response to government's numerous initiatives, have been various

¹ Judgment delivered on 17 March, 2011, Case No: CCT 48/10, [2011] ZACC 6 [hereinafter referred to as *Glenister 2*].

² See *Glenister v President of Republic of South Africa and Others [2008] ZACC 19* [hereinafter referred to as *Glenister 1*].

³ By way of example in 2010, this included the formation of the Anti Corruption Task Team (comprised of the National Prosecuting Authority, the Directorate of Priority Crime Investigations (DPCI) and the Special Investigating Unit (SIU). Government also announced targets as part of the performance contract of the Minister of Justice within the Justice, Crime Prevention & Security Cluster (JPCS) of ensuring 100 prosecutions of serious corruption cases where assets of R5 million can be seized take place by 2014.

challenges emanating largely from civil society voicing objections to government policy and the most appropriate strategies for combating corruption.⁴

One such challenge, finding backing from a slender majority of five Constitutional Court judges was that of Hugh Glenister and his second case, *Glenister 2*. Glenister, a private citizen and businessman, in this ambitious litigation, challenged the constitutional validity of two pieces of legislation that effectively disbanded the Directorate of Special Operations (DSO or the Scorpions) and established the Directorate of Priority Crime Investigations (DPCI or the Hawks). To reiterate, Glenister's successful challenge in 2011 followed a Constitutional Court ruling in 2008 that unsuccessfully challenged Cabinet's then decision to initiate the legislative process to disband the Scorpions.⁵

In the discussion that follows, I will seek to review *Glenister 2*'s main findings from the majority judgment and the implications of this decision for South Africa's fight against corruption. Further and more critically, I will review the majority's findings and the implications they have for developing South Africa's constitutional jurisprudence particularly as it relates to issue of corruption and the requirements of independence for institutions supporting democracy. Within this analysis, the discussion will look at a range of jurisprudential issues that lurk in the background to these cases, specifically addressing the notion of constitutionalism, separation of powers, the internationalisation of constitutional law and judicial review. In summary, the paper concludes that the majority decision is far reaching in its pronouncements as regards to entrenching the fight against corruption as a constitutional imperative and the requirements of independence for an anti-corruption body within South Africa's constitutional democracy.

⁴ See the Council for the Advancement of the South African Constitution's (CASAC) public announcements and claims that South Africa was on the verge of becoming a dysfunctional state. *Govt rejects 'dysfunctional state' claims*, TimesLive, Sapa, March 17, 2011.

⁵ See *Glenister 1*, *supra* note 2.

Chapter 2. Hugh Glenister v President of Republic of South Africa: A brief case history

2.1. Background to Glenister 1

The historical background to this litigation is well known. In short, the Scorpions were formed in 2001 to bolster ‘the efforts of existing law enforcement agencies in tackling organised crime’ including the fight against corruption.⁶

This placing of the investigative functions within a prosecuting authority was, for some, the strength of the Scorpions model as evidenced by their alleged success rates. For others, it raised legal questions around the separation of powers or perhaps more appropriately separation of functions – namely investigations on the one hand and prosecutions on the other. If one sees law enforcement largely as a value chain from investigation through to prosecution, these activities relate to the executive function of implementing law and policy.

Due to concerns that too much authority was vested in the Scorpions, in 2005, then President Thabo Mbeki appointed Judge Khampepe to head a commission of inquiry to review the rationale for the establishment of Scorpions, its mandate, its location within the NPA, and the increasingly fractious relationship that had developed between the Scorpions and the South Africa Police Service (SAPS).⁷ The resulting *Khampepe Report* finalised in February 2006 recommended that the Scorpions model remain in place with minor adjustments.

Khampepe recommended that the Scorpions remain located within the NPA but with certain adjustments such that oversight of the law enforcement component of operations be transferred from the Minister of Justice to the Minister of Safety and Security to ensure better relations between the Scorpions and the SAPS.⁸ The *Khampepe Report* was subsequently endorsed by Cabinet in June 2006 by a statement that revealed ‘it endorsed the National Security Council’s decision to accept, in principle, the recommendations of the Khampepe Commission, including

⁶ See *Glenister 2*, *supra* note 1, at para 6.

⁷ *Id.* Many events arguable contributed to or at least provided a backdrop to the break down in relations between the Scorpions and the SAPS including the investigation and prosecution of National Police Commissioner Jackie Selebi, the suspension of NPA Head Vusi Pikoli and various fall-outs of these related to these events.

⁸ *Id.*

the retention of the DSO within the NPA⁹. A further Cabinet statement from 7 December, 2006 stated that Cabinet had reviewed the progress of implementing the Khampepe Commission's recommendations and noting the tensions between the DSO and the SAPS, decided that legal instruments must be put in place to ensure greater cooperation and coordination between the two bodies.¹⁰

However, in December 2007 in Polokwane, in an historical conference that swept aside the leadership of Thabo Mbeki, the ANC party conference resolved that South Africa should have one single police force and that the Scorpions should be disbanded.¹¹ There was much media speculation at the time about the motivation behind this resolution and the perception that forces within the ANC had a vendetta against the Scorpions for investigating senior ANC officials, including its newly elected President, former Deputy President and current State President Jacob Zuma.

The main accusation levelled against the Scorpions by elements within the ANC was that 'the Scorpions were involved in politically motivated targeting of ANC members.'¹² Following numerous high profile investigations into not only Jacob Zuma, but also against ANC MP Tony Yengeni and National Police Commissioner Jackie Selebi, ANC executive member Sipiwe Nyanda stated that the Scorpions were being used 'to pursue a political agenda and to target certain people in the ANC to the benefit of sectarian and foreign interests.'¹³ In addition, ANC Secretary-General Gwede Mantashe was quoted as saying that Scorpions had become 'a political unit' that was 'infiltrated by apartheid security branch' members who were 'targeting erstwhile enemies' – the ANC.¹⁴

Following the resolution at Polokwane, Parliament sought to implement the decision through new legislation amending the NPA Act and the SAPS Act. In February 2008, during the debate following the President's State of the Nation address, then Minister of Safety and Security, Charles Nqakula announced a proposal that would create 'a better crime fighting unit to deal with organised crime, where the best experiences of the Scorpions and the police's Organised Crime Unit will be merged...

⁹ *Glenister 2*, *supra* note 1, at para 7.

¹⁰ *Glenister 1*, *supra* note, 2 at para 12.

¹¹ *Id.* at para 8.

¹² D. Bruce, Without Fear of Favour, The Scorpions and the politics of justice, *SA Crime Quarterly* No. 24, June 2008 at 11.

¹³ *Id.* at 13 quoting A. Basson, Zuma case influenced decision, *Mail & Guardian*, 11 April, 2008 at 2.

¹⁴ *Id.* at 13 quoting H. Omarjee, DA, Scorpions 'hate ANC' – Mantashe. *Business Day*, 16 April, 2008.

the Scorpions in the circumstances will be dissolved...and a new amalgamated unit will be created.¹⁵ Following the directive by Cabinet, the process of drafting new legislation was subsequently initiated by the National Assembly leading to the first challenge by Hugh Glenister resulting in the *Glenister 1* litigation.¹⁶

In *Glenister 1*, the applicant sought to challenge on an urgent basis Cabinet's decision to initiate the new legislation dissolving the Scorpions. The applicant argued that the decision 'had caused mass resignations within the DSO, in effect bringing about its dissolution and depriving South Africa of an effective crime-fighting unit even before the conclusion of the legislative process.'¹⁷ Glenister approached the Constitutional Court on an urgent basis for leave to appeal against the decision of the Pretoria High Court, handed down on 27 May 2008, holding that the High Court lacked jurisdiction to hear the matter.¹⁸ Glenister applied for direct access to the Constitutional Court for an order compelling government to withdraw the relevant Bills from Parliament.¹⁹

By way of directives from then Chief Justice Langa, the only issue for determination by the court in *Glenister 1* was whether 'in view of the principle of separation of powers, the circumstances of the case permitted the court to consider the validity of the decision taken by Cabinet while the Bills were still before Parliament and the legislative process was still underway.'²⁰ In effect, the Court was being asked to determine the validity of the legislation prior to it even coming into effect.

In his application, Glenister submitted that the circumstances of the case were sufficiently exceptional to warrant judicial intervention at the stage of Cabinet's decision, prior to Parliament concluding the process of drafting the legislation. Glenister argued that with mass resignations already taking place at the DSO, the Court was required to intervene at this early stage in the legislative formulation

¹⁵ *Glenister 1*, *supra* note 2, at para 13.

¹⁶ See *Glenister 2*, *supra* note 1, at para 10-11.

¹⁷ *Hugh Glenister v President of the Republic of South Africa and 12 others* published in Judgements, Legalbrief, www.legalbrief.co.za/article.php?story=20081022104323798, accessed on May 10, 2011.

¹⁸ Media Summary, In the Constitutional Court of South Africa, *Hugh Glenister v President of the Republic of South Africa* and others, Case CCT 41/08 [2008] ZACC 19, Judgment Date: 22 October 2008.

¹⁹ *Id.*

²⁰ *Glenister 1*, *supra* note 2, at para 28.

process, in order to prevent irreparable harm in the form of depriving South Africa of an effective crime-fighting unit.²¹

The applicant sought an order from the court declaring that 1) the decision taken by Cabinet on 30 April 2008 to initiate legislation disestablishing the DSO as unconstitutional and invalid and 2) directing the relevant Ministers to withdraw the Bills (the NPA Bill and the SAPS Amendment Bill) from the National Assembly.²² It is worth noting that by the time the Court heard the case, the Bills in dispute were already before Parliament's Portfolio Committees on Justice and Constitutional Development as well as Safety and Security, who had called for public comments on the Bills and begun the process of hearing submissions regarding the Bills' contents.²³

The applicant's submission was opposed by the Ministers of Safety and Security as well as Justice and Constitutional Development. Central to the Ministers' argument, was that judicial intervention at this stage was undesirable because South Africa's democratic dispensation, as embodied in the Constitution, created 'checks and balances to maintain the delicate balance in power wielded by the executive, legislature and judiciary.'²⁴ Under their view, separation of powers delineated as a 'delicate balance.' The duty of the Cabinet, as representation of the executive, is to 'account to the legislature for policies, decisions and actions, and the concomitant powers of Parliament [is] to ensure the accountability of the executive.'²⁵ Any additional interventions at this stage with the executive's initiation of legislation, the respondents' contended, 'would upset this balance' and is 'neither necessary nor warranted.'²⁶

In terms of the applicant's argument's relating to urgency, citing the mass resignations of DSO staff and immediate consequential harm that this legislative process was having to combating crime and corruption, the respondent's argued that while Parliament's deliberative process was still under way, no final decision had been taken on what form the enactment will take, whether the DSO should continue

²¹ Id.

²² *Glenister 1*, *supra* note 2, at para 3.

²³ Id. at para 4.

²⁴ Id. at para 25.

²⁵ Id.

²⁶ Id.

to carry out its mandate and insufficient proof had been provided as to why employees were leaving the organisation.²⁷ In addition, as alternative remedies would be available to the applicant in circumstances where the enactments are ultimately proved to be unconstitutional, the court should not exercise its discretion to intervene at this time.²⁸

This judgement yielded a rich discussion on the separation of powers (discussed below), which in hindsight to the subsequent legislation and litigation, raises questions as to the Court's ultimate prudence in this matter. However, in a unanimous judgment, the Court in *Glenister 1* held that the applicant had failed to establish that 'a material and irreversible harm would arise in the sense that no effective remedy would be available once the legislative process is complete.'²⁹

In summary, the Court, found based upon a separation of powers argument that the executive had carried out its constitutionally mandated task of 'initiating and preparing legislation' and that Parliament was also carrying out its duties of overseeing the executive's actions.³⁰ Such circumstances whereby a court could intervene at the legislative drafting phase would have to be exceptional and failing a showing of 'material and irreversible harm', the applicant could not succeed.³¹

2.2. Background to *Glenister 2*

In October 2008, the laws in question were passed by Parliament effectively dissolving the Scorpions and creating the DPCI, or the Hawks, now firmly under the command and control of the SAPS. Thus, in a new twist and departure from its inability to grant the applicant relief in *Glenister 1*, the subsequent passage of these laws meant that the Court in *Glenister 2* was now able to not only entertain a new constitutional challenge, but also to arrive at an order of invalidity to the very legislation under attack in *Glenister 1*. While only finding against the state by the most slender of majorities, the question remains as to whether the Court had adopted a less formalistic reading of separation of powers in *Glenister 1*, could we have avoided the eventual adjudication in *Glenister 2*?

