The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?

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The South African Constitutional Court's 2018 term traversed a vast array of issues, including family law and maintenance matters,[1] labour disputes and trade union turf battles,[2] racist speech,[3] the right to protest,[4] refugee rights,[5] gun control,[6] political party funding,[7] social security grants,[8] land and property rights,[9] criminal and civil procedure,[10] local government,[11] and customary law.[12] As one reads through the judgments, an impression of contemporary South African life begins to emerge. It is a story in part of governance failures and of social transformation goals not yet realised. But it is also a story of vibrant civil society organisations demanding that government perform better, of poor and marginalised groups finding their voice and claiming their rights, and of the dedicated work that many people in the country are doing to improve the functioning of public and private institutions.

To be sure, the picture that the cases paint is not completely representative. People do not to go to court, after all, unless they, or the institutions on which they depend, are in some kind of crisis. Thus, all the occasions on which officials did their jobs properly, institutions functioned as they were expected to, and people were civil to each other, do not appear in the Court's 2018 record. In addition, constitutional litigation, in the nature of things, can address only some of the ways in which public and private power is exercised. International economic and political decisions[13] that profoundly affect South Africans' lives – such as the choices made by multinational corporations about where to invest and by President Donald Trump about what to tweet – are not represented in the cases. Closer to home, the cases do not fully reflect the oppressive social and economic power structures to which poor, mostly black South Africans, are subject. Nevertheless, despite these omissions, the picture that the cases paint is undoubtedly more detailed than would have been the case twenty, or even ten, years ago. In simple

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1 *S S v V V S* [2018] ZACC 5; 2018 (6) BCLR 671 (CC).

2 *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* [2018] ZACC 7; 2018 (5) BCLR 527 (CC); [2018] 6 BLLR 531 (CC); (2018) 39 ILJ 1213 (CC); *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] ZACC 22; [2018] 9 BLLR 837 (CC); (2018) 39 ILJ 1911 (CC); 2018 (5) SA 323 (CC); 2018 (11) BCLR 1309 (CC); *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; [2018] 11 BLLR 1035 (CC); 2018 (11) BCLR 1411 (CC).

3 *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] ZACC 13; (2018) 39 ILJ 1503 (CC); 2018 (8) BCLR 951 (CC); [2018] 8 BLLR 735 (CC); 2018 (5) SA 78 (CC); *Duncanmec (Pty) Limited v Gaylard NO and Others* [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC).

4 *Mlungwana and Others v S and Another* [2018] ZACC 45.

5 *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9; 2018 (7) BCLR 856 (CC); 2018 (4) SA 333 (CC); *Gavric v Refugee Status Determination Officer, Cape Town and Others* [2018] ZACC 38.

6 *Minister of Safety and Security v South African Hunters and Game Conservation Association* [2018] ZACC 14; 2018 (2) SACR 164 (CC); 2018 (10) BCLR 1268 (CC).

7 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17; 2018 (8) BCLR 893 (CC), 2018 (5) SA 380 (CC); *Ahmed and Others v Minister of Home Affairs and Another* [2018] ZACC 39

8 *South African Social Security Agency and Another v Minister of Social Development and Others* [2018] ZACC 26; 2018 (10) BCLR 1291 (CC); *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* [2018] ZACC 36.

9 *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41; *Rahube v Rahube* and Others [2018] ZACC 42.

10 *Conradie v S* [2018] ZACC 12; 018 (7) BCLR 757 (CC); *Liesching and Others v S* [2018] ZACC 25, 2018 (11) BCLR 1349 (CC); *M T v S; A S B v S; September v S* [2018] ZACC 27; 2018 (2) SACR 592 (CC); 2018 (11) BCLR 1397 (CC).

11 *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others* [2018] ZACC 15; 2018 (8) BCLR 881 (CC), 2018 (5) SA 1 (CC).

12 *Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others* [2018] ZACC 28.

13 As distinct from international law, which is becoming more prominent in the CCSA's case law.

numbers, the Constitutional Court (CCSA) today decides about twice as many cases each year as it did in its first decade.[14] The nature of the cases has changed, too, from the rights-based challenges to old-order legislation that dominated the Court's first decade to the detailed, fact-driven inquiries into the lawfulness of executive and administrative action that occupy it today.