²⁷ Id. at 27.

²⁸ Id.

²⁹ Id. at 57.

³⁰ Id.

³¹ Id.

At its core, the Court in *Glenister 2* was faced with the same set of facts that were presented to them three years previously, however with a major exception, namely the impugned legislation was now duly passed by Parliament, the Scorpions were dissolved, and the Directorate for Priority Crime Investigation (the Hawks) were firmly established as South Africa's lead anti-corruption fighting capacity, residing within the SAPS.

As Ngcobo CJ notes in his minority judgement (referred to by the majority as the main judgement³²), the Scorpions model soon came under scrutiny as concerns were raised 'within the criminal justice and intelligence community relating to its role and functioning'.³³ Fundamental to the challenges to the Scorpions model was its location as a law enforcement agency with investigative powers within the National Prosecuting Authority (NPA) and the prominent role played by prosecutors in leading investigations.

The majority five to four decision in *Glenister 2*, discussed in detail below, declared that Chapter 6A of the South African Police Services Act 68 of 1995 was inconsistent with the Constitution and invalid 'to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation'.³⁴ Such declaration of constitutional invalidity was suspended for 18 months in order to give Parliament an opportunity to remedy the defect.³⁵

2.3. Background to *Glenister 3*

Five years on from the Constitutional Court's decision in *Glenister 1* and two years down the line from *Glenister 2*, Mr. Glenister and others, notably the Helen Suzman Foundation (HSF), initiated further litigation challenging Parliament's attempt to remedy the defect referred to in *Glenister 2*. In the case of *The Helen Suzman Foundation v President of the Republic of South Africa*, referred to hereafter as *Glenister 3*³⁶, the applicants submitted that Parliament's purported compliance with the Constitutional Court judgment in *Glenister 2*, by way of the South African Police

³² It is a strange feature of the case that the minority judgement is referred to as the 'main judgement' leading to speculation as to what transpired when the Justices agreed to the two opinions.

³³ See *Glenister 2*, *supra* note 1, at para 6.

³⁴ *Id.* at para 251.

³⁵ *Id.*

³⁶ *Helen Suzman Foundation v The President of the Republic of South Africa and others*, Case no: 23874/2012, decided on 13 December, 2013, High Court of South Africa, Western Cape Division. Mr. Glenister was also an applicant in this case alongside the HSF [hereinafter referred to as *Glenister 3*].

Services Amendment Act 10 of 2012 (the SAPS Amendment Act), failed to remedy the constitutional defects identified by the Court.³⁷ The HSF challenged the legislation on a ‘purely objective’ legal basis which the court noted with approval as ‘in keeping with the approach of our courts to invalidity.’³⁸

The Cape High Court ultimately found that six sections within the new Chapter 6A of the SAPS Amendment Act failed to pass constitutional muster for various reasons including:

- a) The appointment process of the Head of the DPCI lacks adequate criteria and vests an unacceptable degree of political control in the Minister and Cabinet, which is in conflict with international best practice;
- b) The powers vested in the Minister (Police) to extend the tenure of the Head and Deputy Head (the DPCI or Hawks) is intrinsically inimical to the requirements of adequate independence;
- c) The suspension and removal ‘process’ not only vests an inappropriate degree of control in the Minister, but also allows for two separate and distinct processes, determined on the basis of arbitrary criteria, each able to find application without any reference to the other; and
- d) There is an unacceptable degree of political oversight in the jurisdiction of the DPCI, and the relevant provisions are themselves so vague that not even those responsible for their implementation are able to agree on how they should be applied.³⁹

Similar to the remedy provided by the court in *Glenister 2*, the Cape High Court in *Glenister 3*, provided a declaration of constitutional invalidity that was suspended for 12 months in order to allow Parliament an opportunity to remedy the defects. The Court’s orders were further referred, in terms of s 8(1)(a) of the Constitutional Court Complementary Act No 13 of 1995, to the Constitutional Court for confirmation.⁴⁰

³⁷ Id. at para 4.

³⁸ Id.

³⁹ Id. at para 119.

⁴⁰ Id. at 123. The case was set down for argument before the Constitutional Court in May 2014.

Chapter 3. Constitutionalism and the Separation of Powers doctrine in *Glenister*

In a case like *Glenister*'s, where the Court is asked to review and ultimately declare as invalidate and unconstitutional a piece of legislation, considered first at an executive level as appropriate policy and then passed into law by a democratic legislature, the issue of separation of powers inevitably features as a backdrop to the analysis. While implicit in *Glenister 2*, the issue of separation of powers was decisive to the Court's reasoning in *Glenister 1*.

In short, the doctrine of separation of powers poses the notion that government is divided into distinct operational and functional spheres or branches. Reduced to its fundamentals, these branches of government include: the legislature responsible for developing policy; the executive responsible for administering policy; and the judiciary responsible for reviewing policy in compliance with legal norms, such as a supreme law or constitution.

Such branches of government are meant to fit together seamlessly into a working governmental system characterised by checks and balances such that no one branch of government dominates or wields supreme authority and hence the prospect of tyranny is avoided. The doctrine of separation of powers dates back 'the medieval period and middle ages' where political philosophers searched for 'the secrets of good government.'⁴¹ It is however Montesquieu, writing in the eighteenth century, who is considered as giving 'the doctrine its modern scientific form, and whose ideas substantially influenced the French and American Revolutions.'⁴²

Before reviewing how the notion of separation of powers is featured in the *Glenister* litigation, it is worth noting that in its modern incantation, the notion of separation of powers falls under a broader organising principle, relevant to this analysis, namely the notion of 'constitutionalism.' While the notion of constitutionalism has been the source of significant academic literature, as an organising principle, Bo Li has described the separation of powers as,

⁴¹ See C.M. Fombad, Separation of Powers and Constitutionalism in Africa: The Case of Botswana, *Boston College Third World Law Journal*, Volume XXV Number 2, 2005 at 303-304.

⁴² *Id* at 305.

*a system of political arrangements in which there is a supreme law (generally called 'constitution' in which all (particularly the entire system of government) is government by the supreme law, in which only the people's will, (as defined through some pre-specified institutional procedure, usually through a super-majority voting mechanism) can supersede and change the supreme law, in which changes can only be made infrequently due to the difficulty of garnering the requisite popular support, and in which there are separation of powers, checks and balances and an independent judiciary dedicated to legal reasoning to safeguard the supremacy of the constitution.*⁴³

While we understand written constitutions today as central to the notion of constitutionalism, Mark Tushnet has argued that over the course of the twentieth century, at least two variant models of constitutionalism predominated.⁴⁴ The first is the Westminster model of parliamentary supremacy which, in the case of the United Kingdom, was not characterised by a written supreme law. Rather, the traditional Westminster system is one in which 'democratically elected legislature had power constrained only by the cultural presuppositions embedded in a majority will.'⁴⁵ Presuppositions, Tushnet argues, that were unwritten in the case of Great Britain, but that could be written into a constitution 'that serve as a reference point for political debate about whether a particular proposal was consistent with the culture's presupposition.'⁴⁶

It is interesting to think about this model in terms of South Africa's pre-constitutional dispensation. In light of this, while fundamentally undemocratic, it can be argued, that the apartheid state functioned under a form of constitutionalism wherein parliamentary supremacy dominated and was constrained only by the cultural presuppositions of the white minority, including a relatively conservative legal culture inclusive of the Roman-Dutch common law.

The other dominant notion of constitutionalism identified by Tushnet is that of 'constrained parliamentarianism',⁴⁷ more commonly associated with the United

⁴³ B. LI, What is Constitutionalism, Perspectives, Vol 1, No. 6 which can be found at http://www.oycf.org/Perspectives2/6_063000/what_is_constitutionalism.htm.

⁴⁴ M. Tushnet, New Forms of Judicial Review And The Persistence of Rights And Democracy-based Worries, 38 *Wake Forest Law Review*, 813 2003.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id. Tushnet attributes the term constrained parliamentarianism to Bruce Ackerman see *The New Separation of Powers*, 113 *Harvard Law Review* 633 at 664-87 (2000).

States and later the Fifth Republic in France⁴⁸ whereby the legislature's powers are limited in terms of a written constitution and the executive and courts are given demarcated powers, in the case of courts, to review and enforce constitutional precepts.⁴⁹ Central to the Westminster model was the possibility, identified by Tushnet, and applicable to the functioning of the rule of law under apartheid, for 'empowered democratic majorities' (or minorities) 'to violate rights that liberal systems should protect'.⁵⁰ What has remained notable about the second variant, also known as 'liberal constitutionalism', particularly as regards the U.S. model has been the broad powers assumed by courts to invalidate legislation on the ground that the legislation violated fundamental rights.⁵¹

In more recent times, and certainly since the end of the Cold War, scholars have sought to identify the core elements, or prerequisites, of liberal constitutionalism as inclusive of: a written constitution which identifies fundamental human rights and liberties; some form of separation of powers; and an independent judiciary with the final arbitrating powers to determine the constitutionality of laws and the validity of constitutional amendments.⁵² In addition to these prerequisites can be added the establishment of institutions supporting democracy⁵³, which in the South African context have been incorporated in Chapter 9 and 10 of the South African Constitution and include *inter alia*: the Auditor General; the Public Protector; the Independent Electoral Commission; and the South African Human Rights Commission.⁵⁴

Underpinning the notion of modern or liberal constitutionalism, as identified by Charles Fombad, is the idea that,

⁴⁸ See CM Fombad, *Post 1990 Constitutional Reforms in Africa and the Prospects for Constitutionalism*, OSSREA conference paper, Addis Ababa, November-December 2004 at 8, who argues that the governance system established by 1958 constitution of the French Fifth Republic is essentially a combination of the modern Westminster parliamentary model (distinct from the traditional Westminster discussed by Tushnet) and the United States presidential system.

⁴⁹ M. Tushnet, *supra* note 44.

⁵⁰ *Id.*

⁵¹ *Id.* at 814.

⁵² See C.M. Fombad, *Post 1990 Constitutional Reforms*, *supra* note 48 at 2.

⁵³ *Id.* at 5.

⁵⁴ It is worth noting for this discussion that the South African constitutional drafters, while creating the office of the Public Protector in section 182 to investigate improper conduct in state affairs and public administration did not have the foresight to create a dedicated anti-corruption agency as a Chapter 9 institution supporting democracy. Calls for the establishment of such a dedicated agency has been central to civil society claims against the backdrop of the Glenister litigation given concerns around the appearance of increasingly endemic corruption in the country.

government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule, but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations. In other words, constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions. Two ideas are therefore fundamental to constitutionalism so defined. Firstly, the existence of certain limitations imposed on the state particularly in its relations with citizens, based on certain clearly defined set of important values. Secondly, the existence of a clearly defined mechanism for ensuring that the limitations on government are legally enforceable. In a broad sense, constitutionalism has a certain core, irreducible and possibly minimum content of values with a well defined process and procedural mechanisms to hold government accountable.⁵⁵

In summary therefore, this notion of constitutionalism, as embodied in the South African Constitution, and applicable to the litigation under discussion, encompasses various aspects which seek to place limitations on government power, ensure the protection of fundamental rights and ensure good governance characterised by checks and balances. Of particular relevance for this discussion, as recognised in the 1996 South African Constitution, modern constitutionalism finds expression through the separation of powers, an independent judiciary with broad yet limited powers of judicial review and a governance system which seeks to ensure protection of fundamental rights as spelled out in Chapter 2's Bill of Rights.

However, the South African Constitution does more than just purport to express liberal constitutionalism in its more recent and complete embodiment. The South African Constitution, and the various decision of the Constitutional Court as the final arbiter of what it requires, holds itself out as a transformative constitution, a constitution 'committed to social transformation' and a constitution that 'has set itself the mission to transform society in the public and private spheres.'⁵⁶ Davis and Klare note that the independence of the judiciary is significant to this process, as the Constitution 'confers significant powers and responsibilities upon South African courts to interrogate and renovate the common and customary law so as to promote the values expressed in the Bill of Rights.'⁵⁷ Such power is rooted in so-called development clauses of the Constitution, notably ss 39(2) and 8(3) which 'place South African judges under a duty to actively promote constitutional values, rather

⁵⁵ C.M. Fombad, *Post 1990 Constitutional Reforms*, supra note 48 at 5.

⁵⁶ Davis and Klare, *Transformative constitutionalism and the common and customary law*, 2010 *SAJHR* 403 at 404.

⁵⁷ *Id.* at 410.

than merely to assure the conformity of judge-made law to constitutional strictures.⁵⁸ This discussion will return to this notion of transformative constitutionism in the analysis below of the majority's legal reasoning in *Glenister 2*.

Modern constitutionalism, as noted above, with its distrust and suspicion of the arbitrary or unauthorised use of power, has viewed the separation of powers as one of the central organising principles to safeguard against these tendencies. When asked to review the constitutionality of proposed legislation, the courts are mindful that the separation of powers doctrine may provide limitations on what is permissible, or not, in terms their own powers of finding such legislation or policy unconstitutional. In terms of the litigation in *Glenister 1*, the separation of powers featured explicitly as a doctrine which the court felt tied its hands in granting the relief sought by the applicants.

As directed by Chief Justice Langa, upon handing down judgment in *Glenister 1*, the only issue for determination by the Court was whether, in view of the doctrine of separation of powers, is it permissible for the Court to consider the validity of Cabinet's decisions while the Bills were still before Parliament and the legislative process was still underway.⁵⁹ In the Court's unanimous judgment, it developed a test that addresses the proposition, notably, that the Court may only intervene in such circumstances to prevent a demonstrable material and irreversible harm such that no effective remedy would be available once the legislative process is complete.⁶⁰

Applying this test, the Court held that the applicant's failed to demonstrate such material and irreversible harm warranting judicial intervention. They held this primarily because, the factual basis of mass resignations from the DSO were inconclusive to the issue of irreversible harm to the fight against crime and corruption; and secondly, the Court more prominently noted a formalistic approach to separation of powers, since Parliament had yet to enact the Cabinet recommendations, the legislative process remained indeterminate and inconclusive and ultimately remained within Parliament's competence to conclude prior to judicial review.

⁵⁸ Id.

⁵⁹ *Hugh Glenister v President of the Republic of South Africa and 12 others*, Media summary, published in Judgments, 22 October 2008.

⁶⁰ Id.

Chief Justice Langa begins his discussion on separation of powers with the broad statement,

*it is now axiomatic that the doctrine of separation of powers is part of our constitutional design. Its inception in our constitutional jurisprudence can be traced back to Constitutional Principle VI, which is one of the principles which governed the drafting of our Constitution.*⁶¹

The then Chief Justice further notes that while there is no express mention of the separation of powers doctrine in the text of the 1996 Constitution, in the first certification judgment, *In re: Certification of the Constitution of the Republic of South Africa, 1996* the court stated that,

*[t]he principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping powers from one another. In this sense it anticipates the necessary and unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.*⁶²

This statement is telling in so far as it opens the way for the Court to develop a uniquely South African constitutional approach to a separation of powers noting some flexibility as opposed to a rigid doctrinal approach to complete separation. The Chief Justice contends that this is explicitly what the Court called for in the case of *De Lange v Smuts NO and Others*, where Ackermann J remarks,

*I have no doubt that over time our Courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power to completely that the government is unable to take timely measures in the public interest.*⁶³

⁶¹ *Glenister 1, supra note 2*, at 29. This principle proclaims '[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. See Schedule 4 to the Interim Constitution Act 200 of 1993 and *Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26.

⁶² *Id.* at 30.

⁶³ *Id.* at 31.

In order to understand the Court's approach to developing a 'distinctively South African model of separation of powers', Chief Justice Langa directs us to the text of the Constitution, notably section 85 which vests executive authority with the President, acting with the Cabinet, specifically section 85(2)(d) which vests constitutional authority with the Cabinet to prepare and initiate legislation and section 73(2) which gives a Cabinet member the authority to introduce Bill in Parliament.⁶⁴ The Chief Justice further notes that 'one of the issues the Cabinet will consider is whether the proposed legislation that it approves and initiates conforms to the Constitution'⁶⁵.

Turning to the role of the courts, the judgment in *Glenister 1* reminds us that within a constitutional democracy, the courts are 'the ultimate guardians of the Constitution' who, guided by the separation of powers doctrine, 'have a constitutional obligation to ensure that the exercise of power by the other branches of government occur within constitutional bounds.'⁶⁶ However even in such circumstances, 'courts must observe the limits of their powers.'⁶⁷

Turning to the Court's previous ruling in the *Doctors for Life* case, the judgment reiterates certain important points from that judgment. The Courts quotes the following from their previous judgment,

*The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings...Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government...This means that the Judiciary should not interfere in the process of other branches of government unless to do so is mandated by the Constitution.*⁶⁸

Having established the legal principles that separation of powers requires respect for the constitutional design, while acknowledging the role of the courts as the ultimate guardians of the rule of law, the judgment turns to identify the sole question of the *Glenister 1* litigation namely, 'whether it can ever be appropriate for this Court to intervene when draft legislation is being considered by Parliament, to set aside the

⁶⁴ Id. at 32.

⁶⁵ Id.

⁶⁶ Id. at 33.

⁶⁷ Id. at 33.

⁶⁸ Id. at 34.

decision of the executive to initiate the legislative process.⁶⁹ That question was then divided into three sub-questions,

- (i) *can courts ever intervene at this stage in the legislative process;*
- (ii) *if the answer to (i) is 'yes', what are the circumstances that would warrant intervention; and*
- (iii) *are these circumstances present in this case?*⁷⁰

In responding to these questions, the Court in *Glenister 1* came to the following conclusions. The cautious response to question one is a positive one that courts may intervene in the legislative process, but only under exceptional circumstances. The more definitive answer to question three as to whether the circumstances are present in this case is negative. The interesting discussion relates to the second question and to a consideration of the circumstances under which judicial intervention may be warranted.

With the crisp question presented as to what circumstances permit judicial intervention within the legislation process, the *Glenister 1* court highlights two guiding principles: firstly, the constitutional requirement that all branches of government act within the law and secondly, that courts refrain from interfering with legislative and executive 'autonomy' in the legislative process.⁷¹ Following these guiding principles, the Court further notes that the ordinary rule of jurisprudence is that 'courts do not intervene until the legislative process is complete.'⁷²

Noting that a clear test has not yet been developed by the Court, they looked to international jurisprudence for an indication of an appropriate test. Thus, the Court endorsed a test developed by the *Privy Council in Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and Another*, who held that a court in Hong Kong may intervene in the legislative process if there is 'no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object.'⁷³ In developing this test the Court notes that,

[i]ntervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her once the legislative process is

⁶⁹ Id. at 36.

⁷⁰ Id.

⁷¹ Id. at 42.

⁷² Id. at 43.

⁷³ Id.

*complete, as the unlawful conduct will have achieved its object in the course of the process. The applicant must show that the resultant harm will be material and irreversible. Such an approach takes account of the proper role of the court in our constitutional order. While duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and the legislature. This is a formidable burden facing the applicant.*⁷⁴

While indeed a formidable burden for applicants which proved unsuccessful in *Glenister 1*, the Court provides further guidance, again relying on comparative international jurisprudence, as to a circumstance where an applicant may succeed in seeking judicial intervention in the legislative process. In the decision of *Trinidad and Tobago Civil Rights Association v The Attorney-General of Trinidad and Tobago*, the High Court in this case intervened to prevent the enactment of a Bill that ‘proposed to abolish the jurisdiction of the court to consider public interest applications for judicial review’.⁷⁵

Applying the test ultimately approved by the Constitutional Court, the High Court in Trinidad and Tobago held that the legislation would impair the rights of the public to challenge legislation, causing ‘immediate prejudice and affecting the powers of the judiciary’⁷⁶, and therefore creating exceptional circumstances to warrant judicial intervention to avoid an irreversible and material harm. On appeal however, the Court of Appeal of Trinidad and Tobago applied the test of the Privy Council in Hong Kong to demonstrate that if the Bill was enacted, the courts would still have the power to declare it void if it offended the Constitution. The appellate court therefore found that the High Court erred in holding this as an exceptional case, as the consequences were not irreversible and because the issue of constitutionality could still be presented before the courts at a later stage.⁷⁷

Upon reflection, as to developing the adopted test further by giving content to the notion of ‘exception circumstances’, Chief Justice Langa found it unnecessary ‘to identify with precision’ what may constitute exceptional circumstances as this will depend on the facts of each case requiring a case-by-case determination.⁷⁸ He did however caution that prior to the enactment of a law, it would be extremely difficult to

⁷⁴ Id. at 44.

⁷⁵ Id. at 45.

⁷⁶ Id. at 45.

⁷⁷ Id. at 46.

⁷⁸ Id. at 47.

demonstrate an irreversible and material harm, because in matters of constitutionality, the Court will regardless have an opportunity to review the legislation once the legislative process is complete.⁷⁹

When assessing the various arguments put forth by the applicants as to why the Court should intervene to address constitutional problems with the draft legislation prior to the completion of the legislative process, the Court was unconvinced that such arguments met the test laid down by the Court. The Court dealt with each of the applicants' various argument which included: 1) the negative effects the draft legislation was having on the daily operations of the DSO or the Scorpions; 2) that members of the DSO were resigning due to the decision to initiate the new legislation; 3) that the President and Cabinet seek to disband the DSO and place such members within a dysfunctional unit of the SAPS because ANC members were under investigations; 4) that the decision to initiate the legislation arose out of the Polokwane Resolution with Cabinet acting under the dictates of the ruling party rather than in terms of its constitutional obligations; 5) that judicial action was required because they are the only body with the vested power in which to act given the legislature's relative marginalisation in what has become a one-party dominant state; and lastly 6) that the draft legislation posed a significant threat to the independence of the NPA and will thus cause harm to the structure of the Constitution.⁸⁰

To these various claims by the applicants, the Court generally had a very similar response that the applicants had failed to meet the test of establishing material and irreversible harm if the Court did not intervene at this stage. The opportunity for the Court to intervene, as the Court of Appeal in Trinidad and Tobago noted, can still take place once the legislation had been passed. Critical to Chief Justice's Langa's view was firstly a principled assessment that Parliament has certain obligations to ensure that the legislation it passes is constitutional and, more further, that Parliament still had a legislative process to complete which means that the final legislation it produces may differ from that prepared by Cabinet. The Courts' view can be summarised as follows,

⁷⁹ Id.

⁸⁰ Id. See at 50 to 56.

*[i]t would be institutionally inappropriate for this Court to intervene in the process of law-making on the assumption that Parliament would not observe its constitutional obligations. Again should the legislation as enacted be unconstitutional...appropriate relief can be obtained thereafter.*⁸¹

Given the benefit of hindsight, it remains an open question as to whether the Court's approach to the separation of powers doctrine and the test they adopt, as to when it is appropriate for a court to intervene in the legislative process, withstands critical scrutiny. Given that we remain with the constitutional challenges to the litigation some six years later in the form of *Glenister 3*, was whether the Court had enough factual information before it to assume that Parliament would not deviate substantially from what had been prepared by Cabinet and to assess whether the legislative process was really as open ended and indeterminate as the Court presumed.

Further, recognising the various constitutional and international law arguments that would have been led in *Glenister 1*, discussed below as dispositive to the question of constitutionality in *Glenister 2*, doubts remain as to why the Court was unable to get behind, or beyond, the formalistic doctrinal question of separation of powers, to the material facts pointing to irreversible harm and the substantive question as to the constitutionality of the proposed legislation as inconsistent with the rule of law and protection of fundamental rights. The Court, by setting the test at a relatively high and arguable abstract level of 'irreversible and material harm', relied substantially on the formality that the Court retains the authority to review the legislation at a later stage if its constitutionality remained an issue.