There are, of course, several reasons for these changes. With the expansion of the CCSA's jurisdiction in 2012 to non-constitutional matters,[15] the opportunity for appeals from the Supreme Court of Appeal (SCA) has increased. In addition, the development of the principle of legality as a broad ground for the review of exercises of the executive power has given the CCSA a wider mandate than was perhaps originally envisaged.[16] But some of the Court's heavier case load, at least, has to do with an increasing turn to litigation on the part of public office bearers and the people impacted by their decisions. Whereas the CCSA's docket was dominated in the first decade of its institutional life by questions of collective political morality, such as the constitutionality of the death penalty, today the day-to-day workings of government are laid bare in court. Not just a thicker slice of social life, but also of specifically *political* life is finding its way into the CCSA's judgments.

Is this something we should be concerned about? Is the fact that more and more everyday politics is passing through the CCSA a troublesome development or just the inevitable, and entirely healthy, consequence of the country's turn to liberal constitutionalism?

In their recent, co-authored book, Michelle Le Roux and Dennis Davis sound a note of alarm.[17] While acknowledging the benefits of certain types of constitutional litigation, they argue that the increased rate of such litigation has had a debilitating impact on the quality of South Africa's democracy. They are concerned, too, about the effect of all of this on the courts, and their ability to carry out their designated functions. Central to their argument is the concept of 'lawfare', which they borrow from expatriate South African anthropologists, Jean and John Comaroff. Though wonderfully protean, as we shall see, this term has a predominantly negative connotation, calling up as it does an idea of the law being *improperly* used in pursuit of political ends. In the Comaroffs' usage in particular, the judicialization of social and economic struggles that they allege has followed on the adoption of the 1996 South African Constitution is treated as a troubling development – as a form of 'fetishism' that distracts from the true purposes and possibilities of democratic politics.[18]

Neither Le Roux and Davis nor the Comaroffs offer rigorous evidence in support of these concerns. Their methodology is rather to exploit the ambiguity of the term 'lawfare' to create a general sense of disquiet. In so doing, they conceptually stretch it to the point where it loses all analytic precision. Le Roux and Davis's book, for its part, starts with a relatively clear introduction, but then disintegrates into a series of anecdotes – of interesting but not obviously connected accounts of court room dramas, the bulk of which featured in a book they published under a different title ten years ago.[19] In consequence, the reader searches in vain for guidance on how we are to distinguish instances of good lawfare from bad lawfare and on what, in any event, we should do about this phenomenon. The Comaroffs' work is more theoretically sophisticated but is driven by a postmodernist distaste for liberal constitutionalism rather than a dispassionate interest in its actual effects.

Against this background, the aim of this article is to bring both more conceptual clarity and more empirical rigour to the debate – to use an assessment of the CCSA's 2018 term as an opportunity to reflect on what the lawfare concern is really about and whether South Africans indeed have grounds to be worried. I start by tracing the lineage of the term. As noted, Le Roux and Davis borrow it from the Comaroffs, who first used the word in a 2001 paper. But the term also has other origins. Roughly

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[14] This is not just a function of docket control because the CCSA does not have as much discretion over its case load as other constitutional courts.

[15] Section 167(3)(b)(ii) of the 1996 Constitution, as amended in 2012, gives the Court jurisdiction, in addition to constitutional matters, over any matter that raises 'an arguable point of law of general public importance'.

[16] See L Kohn 'The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?' (2013) 130 *South African Law Journal* 810.

[17] M Le Roux & D Davis *Lawfare: Judging Politics in South Africa* (2019).

[18] See the references in II.A below.

[19] D Davis & M Le Roux *Precedent & Possibility: The ((Ab)use of Law in South Africa* (2009).

contemporaneously with the Comaroffs' first usage, 'lawfare' was invoked by a US military lawyer as a label for the alleged abuse of international human rights law by America's supposed enemies. Closely allied to this, a pro-Israeli usage of the term emerged to describe the way in which international human rights law is apparently being used to attack that country. Over the last five years, the term has morphed again, finding contemporary relevance as a label for the way that law has been used, particularly in Latin America, to neutralise legitimately elected democratic leaders.

With this understanding of the genealogy of the term in place, the second section breaks down the worry about lawfare into three specific concerns. The first is a concern about the debilitation of democratic politics that allegedly accompanies the turn to liberal constitutionalism. This concern is founded in the first instance on a leftist critique of the tendency of liberal governance systems to displace bottom-up popular rule with technocratic control. But it is also a concern that resonates with an older US civil rights literature, dating from the 1960s and 70s, about the dangers of waging political struggles through the courts. Finally, in its specifically South African manifestation, it is a concern about the way in which the 1996 Constitution allegedly diverts attention away from the broad sweep of South African history and the deep-seated sense of historical injustice and cultural alienation that black South Africans feel.