In so doing, the Court tied its hands when it came to looking at the constitutional issues that feature centrally in *Glenister 2* and that eventually persuaded a majority of the court as to the legislation's unconstitutionality. As will be discussed further below, when it comes to the Court's positioning of separation of powers and with regard to their understanding of judicial review, the *Glenister* litigation invited the Court to take a somewhat bolder and more coherent position as to the judicial role, not only as the final arbitrator of constitutional rights, but also as in intermediate arbitrator while various democratic process that remain on-going. With the benefit of greater foresight, the litigation in *Glenister 1* invited the Court to take a position on

⁸¹ Id. at 56.

judicial review that went beyond a formalistic understanding of separation of powers, and which holds out only a limited role for the Court coupled with a test that most applicants will find difficult to obtain under circumstances where the legislative process remains on-going.

Against the backdrop of what has come to follow, it is difficult on the one hand to be over critical of the Court's cautious approach. However, given this litigation is still on-going and South Africa's anti-corruption policing operations remains uncertain as to what is required following the *Glenister 2* judgment and Parliament's contested attempts to re-draft the impugned legislation, one is left to speculate as to the consequences of an alternative approach. Had a more visionary approach been adopted by the Court in *Glenister 1* that allowed the Court to interrogate the merits of the potential irreversible harm alleged, informed by an interpretive method of transformative constitutionalism that looked to the constitutional problems posed by the draft policies, the subsequent litigation could have been avoided.

Chapter 4. *Glenister 2*, the pivotal findings

Three years down the line from *Glenister 1*, the Court in *Glenister 2* was asked to review as unconstitutional the very same legislation that was in question in the prior litigation. The Court was again asked to review the legislation, now unhampered by the separation of powers doctrine, as the legislation in question was now duly passed into law by Parliament, the DSO was shut down, and new Directorate for Priority Crime Investigations (DPCI, or the Hawks) was established and operational.

4.1. The imperative of fighting corruption

Pivotal to Moseneke DCJ and Cameron J's majority decision in *Glenister 2* is an extensive discussion on the need and rationale for fighting corruption.⁸² It is the very positioning of the concept of corruption against the general schema of the Constitution, and in particular the Bill of Rights, that is the lynchpin of the majority decision. In framing their judgement the majority note the following:

*There can be no gainsaying that corruption threatens to fell at the knees of virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, promote, and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.*⁸³

The majority go on to note that the preamble to *the Prevention and Combating of Corrupt Act* provides further recital stating that 'corruption and related corrupt activities undermine rights; the credibility of governments; the institutions and values of democracy; and ethical values and morality; and jeopardizes the rule of law.'⁸⁴

It is worth mentioning in brief that there is previous constitutional adjudication to support the various propositions raised above. Notably in *S v Shaik and Others*⁸⁵, the Court cautioned that corruption is 'antithetical to the founding values of our

⁸² See *Glenister 2*, *supra* note 1, at para 166.

⁸³ *Id.*

⁸⁴ *Id.* at para 170.

⁸⁵ [2008] ZACC 7.

constitutional order.⁸⁶ Further in the case of *South African Association of Personal Injury Lawyers v Heath and Others (SAAPIL)*⁸⁷, the court held,

*[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms.*⁸⁸

Presupposing the answer that the Constitution no less than requires the South African state to establish and maintain an independent corruption fighting unit, the majority then poses the following question which frames the remainder of their compelling and far-reaching opinion – ‘what is the source of the obligation to establish and maintain a corruption-fighting unit, and which structural and operational attributes must it have?’⁸⁹

4.2. The obligation to establish and maintain a corruption-fighting unit

The response to the question posed by the court is unequivocal – ‘the Constitution is the primal source for the duty of the state to fight corruption.’⁹⁰ Thus, through this encompassing pronouncement, the Court ensures the constitutional imperative of fighting corruption. While noting that there is no explicit or ‘express terms’ that provide definitional cover to the duty, the majority relies on an analysis that looks to the general schema of the Constitution flowing from the requirement in 7(2) to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’ for imposing the duty on the state.⁹¹ What remains far-reaching about the majority judgement is not only that they infer this duty from the general schema of the Constitution, where the word ‘corruption’ does not appear once in the text, but that they also give content to what this duty entails – namely, ‘to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices.’⁹²

While the word ‘corruption’ does not appear in the constitutional text, let alone an explicit statement that it must be fought, it is clear for the majority from the

⁸⁶ *Glenister 2*, *supra* note 1, at para 172.

⁸⁷ [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC)

⁸⁸ *Glenister 2*, *supra* note 1, at para 172 quoting *SAAPIL* at para 4.

⁸⁹ *Id.* at para 174.

⁹⁰ *Id.* at para 175.

⁹¹ *Id.*

⁹² *Id.*

Constitution's language, and various constitutional provisions, that the concept of corruption is lurking in the document almost as an antithetical set of practices in contradistinction to various constitutional principles and imperatives. Thus for instance, as the majority notes, the Constitution speaks about the requirements of an 'accountable, responsive and open' government.⁹³ Further the Constitution states that public administration must be governed by high standards of 'ethics, efficiency and must use public resources in an economic and effective manner.'⁹⁴

In section 215 of the Constitution, the requirements that public finance, budgetary and expenditure processes be underpinned by openness, accountability and effective financial management of the economy.⁹⁵ In section 217, similar requirements are applied to public procurement⁹⁶, when organs of state contract for goods and services.⁹⁷

These various provisions must be read with section 7(2) which as the majority notes, 'casts a special duty upon the state.'⁹⁸ Notably 7(2) requires the state to uphold and promote the Bill of Rights as framed by the majority, against the backdrop of the general schema of the Constitution, allowing corruption to go unchecked is inimical to this duty.⁹⁹ As noted above, the majority however is not satisfied with simply identifying this duty and not providing it with any substantive content. The majority goes further to say that the duty to combat corruption in terms of the Constitution requires 'an integrated and comprehensive response.'¹⁰⁰

Part of this response entails ensuring that whatever entity established by the state is sufficiently independent. In order to support their view on the requirements of 'structural and operational autonomy'¹⁰¹, the majority rely on an extensive discussion

⁹³ Id. at para 176. See also, The Constitution of the Republic of South Africa, 1996 [hereinafter the Constitution] section 195.

⁹⁴ Id.

⁹⁵ Id. See Constitution, *supra* note 93 at section 215.

⁹⁶ It is worth noting the deleterious effects of corruption in the area of procurement involving the annual loss of millions of Rands of revenue to the state through fraudulent practices.

⁹⁷ *Glenister 2*, *supra* note 1, at para 176.

⁹⁸ Id. at para 177.

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Id. at para 188. See the report referred to in the majority judgement, *Organisation for Economic Co-operation and Development (OECD): Specialised Anti-corruption Institutions: Review of Models*, www.oecd.org/dataoecd/7/4/39971975.pdf.

of international law and South Africa's obligations as signatory of the United National Convention Against Corruption (UNCAC or the Convention).

For Ngcobo CJ, section 7(2), while placing obligations on the state, leaves open the choices the state can make based upon 'the nature of the right involved, the availability of government resources and whether there are other provisions of the Constitution that spell out how right in question must protected or given effect.'¹⁰² It is worth noting that Ngcobo CJ, in his minority opinion concedes that the constitution obliges the state to 'take effective measures to fight corruption.'¹⁰³ However, he is not prepared to go to the lengths of the majority and 'narrowly construe the options available to the state in discharging this obligation.'¹⁰⁴ More specifically, Ngcobo disputes that the constitutional obligation requires the establishment of an independent anti-corruption unit at all. He opines 'the Constitution is not prescriptive, however, as to the specific mechanisms through which corruption must be rooted out, and does not explicitly require the establishment of an independent anti-corruption unit,' as an instrumental expression of the commitment to take effective measures.¹⁰⁵

4.3. South Africa's anti corruption obligations under international law

South Africa signed the UNCAC on 9 December 2003 and ratified it on 22 November 2004.¹⁰⁶ According to an independent review of South Africa's accession to the Convention, South Africa has 'substantially transformed UNCAC provisions into legal requirements both in terms of national laws and action programmes.'¹⁰⁷

Critical for the majority in interpreting South Africa's constitutional imperative to fight corruption is their understanding of section 39(1)(b) read with section 231 of the Constitution.¹⁰⁸ Section 39(1)(b) states that 'when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.'¹⁰⁹ Section 231(4) is of particular significance for the majority as it states the following:

¹⁰² *Glenister 2*, supra note 1, at para 106.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at para 84.

¹⁰⁵ *Id.* at para 84 and 113.

¹⁰⁶ See www.u4.no/pdf/?file=/helpdesk/helpdesk/queries/query115.pdf accessed on 11 May 2011.

¹⁰⁷ *Id.*

¹⁰⁸ *Glenister 2*, supra note 1, at para 179.

¹⁰⁹ *Id.*

*Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*¹¹⁰

The majority note that a number of international agreements now ‘bind’ the Republic¹¹¹ and that UNCAC in particular imposes an obligation ‘on each state party to ensure the existence of a body or bodies tasked with the prevention of corruption.’¹¹² Central to the obligations imposed by UNCAC, not discussed at length in the judgement relate to Article 36 of the Convention entitled ‘*Specialized Authorities*.’¹¹³ Article 36 of UNCAC reads as follows:

*Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.*¹¹⁴

While somewhat prescriptive, the actual schema envisioned by UNCAC’s Article 36 remains undefined, covered largely under the phrase ‘in accordance with the fundamental principles of the legal system of the State Party.’¹¹⁵ In particular, the issue of independence is raised, but it is not defined nor given any fundamental content, modified simply by the term ‘necessary.’¹¹⁶

The majority address this requirement by focusing on the issues of political oversight and accountability in what they describe as ensuring the anti corruption body is insulated ‘from a degree of management by political actors that threatens imminently to stifle the independent functioning of the unit.’¹¹⁷ The Court’s use of international law

¹¹⁰ The Constitution, *supra* note 93 at section 231(4).

¹¹¹ These include besides the UNCAC, the Southern African Development Community (SADC) Protocol on Combating Illicit Drugs and the African Union Convention on Combating Corruption.

¹¹² *Id.* at para 183.

¹¹³ United National Convention Against Corruption, 2004.

¹¹⁴ *Id.* at Article 36.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Glenister 2*, *supra* note 1, at para 216.

and how it features broadly in terms of South Africa's constitutional schema is discussed below in greater detail.

4.4. The constitutional requirement of independence

As applied to the facts of the case, the Court entertained the question of whether the newly established DPCI or 'the Hawks', as a creature of statute, have 'the operational and structural attributes of independence.'¹¹⁸ The majority conclude somewhat summarily, but also by way of comparison to the Scorpions, that the Hawks 'lack the degree of independence arising from the constitutional duty on the state to protect and fulfil the rights in the Bill of Rights'¹¹⁹ namely the state's 7(2) obligations.

The majority come to this conclusion for a number of reasons. Most notably, they conclude that the Hawks are 'insufficiently insulated from political influence in its structure and functioning.'¹²⁰ Fundamentally, the question of political oversight is a fault line in the decision between the majority and minority opinions. For the majority, their 'gravest disquiet' with the structure of the Hawks arises in relation to the fact the statute provides for a Ministerial Committee made up primarily of justice and security cluster Ministers who 'may determine guidelines in respect to the functioning of the DPCI.'¹²¹ It is clear from a reading of the case that the majority walk a thin line in this part of their judgement as the question of the operational structure of the Hawks is clearly a political question on which is difficult for a court to provide clear content.

What concerns the Court is the fact that the head of the Hawks, a Deputy National Commissioner of the SAPS, is accountable to the National Commissioner, whose post lacks security of tenure, as opposed to the National Director of Public Prosecutions in the case of the Scorpions.¹²² Further, the power of the Ministerial Committee to issue policy guidelines, in the view of the majority, creates a plain risk of 'executive and political influence on investigations and on the entity's functioning.'¹²³

¹¹⁸ Id at para 208.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Id at para 228.

¹²² Id at para 229.

¹²³ Id.

The majority's judgment must be understood against the backdrop of recent political events including the fall out around then National Director of Public Prosecutions Vusi Pikoli's attempt to arrest the then National Commissioner of Police Jackie Selebi. Pikoli was eventually suspended around the incident, and the alleged interference by then President Mbeki was one of the issues dealt with by the Ginwala Commission of Inquiry, wherein it was claimed that Mbeki's actions contravened the independence enjoyed by the National Director as per the NPA Act.¹²⁴ The Ginwala Commission ultimately cleared President Mbeki of any wrong-doing¹²⁵ but one can hypothesize as to whether these events informed policy decisions as regards the functioning of the Ministerial Committee and the prominence they have in oversight over the Hawks.

For Ngcobo CJ, the question of independence as regards the functioning of the Hawks does not fall foul of the Constitution. Notably, he argues that the legislation creating the Hawks has important safeguards to ensure independence. As regard to the Ministerial Committee's power to make policy guidelines, Ngcobo reads chapter 6A of the SAPS Amendment Act to ensure that applications of policy guidelines must ensure the Hawks have 'the necessary independence to perform its functions.'¹²⁶ The then Chief Justice notes that if for some reason such policy guidelines fail to comply with this requirement, Parliament in the exercise of its power to approve policy guidelines, 'will no doubt not approve them.'¹²⁷

One wonders however if operationally this would in fact be the case. The more political actors involved in determining the operational policy guidelines of any anti corruption agency, whether it be a Ministerial Committee or Parliament, must raise concerns around autonomy and effectiveness as it is likely that such Ministers or MPs could be the subject of anti corruption investigations. For the majority, the power to formulate policy guidelines as outlined in the statute places no limits on the power of the Ministerial Committee and is 'inimical to independence.'¹²⁸

As for the majority's contention that the Ministerial Committee is a political body that is likely to undermine the effectiveness of the Hawks, Ngcobo CJ rejects this

¹²⁴ See generally, Pikoli and Wiener, *My Second Initiation the Memoir of Vusi Pikoli* [Picador Africa], 2013

¹²⁵ See 'Ginwala absolves Mbeki,' <http://mg.co.za/article/2008-12-05-ginwala-absolves-mbeki> accessed on May 12, 2011

¹²⁶ *Glenister 2*, supra note 1, at para 216.

¹²⁷ *Id.* at para 138.

¹²⁸ *Id.* at para 234.

contention in strong language as ‘highly speculative’ and without ‘factual basis.’¹²⁹ The various Ministries involved including, Police, Finance, Home Affairs and Intelligence, for the Chief Justice, have an important role to play in the fight against corruption, and the role and functioning of such Ministries, in support of the work of the Hawks, for Ngcobo ‘is the way our constitutional democracy is structured.’¹³⁰

In summary, for Ngcobo, the issue of oversight is a political question for the legislature to determine.¹³¹ Mindful of the institutional role of the court, ‘the judicial role’ reminds the Chief Justice, ‘is limited to determining whether the agency under consideration complies with the Constitution.’¹³² He goes on to conclude although ‘that there is more than one permissible way of securing the structural and operational autonomy of the DPCI [this] does not make the choice of one rather than the other unconstitutional.’¹³³

4.5. Additional requirements to ensure adequate independence

The *Glenister 2* majority hold that the expressed language of international conventions such as the UNCAC, when read with the constitutional scheme required by the Bill of Rights, ensures the need for a sufficiently independent anti corruption unit. The majority however add further considerations to the requirement of independence besides political oversight such as, the perception of independence from the public, adequate security of tenure of the Head and remuneration for DCPI member.

On the issue of perceptions, the Court notes that in its prior decision in *S v Van Rooyen*¹³⁴ it stated that ‘the appearance or perception of independence plays an important role’ in evaluating whether independence in fact exists.¹³⁵ Public confidence, the majority go on to hold, is indispensable ‘in mechanisms that are designed to secure independence.’¹³⁶ Lurking behind these pronouncements by the Court relating to the public perception of an institution’s independence, is the political

¹²⁹ Id at para 142.

¹³⁰ Id.

¹³¹ Id at para 146.

¹³² Id.

¹³³ Id.

¹³⁴ [2002] ZACC 8. *Van Rooyen* endorses the view that the test for independence should include public perception.

¹³⁵ *Glenister 2*, supra note 1, at para 207.

¹³⁶ Id.

context to this case, namely the manner in which the Scorpions were disbanded and the perception in numerous quarters that it was a politically motivated act to neutralise investigations into members of the ruling party.

In addition to the issue of public perception, for the majority, the absence of employment security guarantees, ensuring appointments are sufficiently shielded from political influence, as well as statutorily secured remuneration levels further compromise the Hawks independence and does not compare favourably to regime under the Scorpions.¹³⁷ On the issue of term limits, the majority note that the National Director of Public Prosecutions does not have a renewable term as opposed to the SAPS National Commissioner.¹³⁸

In addition, a renewable term of office, note the majority somewhat speculatively, 'heightens the risk that the office-holder may be vulnerable to political and other pressure.'¹³⁹ As noted, the further lack of provisions in the new statutory scheme related to remuneration levels and security of employment are indicative of insufficient protections and that the Hawks structure does not compare favourably to the arrangement under the Scorpions on the issue of independence.¹⁴⁰ The absence of secured remunerations levels as guaranteed by statute the majority contend, 'gives rise to problems similar to those occasioned by a lack of secure employment tenure... the absence of secured remuneration levels is indicative of the lower status of the new entity' when compared to the Scorpions.¹⁴¹

4.6. *Glenister 2* in summary

At its core the majority hold the following, 'that the statutory structure creating the DPCI ('Hawks') offends the constitutional obligation resting on Parliament to create an independent anti-corruption entity, which is both intrinsic to the Constitution itself and which Parliament assumed when it approved the relevant international instruments, including the UN Convention.'¹⁴² While the majority are at pains to say 'they do not prescribe what the obligation as defined requires, they do conclude

¹³⁷ Id at para 249.

¹³⁸ Id at para 223.

¹³⁹ Id.

¹⁴⁰ Id at para 227.

¹⁴¹ Id.

¹⁴² Id at para 248.

however that ‘structural and operational’ independence is required to fulfil the obligation and the attributes of such independence should include no less than what was in existence under the disbanded Scorpions. Such attributes on independence include specially secured conditions of employment of members of the anti corruption entity and appropriate but not over-reaching oversight mechanism from the executive.¹⁴³

The remedy provided by the majority is ‘a declaration of constitutional invalidity of Chapter 6A of the South African Police Service Act 68 of 1995 as inconsistent with the Constitution to the extent it fails to secure an adequate degree of independence for the Directorate of Priority Crime Investigation.’¹⁴⁴ Such order was suspended for 18 months in order to give Parliament the opportunity to remedy the defect.¹⁴⁵

To further contextualise the far-reaching nature of the majority judgment, it is worth contrasting it with Ngcobo CJ’s minority judgement which holds that ‘the DPCI enjoys an adequate level of structural and operational autonomy which is secured through institutional and legal mechanisms aimed at preventing undue political interference.’¹⁴⁶ There are numerous other issues of constitutional relevance for which there was little dispute between majority and minority judgements. For instance, the applicants applied for direct access to the Constitutional Court on the allegation that Parliament failed to facilitate public involvement in the legislation.¹⁴⁷ This claim on the lack of public involvement was dismissed by Ngcobo CJ based primarily upon an earlier judgement in the *Doctors for Life*¹⁴⁸ and *Matatiele II*¹⁴⁹ cases, where the application was not brought in a timely manner. In *Doctors for Life*, the Court held ‘applicants who have not pursued their cases timeously in this Court may well be denied relief.’¹⁵⁰ This finding was not disputed by the majority judgment. Further, challenges to the impugned legislation based upon rationality dismissed by

¹⁴³ Id.

¹⁴⁴ Id at para 251.

¹⁴⁵ Id.

¹⁴⁶ Id at para 156.

¹⁴⁷ Id at para 23.

¹⁴⁸ *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11 [hereinafter, *Doctors for Life*].

¹⁴⁹ *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 12.

¹⁵⁰ *Glenister 2*, supra note 1, at [26] quoting *Doctors for Life*, supra n. 76.

the Court. Further, applicants contended that the legislation violated provisions of section 179 of the Constitution by undermining the independence of the NPA.¹⁵¹

¹⁵¹ See Id at para 71.

Chapter 5. The internationalisation of constitutional law

A notable feature to the *Glenister* decisions both 1 and 2, was the prominent manner in which international law featured in the judgments. One of the distinctive legal developments in the latter half of the twentieth century, and in particular during the past two decades, with the broad agreement by state parties to various international treaties and conventions, has been the so-called ‘internationalisation of constitutional law.’¹⁵² As Fombad has argued, particularly since the end of the Cold War, ‘the capacity of national constitutions to serve as the exclusive framework for self-governing practices of the national community has progressively diminished.’¹⁵³ The *Glenister* case, and in particular the interpretative approach adopted by the majority decision in *Glenister 2*, as Fombad argues, is ‘perhaps one of the best examples of the far-reaching potential of internationalisation of constitutionalism.’¹⁵⁴

As discussed in brief above, the manner in which the majority judgment in *Glenister 2* frames the relationship between international law and South Africa’s constitutional schema is fundamental to the conclusions they reach about what is imperative in terms of the government’s obligations to fight corruption. In this regard, it worth drawing attention to the four provisions, identified in the majority judgment, that ‘regulate’ the impact of international law in South Africa.¹⁵⁵

These various provisions are: 1) Section 39(1)(b) which concerns the impact of international law on the interpretation of the Bill of Rights; 2) Section 231 which concerns the status of international agreements; 3) Section 232 dealing with customary international law providing that it ‘is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament; and 4) Section 233 dealing with the application of international law and providing that when interpreting any legislation, ‘every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’.¹⁵⁶ Having identified these four sections, the majority goes on to assert that their judgment is primarily concerned with the first and

¹⁵² CM Fombad, *Internationalisation of Constitutional Law and Constitutionalism in Africa* (2012) 60 Am. J. Comp Law 439.

¹⁵³ *Id* at 440.

¹⁵⁴ *Id* at 26.

¹⁵⁵ *Glenister 2*, *supra* note 1 at para 179.

¹⁵⁶ *Id*. See generally, *The Constitution*, *supra* note 93..

second provisions, namely section 39(1)(b) and section 231 which shall be reviewed below in some detail.

The majority first turn their attention to section 231. In section 231(2) the Constitution states that '[a]n international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)'.¹⁵⁷ Section 231(3) notes the effect of 'international agreements of a technical, administrative or executive nature', entered into the by the executive without approval by both houses of Parliament, but which bind the Republic nevertheless once tabled in Parliament within a reasonable time.¹⁵⁸ Section 231(4) notes that '[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'¹⁵⁹.

The majority judgment notes that the power of these provisions is not derived from the fact rights and obligations contained in international agreement are necessarily transformed into 'home-grown constitutional rights and obligations.'¹⁶⁰ What is critical to note here is that, in and of its self, an international agreement incorporated into South Africa law does not necessarily transform the rights and obligations contained therein into constitutional rights and obligations. Rather, the process of incorporating international agreements into South African law, merely create ordinary domestic statutory obligations.¹⁶¹ However, the majority caution that this understanding of the status of international agreements as ordinary statutory law does not mean that such agreements do not have *constitutional effects*. Notably, read in conjunction with section 7(2) exhorting the state 'to respect, protect, promote and fulfil the rights in the Bills of Rights' the binding effect of international agreements places certain positive obligations with 'significant impacts in delineating the state's obligations...'¹⁶²

¹⁵⁷ The Constitution, *supra* note 93 at s.231.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Glenister 2* at para 181.

¹⁶¹ *Id.*

¹⁶² *Id.* at para 182.

Based on this interpretative reading of section 231, this part of the majority judgment proceeds by looking at various international agreements on combating corruption that currently 'bind' the Republic including: 1) the United Nations Convention Against Corruption; 2) the Southern African Development Community Protocol on Combating Illicit Drug; 3) and the African Union Convention. The Organisation for Economic Cooperation and Development (OECD) report on specialised anti-corruption institutions, while not binding, is also noted as an important interpretative document that gives content to the various obligations in the conventions cited.¹⁶³

Reading section 231 in conjunction with section 7(2) in the Bill of Rights, the majority then turn to section 39(1)(b) of the Constitution which provides the imperative that when interpreting the Bill of Rights, a court 'must consider international law.'¹⁶⁴ In understanding the broad interpretative implications of section 39, the court deploys unequivocal language to state the following and arrive at a conclusion which forms the basis of the their *ratio*,

[t]he impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? The question must be answered in part by considering international law. And international law, through the interlocking grid of conventions, agreements and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with necessary independence... That is a duty this country undertook when it acceded to these international agreements. And it is an obligation that becomes binding on the Republic, in the international sphere, when the National Assembly and the NCOP by resolution adopted them, more especially the UN Convention... That the Republic is bound by international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) requires.¹⁶⁵

The approach of the majority judgment has been described in a recent academic analysis by Tuovinen as 'highly ambitious' and one 'that is marked by a number of problems.'¹⁶⁶ Central to Tuovinen's critique is the purported 'questionable' distinction adopted by the majority decision between 'adopting international law into the

¹⁶³ See *Id.* at [183] – [188].

¹⁶⁴ *Id.* at [192]. See also, the Constitution, *supra* note 93 at s. 39.

¹⁶⁵ *Id.* at [192] – [194].

¹⁶⁶ J Tuovinen, *The Role of International Law in Constitutional Adjudication: Glenister v President of the Republic of South Africa* (2013) 130 *SALJ* at 664.

constitutional schema and ‘incorporating international law into domestic law.’¹⁶⁷ Part of the challenge for Tuovinen is that the majority decision uses a variety of terms including ‘adopting’, ‘appropriating’, ‘drawing in’ and ‘incorporating’ to describe the place of international norms within the constitutional schema without clearly differentiating the meaning of these terms. This leaves the reader with some ambiguity as how the majority doctrinally conceives the role of international law within South Africa’s constitutional dispensation.¹⁶⁸

This critique goes further by arguing that the majority decision positions international law differently to how it has featured in previous case law.¹⁶⁹ In *AZAPO v President of the Republic of South Africa*¹⁷⁰, the Court defined international law as performing merely ‘a guiding function’, and as such serving as an ‘interpretative’, as opposed to an ‘authoritative’ function.¹⁷¹ In a departure from a faithful reliance upon a textual analysis of the majority decision, Tuovinen relies upon ‘extra-curial’ remarks by Cameron J, who in a lecture at Duke University in 2011, after giving judgment in *Glenister 2*, remarked that the case ‘goes further than previous case law’ by ‘cutting through the theoretical divide between monism and dualism and draw[ing] international law directly into the domestic sphere.’¹⁷²

Ultimately, Tuovinen’s textual critique, derived from the majority’s positioning of international law, argues that the majority decision conflates the interpretative and authoritative functions of international law within South Africa’s constitutional schema, such that the majority decision gives international law ‘formal authority’ while providing justification for its use ‘in terms of the interpretative mandate found in section 39(1)(b).’¹⁷³ This critique argues that the majority ultimately provides incongruous reasons to the relevant constitutional provisions for its positioning of international law in a manner which is ‘contradictory and untenable.’¹⁷⁴

Turning to the minority decision, Tuovinen critiques the minority judgment that opines that 1) reliance upon international law in this case amounts to an ‘unwarranted

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 665.

¹⁶⁹ *Id.*

¹⁷⁰ 1996 (4) SA 672 CC.

¹⁷¹ Tuovinen *supra* note 166 at 665.

¹⁷² *Id.* at 665.

¹⁷³ *Id.* at 666.

¹⁷⁴ *Id.*

incorporation’ of international law ‘through the back door’ and 2) international law has no bearing on ‘the interpretation of the obligations found in section 7(2).’¹⁷⁵ As Tuovinen’s textual critique above notes, the minority ultimately disposes of the use of international law as an interpretive tool, finding that the international law in question – the various anti-corruption conventions – seemingly bear no connection to the Bill of Rights that could give rise to an interpretative connection.’¹⁷⁶ The implication of such an approach is such that international law is ‘only applicable to the substantive provisions of the Bill of Rights.’¹⁷⁷

In summary, the Tuovinen’s textual critique of the judgments in *Glenister 2* argues that both judgments fail to draw appropriate distinctions between formal and persuasive relationship between the Bill of Rights and international law and that the appropriate interpretation of section 39(1)(b) is to use international law to evaluate, or ‘consider’ its relevant provisions and ‘give reasons for either adopting or rejecting the solutions proposed by international law.’¹⁷⁸ The author further argues that ‘[i]nternational law ought to be considered as part of the substantive reasoning a court undertakes when it interprets the Bill of Rights.’¹⁷⁹ The author concludes, particularly as regards to the majority decision, that such decision could be based upon a ‘more solid jurisdictional foundation’ had it dealt with the substantial reasons more explicitly and in detail in the judgment regarding the use and positioning of international law.¹⁸⁰

While there is much in the Tuovinen’s textual critique which points to possible areas of concern regarding the majority judgment’s positioning of international law as either authoritative or persuasive, it is unclear whether this critique, which is concerned with substantive reasons for the Court’s conclusions, would ultimately result in a different conclusion had the Court adopted the suggested approach. What remains to be seen, and something which will deserve attention going forward, is the extent to which the Court in future cases will be able to rely upon as determinative the majority’s reasoning in *Glenister 2*, to find application of international law within South Africa’s constitutional schema.

¹⁷⁵ Id. at 667.

¹⁷⁶ Id. at 668

¹⁷⁷ Id.

¹⁷⁸ Id. at 669.

¹⁷⁹ Id.

¹⁸⁰ Id. at 671.

Chapter 6. Weak-form judicial review and democratic experimentalism in South Africa's constitutional dialogue

While the reach of the majority decision in *Glenister 2* may be viewed by some as a form of judicial activism, on closer scrutiny, the Court was careful to craft a remedy that retains the ultimate authority for policy formulation and determination with the government's so-called political branches, namely the executive and the legislature. Much of the debate around the appropriateness of judicial review, stemming from a somewhat rigid and perhaps antiquated notion of separation of powers, has been between notions of judicial activism on the one hand versus judicial restraint on the other.¹⁸¹ In an expansive article which seeks to render problematic this stark dichotomy, Tushnet identifies a new distinction between so-called *strong-form judicial review* as opposed to *weak-form judicial review*, identifying the South African Constitutional Court's approach in the case of *Government of South Africa v. Grootboom*¹⁸² as a variant of weak-form judicial review.¹⁸³ Following Tushnet's position, I will argue that the majority approach to judicial review in *Glenister 2* follows the Court's approach in *Grootboom* consistent with the notion of weak-form judicial review described by Tushnet.

Before examining Tushnet's thesis, it will be useful to understand the purpose of judicial review and begin to explore the parameters of the judicial restraint versus judicial activism dichotomy. It is important to do this in order to establish the limits of this debate as we seek to understand how the majority in *Glenister 2* approach judicial review and whether more accurate descriptors than restraint versus activism can help us unlock the Court's method. Broadly speaking, within the doctrine of constitutionalism and under a constitutional democracy such as South Africa's, the judiciary is tasked through judicial review to review legislation or administrative action to ensure its 'consonance with constitutional rights.'¹⁸⁴ The legislation or action under scrutiny must not be characterised by 'unjust discrimination and arbitrary deprivations'¹⁸⁵ and ultimately is reviewed to ensure it is faithful specifically

¹⁸¹ See P Lenta, Judicial Restraint and Overreach (2004) 20 *SAJHR* 544.

¹⁸² *Government of South Africa v Grootboom*, 2000 (11) BCLR 1169.

¹⁸³ See M Tushnet, *supra* note 44 at 822.

¹⁸⁴ Lenta, *supra* note 181 at 545.

¹⁸⁵ *Id.*

to the constitution and in general to the rule of law. Judicial review, in and of itself, argues Lenta,

*expresses a distrust of elected representatives and acts as a precaution against abuses of the initial investment of trust. Viewed from the perspective of democracy, this sort of heading might seem paradoxical, since it involves the potential removal of some of the power invested in elected representatives and the concomitant displacement of power to an unelected and unaccountable judiciary which has the power to countermand legislative enactments. Most modern liberals view judicial review as a necessary check on the discretion of government and, despite their differences, support a vigorous constitutional scrutiny where the infringement of rights is alleged. But in interpreting the Constitution and in applying rights to particular cases, judges also exercise discretion in deciding issues that are the subject of widespread and reasonable disagreement.*¹⁸⁶

The notion of judicial restraint, for purposes of this analysis, flows squarely from the doctrine of separation of powers and a recognition of the respect courts give to other spheres of government when reviewing their actions, which in the case under discussion refers to the preparation of legislative policy by the executive (Cabinet) and the deliberation and passing of such policy into statute by the legislature (Parliament). Courts may defer to the choices made by the executive and legislature for any number of reasons. As Lenta argues, courts generally exercise restraint by deploying a variety of legal reasoning techniques including:

*ripeness (refusing to hear a matter until the applicant has exhausted all other remedies; standing (refusal to proceed unless the applicant has a close personal interest in the outcome); strict adherence to precedent; the presumption of constitutional validity of statutes and restricted interpretation of constitutional rights among others.*¹⁸⁷

Judicial activism on the other hand, is a somewhat looser term which seeks to recognise that within a vibrant constitutional democracy such as South Africa's, the judiciary has a broad degree of discretion as the final arbitrators of the Constitution to interpret, and give content to, the parameters of rights and guard against tyranny. Under such a view, courts are not seen to be hindered by a notion of working under a democratic deficit because they are unelected. Rather, courts are only counter-majoritarian when they decide against the will of the elected executive and

¹⁸⁶ Id. at 545.

¹⁸⁷ Id. At 547 footnote 8.

legislature with no less legitimacy than these spheres of government given the vital role they are given within the constitutional schema.¹⁸⁸

Turning to Tushnet's argument, he contends that in terms of the work that the judiciary does in modern constitutional democracies such as South Africa, and how they understand their endeavour, the debate between activism and restraint may be misleading.¹⁸⁹ Broadly defined, the space in between the concepts of restraint versus activism is what Tushnet describes as 'strong-form judicial review.' He sees the structure of the debate between restraint and activism as returning to a somewhat antiquated distinction between parliamentary supremacy and constrained parliamentarism.¹⁹⁰ Under a system of parliamentary supremacy, which characterised apartheid South Africa, legislatures were endowed with legal authority to enact whatever they wanted and had 'the practical power to do so because the political cultures in which they were located did not acknowledge that legislative authority was under moral, if not political limits.'¹⁹¹ Constrained parliamentarism on the other hand, characterised by principles of constitutionalism identified above, provide courts with a democratic and interpretative role and function that is derived directly from a supreme textual source, namely the constitution.

For Tushnet, the parameters of the debate going forward therefore lie in the distinction over 'what weight should be given to the legislature's resolution of the interpretive question.'¹⁹² More specifically, on the one hand are proponents of a restraint-type view, who argue that courts should presume legislators have attempted to discern and act within permissible constitutional limits. On the other hand, are those who propose a more sceptical view towards legislators that doubts 'the seriousness with which legislatures [take] their interpretive obligations', arguing that courts are 'required to arrive at interpretive judgments independent of prior judgments by other political actors on the same question.'¹⁹³

This leads Tushnet to postulate the notion of 'weak-form judicial review' as an emerging phenomenon within modern constrained parliamentary systems. Weak-

¹⁸⁸ See *Id* at 549 referring to R Dworkin's *Freedom's Law* (1996) 1-35.

¹⁸⁹ Tushnet, *supra* note 44 at 815.

¹⁹⁰ *Id* at 816.

¹⁹¹ *Id*.

¹⁹² *Id* at 817.

¹⁹³ *Id*.

form judicial review may have numerous variants, but within what has been described elsewhere as ‘the new Commonwealth model’ it narrowly instructs courts to ‘construe legislation whenever fairly possible to be consistent with constitutional norms,’ without providing courts with the power to actually displace such legislation that once interpreted is found to be inconsistent with such norms.¹⁹⁴ An alternative more ‘stronger’ version of such review can be seen in the British Human Rights Act of 1998 with ‘directs courts to interpret statutes in a manner that makes them consistent with the European Convention on Human Rights, if such a construction is possible,’ and that ‘Courts unable to do so may declare the statute incompatible with the Convention’.¹⁹⁵ In terms of what Tushnet understands as taking place within South African constitutional jurisprudence, he identifies yet another variant of weak-form judicial review to describe the Court’s interpretative approach to constitutional rights in the case of *Government of South Africa v Grootboom*.¹⁹⁶

Tushnet extends the notion of weak-form judicial review to apply Dorf and Sabel’s theory of ‘democratic experimentalism’.¹⁹⁷ Dorf and Sabel, according to Tushnet, ‘treat approaches like that taken in *Grootboom* as exemplifying a distinctive variant of weak-form judicial review, part of a group of legal techniques they call democratic experimentalism.’¹⁹⁸

As Tushnet explains,

A democratic experimentalist court begins with a constitutional principle stated at a reasonably high level of abstraction, such as the South African provision purporting to guarantee access to adequate housing. It begins the experimentalist project by offering an incomplete specification of the principle’s meaning in a particular context... The court then asks the legislators and executive officials to develop and begin to implement plans that have a reasonable prospect of fulfilling the incompletely specified constitutional requirement. The next step involves examining the results of the experiment. Perhaps legislators and executive officials will be able to demonstrate that their programs are moving in the right direction. A democratic experimentalist court might respond by fleshing out the constitutional requirement a bit more, specifying in somewhat more detail what the government must do to fulfil its broad obligation to ensure access to adequate housing. Or, perhaps

¹⁹⁴ Id.

¹⁹⁵ Id at 821.

¹⁹⁶ 2000 (11) BCLR 1169.

¹⁹⁷ Tushnet, *supra* note 44 at 822.

¹⁹⁸ Id.

*legislators and executive officials will be able to show that the task they initially set for themselves in response to the court's first decision could not be accomplished within a reasonable time, or reasonable resources, and propose some modification in the constitutional standard...Notably, that adjustment might be upward, imposing more requirements on government, or downward, imposing fewer. The revisability of a court's constitutional judgment makes this a weak-form of judicial review.*¹⁹⁹

The potential pit-falls with weak-form judicial review are at least two fold: on the one hand is the possibility that it degenerates into a new form parliamentary supremacy and on the other hand is the possibility that it escalates into a form strong-form review.²⁰⁰ In the first instances, returning to *Grootboom*, the remedy required by the court simply required government to 'submit a plan for public housing that contains a component dealing with the desperately at need.'²⁰¹ For the Court, on its face, a recalcitrant government can fully comply with the remedy by 'developing a plan that it has no intention of implementing.'²⁰² Tushnet likens this to so-called 'paper rights' like a Soviet five-year plan 'existing on paper but having no beneficial real world impact.'²⁰³

Contrasted with this is a court that escalates its initial directives into a strong-form judicial review when faced with a recalcitrant state institution, perhaps brought before the court at a second instance, due to non-compliance with the broad parameters of a previous judgment. In such an instance, the court responds 'by developing increasingly precise requirements for that institution' and seeks to go further by monitoring compliance with the court's general directives.²⁰⁴

By way of example, let's look again at *Grootboom*,

*The court directs government to develop a plan and begin to implement it. The plaintiffs come back to court, saying that the plan is inadequate in various respects, and that the implementation is flawed. The court responds by insisting that the plan be augmented to deal with the inadequacies and flaws. In the next round, new inadequacies and flaws are exposed, and the court again tries to get the plan to work.*²⁰⁵

¹⁹⁹ Id. at 823.

²⁰⁰ Id.

²⁰¹ Id at 828.

²⁰² Id.

²⁰³ Id.

²⁰⁴ Id. at 831

²⁰⁵ Id. At 832.

While Tushnet's article pre-dates the Court's decision in *Glenister 2*, it is arguable that both the notion of weak-form judicial review, its potential pitfalls, and its extension in the form democratic experimentalism as outlined by Dorf and Sabel, finds expression in the *Glenister 2* majority's approach to judicial review. The Court in *Glenister 1*, refuses to go to the merits of the issues in dispute because of a formalistic separation of powers doctrine which inhibits the Court from acting, because the legislature, assumed to be acting in good faith, must still apply its mind to the directives coming from Cabinet with regard to what form the legislation will ultimately take.

In *Glenister 2*, with the legislation already enacted, the democratic experimentalist exercise begins with the Court's finding of constitutional invalidity. However, while the Court provides principled justification and guidance for the how legislature can rectify the statutes in question to ensure constitutional compliance, the Court suspends its order of invalidity for 18 months in order to provide Parliament with the opportunity to rectify the defects. Parliament then, in compliance with the Court's ruling enacts a process to amend the legislation. However, rather than requiring Parliament to return to the Court, by way of an abstract review to ensure constitutionality and adherence to the principles the Court has laid down, this is left again to Mr. Glenister and his civil society cohorts, in the form of the Helen Suzman Foundation, to challenge Parliament's revised statute, and hence the cycle continues.

Chapter 7. Legal Legitimacy, Democratic Values and Political Power within South Africa's transformative constitutional project

Despite the problems left open by the majority decision's inability to go further in *Glenister 2*, what remains remarkable about the case is the way in which the Court figures the fight against corruption as a constitutional imperative. Notably, viewed through the lens of transformative constitutionalism, the majority finding in *Glenister 2* must be understood, as one of the most remarkable decisions to have emerged during South Africa's first twenty years of democratic constitutionalism because the majority make fundamental findings around principles of accountability and the requirements of independence within state structures in the face of overwhelming political opposition. By doing so, one of the overriding implications of the majority decision is the jurisprudential alignment of constitutional principles of good governance and accountability within the very fabric of a rights based constitutional order.

Within what must be seen as a politically charged environment, with a directive from the ruling party, ultimate concurrence between the executive and legislature around a re-structured operational approach to policing corruption, the majority in *Glenister 2* strike a delicate balance by developing a 'flexible separation of powers doctrine'²⁰⁶ which ultimately places a check on the prevailing political elite's approach to combating corruption. While at time engaging in interpretive gymnastics that interweaves international obligations with fundamental rights principles around the requirements of democratic governance, accountability and independence, the Court does so against the backdrop of a worrying corruption narrative in the country that has the potential to undo the democratic struggles' hard fought gains. In so doing, the Court engages in an exercise of democratic experimentalism which places their legitimacy under the microscope as they seek to develop an approach, and ultimately a remedy, that resides between principle and pragmatism.²⁰⁷

Justice Edwin Cameron, the co-author of the *Glenister 2* majority decision, writes in his recent book, *Justice, A Personal Account*, under a concluding chapter entitled *The Promise and Perils of Constitutionalism*,

²⁰⁶ See T. Roux, Principle and pragmatism on the Constitutional Court of South Africa, 7 *Int'l J. Const. L.* 106 2009.

²⁰⁷ *Id.*

*...what does it mean that we are in a constitutional state? It means not only that we project our highest aspirations into the Constitution. It also means that we place in it our best practical hopes...In a time of structural disintegration, social fraying and **predatory looting**, the Constitution continues to prove itself a viable framework for the practical play of power needed to secure our future beyond our current problems... The Constitution creates the practical structures that enable the rest of us – you and me, together with principled, honest leadership, a committed government, an active citizenry and vigorous civil society institutions – to perfect our future (own emphasis).²⁰⁸*

What is striking about Justice Cameron's prose in describing how the Constitution can be used as a tool to work through South Africa's numerous socio-political challenges is that the constitutional framework he proposes is both utopian and aspirational on the one hand and practical or pragmatic on the other. Arguably, the backdrop upon which these comments and the jurisprudential approach adopted by his majority decision in *Glenister 2* can be viewed is the figuring of the South African Constitution as 'a document committed to social transformation' which the Constitutional Court has emphasised on numerous occasions.²⁰⁹ As Klare and Davis have argued, in their seminal article, the aspirational values embraced by not only the constitutional text, but the constitutional jurisprudence that has followed over the past twenty years embraces 'an intention to realise in South Africa a democratic, egalitarian society committed to social justice and self-realisation opportunities for all.'²¹⁰

In contrast to these aspiration values however is critique from Klare and Davis' that South Africa's constitutional project have been characterised by an inhibited and ultimately conservative legal culture inclusive of self-limiting decisions of the Constitutional Court that have failed to develop 'a coherent exploration of the Constitution's values and an explicit and sustained effort to develop new legal methodologies appropriate to transformative constitutionalism...and the lack of critical sharpness with respect to separation-of-powers issues.'²¹¹ Such a critique is consistent how this discussion has figured the case in *Glenister 1*.

In seeking to come to terms with the Constitutional Court's alleged inhibitions during the first two decades of constitutional supremacy, and how *Glenister 2* can be seen

²⁰⁸ E. Cameron, Justice A Personal Account [Tafelberg] 2014 p. 276.

²⁰⁹ Klare and Davis, *supra* note 56 at 403.

²¹⁰ *Id.*

²¹¹ *Id.* at 509.

as amongst a handful of cases in stark contrast to this approach, perhaps something can be drawn from those critiques which seek to understand the Court's practice in terms of notions of 'legal legitimacy, public support and institutional security.'²¹² In an article that looks at various decisions of the Constitutional Court, Theunis Roux argues that Constitutional Court's record since 1995 can be understood as a process whereby the Court has been able to establish and maintain its legitimacy, while ensuring its institutional security through a 'mixture of principle and pragmatism.'²¹³ Roux identifies three categories of cases which provides insight into how one can begin to understand the bridge the Court was able to cross between a cautious doctrinal approach to separation of powers in *Glenister 1* to robust and expansive majority decision in *Glenister 2*.

Roux identifies: (1) those cases where the Court was able to exploit a political context to hand down a decision of principle in the face of contrary public opinion or opposition from the political branches; (2) cases where this was not possible and where the Court was forced to compromise on principle to avoid direct conflict with the political branches and (3) cases where the Court developed 'multifactor balancing tests' converting 'conceptual tests that were seemingly required by the constitutional text into more context sensitive' tests.²¹⁴

For purposes of this discussion, category one is the most revealing and relevant, as it is against this category of cases, that one can begin to understand the social context leveraged by the Court in terms of the expansive nature of the *Glenister 2*'s majority decision and overriding social concerns around the scourge of corruption. The leading case that partially illustrates the first category is that of *S. v Makwanyane*²¹⁵ dealing with the abolition of the death penalty. Faced with significant public support for the death penalty based on 'the country's high rate of violent crime and generally conservative public attitudes on capital punishment'²¹⁶, the court risked losing significant public support by adopting its position on abolition. However Roux provides a cogent explanation as to why this so-called risk was mitigated by the social and political context at the time. He argues, '[w]here a single

²¹² See Roux, *supra* note 206 at 106.

²¹³ *Id.* at 108.

²¹⁴ *Id.*

²¹⁵ 1995 (3) SALR 391 (CC)

²¹⁶ Roux, *supra* note 206 at 118.

party dominates a country's electoral politics, lack of public support for a constitutional court is unlikely ever to be translated into votes for a rival political party. In such a situation, the court may be able to ignore public opinion as a limit on principle, provided the dominant political party insulates it from the immediate repercussions of its decision.²¹⁷ Viewed in this way, *S v. Makwanayane* is not such a hard case, when it comes to the notion of institutional legitimacy, because ultimately the ANC elite favoured the outcome and 'was content for the [Court] to take the burden of the decision onto itself.'²¹⁸ In this regard, *S v Makwanayane* only provides a partial characterisation of the Court's so-called *principled decision* in the face of public or political opposition.

Perhaps more emblematic of this category of cases, is the case of the *Treatment Action Campaign*.²¹⁹ This case concerned 'a constitutional challenge to the government's program for the prevention of mother-to-child transmission of HIV' which was based on the supply of the anti-retroviral drug, nevirapine.²²⁰ The claimants in this case, representing what had effectively become a social movement with widespread public support but faced with staunch government opposition, applied for an order that government's mother-to-child prevention program be universally rolled out based upon sections 27(1)(a) and (2) of the Constitution guaranteeing everyone the right to access health care services.²²¹ It is worth noting, for the context of this note, as Roux reminds, that the state opposed this application on a 'strongly worded separation-of-power argument, the emotive undercurrent of which was betrayed by a statement by the minister of health on national television that she would disobey the [Court's] decision if it went against her.'²²²

Against what Roux describes as a 'political fraught background,' the Court ruled in favour of the applicants handing down a unanimous decision declaring government policy on restricting the mother-to-child prevention program as unconstitutional, imposing a wide-ranging order mandating the provision of nevirapine in all public hospitals to those who require it under certain criteria.²²³ The Court further dismissed

²¹⁷ Id at 120.

²¹⁸ Id.

²¹⁹ 2002 (5) SA 721 (CC).

²²⁰ Roux, *supra* note 206 at 123.

²²¹ Id.

²²² Id at 124.

²²³ Id.

the state's separation of powers argument as 'irrelevant and ill founded.'²²⁴ The explanation for Roux for the 'apparent ease' with which the Court dealt with the *Treatment Action Campaign* case lies in the social and political context that resides behind the case. Notably, the TAC by pursuing a highly effective campaign of mass mobilisation had ensured prior public support for the principled outcome they sought.²²⁵ In addition, although faced with 'principled' opposition from the President and Minister of Health, the political realities on the ground, notably in Gauteng province, indicated that provincial government was already prepared and announced its intention to implement a comprehensive treatment program.²²⁶

In terms of this analysis, the context that allowed for the Court's principled approach in the *Treatment Action Campaign* case can be distinguished from the reliance on principle in *S v. Makwanyane*. In the latter case, the Court was able to rely upon principle knowing they had the acquiescence of the political elite in the face of unfavourable public opinion. In the *Treatment Action Campaign* case, the opposite was the case, while the political establishment was silently behind the President's unorthodox stance on HIV/Aids, a social movement on the ground had developed such significant momentum that the realisation of universal access and roll-out became inevitable. Regardless, Roux concludes, the common threat in both cases was the Court's ability 'to exploit political context to hand down decisions of constitutional principle and, in this way, to build its legal legitimacy.'²²⁷

Understanding the *Glenister 2* majority decision against the backdrop of this analysis raises numerous questions as to durability and legitimacy of the decision for future judgments and the context-specific reasons for the majority principled yet at the same time pragmatic, approach to the case. Questions remain as to the implications this case may have for future challenges to government conduct based upon arguments that highlight the constitutional imperatives of accountable governance and the independence of state institutions. Unlike the *TAC* case's unanimous judgment, the *Glenister 2* case divided the Constitutional Court. This five to four decision, included a cogent and well reasoned minority judgment by Ngcobo CJ –

²²⁴ Id.

²²⁵ Id.

²²⁶ Id.

²²⁷ Id at 125.

referred to by the majority as ‘meticulously drafted’ and oddly referred to repeatedly by the majority opinion as the ‘main judgment.’²²⁸

Despite the slender majority however, the Court took a principled approach to developing various constitutional obligations and requirements when it came to the anti-corruption activities of government. The case is ultimately comparative to both *S. v Makwanyane* and the *Treatment Action Campaign*. Both with the abolition of the death penalty and the progressive realisation of the right to health, core values central to South Africa’s utopian transformational constitutional project were placed in dispute. With the abolition of death penalty, despite overwhelming public opposition, as an early marker of democratic constitutionalism, the Court was obliged to mark a break from the past, from a repressive state apparatuses for which the sanctity of life fell at the altar of oppressive minority rule. For a new constitutional democracy based upon the rule of law that places limits on government’s coercive powers and its monopoly on the legitimate use of force, abolition of the death penalty had immense political and symbolic significance for how the new order would come to be characterised.

Similarly, with *Treatment Action Campaign* case and the progressive realisation of the right to health through universal access and roll-out of nevirapine, the Court decided the case against the backdrop of HIV/Aids pandemic that had already result in the deaths of millions of South Africans. Faced with a growing social movement and overwhelming medical evidence on the effectiveness of anti-retroviral therapy, the Court was able to reach unanimity with a principled and far-reaching decision against intransigent government resistance. These cases reveal the promise of South Africa’s transformative constitutional project.

The *Glenister 2* decision, as is clear from the emphasis found in the majority decision, must be understood against the backdrop of a worrying corruption narrative recognising the corrosive effects that corruption has, not only to a notion transformative constitutionalism, but more fundamentally to the rule of law and exercise of legitimate public power. As with the death penalty and the right to health, the Court in *Glenister 2*, raises the discussion, around various legislative choices by

²²⁸ *Glenister 2*, *supra* note 1 at paras 161 and 162.

government around how to effectively police corruption, to a level which makes the fight against corruption core to South Africa's constitutional values and schema.

However, the failure of the majority to garner support for its approach, beyond the most slender of majorities, reveals that this decision may rest on a foundation of legitimacy which is more perilous than the comparative judgments. Further, while engaging in a process that can be understood in terms of the theory of democratic experimentalism, that provides an order of constitutional invalidity to the impugned legislation suspended, subject to Parliament having the opportunity to remedy the defect, the Court is left to rely upon the good faith on the part of the political branches of government where in fact power politics has informed the approach of these branches to date. Nearly six years down the line from *Glenister 1*, and close to three years now since the *Glenister 2* decision, the case still remains before the courts with the spectre of indeterminacy within the ranks of those policing corruption none the wiser in ensuring that corruption is effectively and efficiently combated via investigation and prosecution – despite the far reaching constitutional requirements pronounced by the *Glenister 2* majority.

Chapter 8. Conclusion

The *Glenister 2* judgement must be welcomed as a rhetorical and legal building block to strengthen South Africa's anti-corruption architecture. The case stands as principled decision and outcome which proposes a pragmatic resolution that seeks to render flexible, while not offending, the separation of powers doctrine. However, concerns remain as to the extent to which future courts may be able to rely upon the majority's interpretative judgments in the cases still to come. While expressly stating that they are not being prescriptive around policy choices, were such choices are inherently political questions within the domain of the executive and legislature, the majority walk a fine line particularly as they seek to provide constitutional content to the requirement of independence. Ultimately however, the Court provides a remedy which leaves it to Parliament to realise the principled approach taken by way of re-drafting the impugned legislation.

Following the decision of the Cape High Court in *Glenister 3* in December 2013, in May 2014, this litigation was set down for argument before the Constitutional Court for review of the High Court decision on Parliament's efforts to re-draft the legislation. However on May 15th 2014, the case was postponed because of an administrative error on the part of the legal team representing the President, 'whose written argument were not properly served on the applicants nor filed with some of the Justices of the Court.'²²⁹ One is left to question the political will on the part of the executive and, the newly constituted legislature, for another round of scrutiny on this protracted litigation by a Court that has already significantly raised the bar in terms of pronouncing what the Constitution requires when it comes to fighting corruption.

Given the political backdrop to this case, the controversy around the Scorpions and allegations of politically motivate investigations, the fractious ANC National Conference in Polokwane, the delays following *Glenister 1*, the broad pronouncements in *Glenister 2*, and the fact that the re-drafted legislation is still under challenge, it remains to be seen whether *Glenister 2* judgment to date has had any discernable impact on fight against corruption. While the legal impact of this litigation over time for the material condition on the ground will be immensely difficult to measure, what we do know is that the case has demarcated the fight against

²²⁹ See <http://concourtblog.com/2014/05/15/helen-suzman-foundation-v-president-of-the-republic-of-south-africa-and-others-glenister-v-president-of-the-republic-of-south-africa-and-others/> [accessed 27 May, 2014].

corruption as a constitutional imperative with certain requirements which cannot be wholly ignored by the political branches of government. Ultimately, this litigation has cautioned South Africa's political leadership that in an environment where warranted anxiety exists around corruption's devastating potential to derail South Africa's transformation democratic project, that constitutional interpretation in its expansive manifestation can operate as a significant counter-weight to the myopic rule of power politics.

Bibliography

Books

1. Cameron, E *Justice A Personal Account* [Tafelberg] 2014.
2. Pikoli and Wiener, *My Second Initiation, The Memoir of Vusi Pikoli* [Picador Africa] 2013.

Journal Articles

1. Ackerman, B 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633.
2. Bruce, D 'Without Fear of Favour, The Scorpions and the politics of justice,' (June, 2008) *SA Crime Quarterly* No. 24.
3. Davis and Klare 'Transformative Constitutionalism and the Common and Customary Law (2010) 26 *South African Journal on Human Rights* 403.
4. Dorf and Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267.
5. Fombad, CM 'Post 1990 Constitutional Reforms in Africa and the Prospects for Constitutionalism' (2004), paper presented at the International Conference on Africa Conflicts: Management, Resolution and Post-Conflict Recovery and Development organised by the Organization of Social Science Research in Easter and Southern Africa (OSSREA) at the United Nations Conference Centre, Addis Ababa, Ethiopia, November 29-December 1, 2004.
6. Fombad, CM 'Internationalisation of Constitutional Law and Constitutionalism in Africa (2012) 60 *American Journal of Comparative Law* 439.
7. Fombad, CM 'Separation of Powers and Constitutionalism in Africa: The Case of Botswana' (2005) *Boston College Third World Law Journal*, Volume XXV No.2 301.
8. Lenta, P 'Judicial Restraint and Overreach (2004) 20 *South African Journal on Human Rights* 544.
9. Li, B 'What is Constitutionalism, Perspectives, Vol 1, No. 6 found at http://www.oycf.org/Perspectives2/6_063000/what_is_constitutionalism.htm.
10. Roux, T 'Principle and pragmatism on the Constitutional Court of South Africa (2009) 7 *International Journal of Constitutional Law* 106.

11. Tuovinen J 'The Role of International Law in Constitutional Adjudication: *Glenister v President of the Republic of South Africa* (2013) 130 *South African Law Journal* 664.
12. Tushnet, M 'New Forms of Judicial Review and the Persistence of Rights and Democracy-based Worries (2003) 38 *Wake Forest Law Review* 813.

International Agreements

1. African Union Convention on Preventing and Combating Corruption 43 ILM 5 (2004).
2. Southern African Development Community Protocol Against Corruption, adopted August 14, 2001, and entered into force on July 6, 2005 see http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf [accessed 27 May 2014].
3. UN General Assembly, United National Convention Against Corruption, 31 October 2003, A/58/422, available at: <http://www.refworld.org/docid/4374b9524.html> [accessed 27 May 2014].

Legislation

1. The Constitution of the Republic of South Africa Act 108 of 1996.
2. Human Rights Act 1998 (United Kingdom).
3. National Prosecuting Authority Act 32 of 1998 as amended by the National Prosecuting Authority Act 56 of 2008.
4. The Prevention and Combating of Corrupt Activities Act 12 of 2004.
5. South African Police Services Act 68 of 1995 as amended by the South African Police Services Act 57 of 2008.

Media and internet

1. *Hugh Glenister v President of the Republic of South Africa and 12 others* published in Judgements, Legalbrief, www.legalbrief.co.za/article.php?story=20081022104323798, [accessed on May 10, 2014].
2. Ginwala absolves Mbeki, *Mail & Guardian*, <http://mg.co.za/article/2008-12-05-ginwala-absolves-mbeki> [accessed on May 10, 2014].

Reports

1. The Ginwala Commission of Inquiry (2008) found at <http://www.thepresidency.gov.za/pebble.asp?relid=345> [accessed 27 May 2014].

2. The Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special operations (February, 2006) found at <http://www.thepresidency.gov.za/docs/reports/khampepe/part1.pdf> [accessed 27 May 2014].
3. OECD report on *Specialised anti-corruption institutions. Review of models* (2008) found at <http://www.oecd.org/corruption/acn/39971975.pdf> [accessed 27 May 2014].

Table of Cases

1. *AZAPO v President of the Republic of South Africa*, 1996 (4) SA 672 CC.
2. *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC.
3. *Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26.
4. *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19.
5. *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6.
6. *Government of South Africa v Grootboom*, 2000 (11) BCLR 1169.
7. *The Helen Suzman Foundation v President of the Republic of South Africa and others*, Case no: 2387/2012, High Court of South Africa, Western Cape Division
8. *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 12.
9. *Minister of Health and Others v Treatment Action Campaign 2002* (5) SA 721 (CC).
10. *Privy Council in Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong and Another* [1970] 2 WLR 1264.
11. *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).
12. *S v Makwanyane* 1995 (3) SALR 391 (CC).
13. *S v Shaik* [2008] ZACC 7.
14. *S v Van Rooyen* [2002] ZACC 8.
15. *Trinidad and Tobago Civil Rights Association v The Attorney-General of Trinidad and Tobago; Rajh Basdeo v The Attorney-General of Trinidad and Tobago* [2005] TTHC 66, HCA No. 5 1070 of 2005, delivered on 7 November 2005.