The second concern is about the effects of lawfare on the courts. In particular, the worry is that the judiciary, in the face of so much litigation about so many controversial issues, will inevitably be drawn into politics and thereby lose the independence on which its ability to constrain the abuse of political power depends. Certain forms of liberal constitutionalism, this concern goes, suffer from an overreach problem. In their ambitious attempt to subject all public and private power to legal constraints, constitutions that provide for judicial review trigger a reaction – the politicisation of the judicial process – that ultimately undermines the achievement of that goal. While this concern has been voiced by critical commentators on liberal constitutionalism, it is clearly one that connects to the traditional preoccupations of liberal constitutional theory, such as the need for a separation of powers and the role of courts as independent checks on the abuse of political power.

The third and final concern is narrower than the other two, although it picks up on aspects of both. It is a concern about the seeming ease with which corrupt officials, often at public expense, can avoid accountability for their actions by using the opportunities that liberal constitutionalism affords them to delay cases, either by taking procedural points or through endless appealing. Related to this, commentators have worried about the extent to which powerful individuals with deep pockets are able to use not just legal proceedings, but law more generally, to achieve victories that they would not be able to achieve through ordinary democratic means. This concern thus combines aspects of the first concern's worry about democratic debilitation with the second concern's worry about the impact of lawfare on the judicial process. Nevertheless, it is sufficiently distinct to warrant examining separately.

Following the second section's setting out of these concerns, the third section drills down on them to see whether they stand up to scrutiny. At a purely conceptual level, I argue, each of the concerns has certain features that suggest that it may be prone to overstatement. The problem with the first is that it assumes that the diversion of political disputes into courtroom battles necessarily cuts across democratic politics – that it is a question of a zero-sum game, in other words, in which as much politics as flows into the courts flows out of the democratic arena. Even without considering the CCSA's case law, that assumption seems questionable. There is no reason in principle why the diversion of political disputes into the court room should extinguish those disputes as a political matter. To be sure, some judicial decisions can be understood as policy resolutions of sorts. But, as the US experience with abortion litigation shows, even such decisions do not constitute the end of the road for democratic politics. Rather, as Gordon Silverstein has argued, liberal constitutions invite an iterative, mutually constitutive relationship between law and politics,[20] so that what we get is not necessarily the death of democratic politics but a more complex and potentially richer form of democratic politics.

The second concern is also often overstated. On its own, the observation that judicial review necessarily draws courts into politics is question-begging. The real issue is whether the courts are able to

[20] Gordon Silverstein *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (2009).

maintain their reputation for impartiality in the face of the politically controversial cases that they are asked to decide. While this is no simple task, courts have numerous well-known devices at their disposal to assist them. Legal reasoning, for one, is a flexible enough medium for talented judges to be able to present what they are doing as the enforcement of a logically consistent body of norms. To be sure, in any reasonably complex constitutional system, there is a developed sense of where the boundary between law and politics lies. But it is a boundary that skilful judges can manipulate in various ways, either in a single case or in the general way that they approach their mandate. Alternatively, it may be possible for judges to take the public into their confidence – to be candid about the influence of their personal political values on constitutional adjudication – but nevertheless to present what they are doing as sufficiently distinct from politics to justify the powers that are given to them.

Finally, the third concern – about the use of procedural tactics and appeals to avoid accountability – assumes that the courts have no ability to prevent this kind of behaviour, i.e. that there are no mechanisms, such as punitive costs orders, that may be used to deter the abuse of the judicial process in this way. This concern also assumes that public office bearers who engage in these tactics will not pay some other price – such as a loss of credibility – that may act as just as much of a deterrent as anything that the courts do. Even if these safeguards do not work, the remaining instances in which liberal procedural rights are abused may be a price that is worth paying for the general subjugation of the exercise of political power to law.

Having analysed each of these concerns at a conceptual level, the third section of the paper finally turns to the Constitutional Court's 2018 term. As noted, the cases do not paint the whole picture, and thus we should be cautious about drawing firm conclusions. It could be that the CCSA's record is a sideshow of sorts – that however admirable its jurisprudence on paper, liberal constitutionalism as a whole is still failing South Africa. Certainly, it is not irrelevant that the cases discussed were all decided while the brute facts of unemployment, grinding poverty and physical violence continued unabated. But it is one thing to say that these two situations – a vibrant jurisprudence and a society in crisis – co-existed, and another to say that they were causally related. The latter claim requires more rigorous support than any of liberal constitutionalism's critics have thus far been able to offer.

By the same token, of course, a mere case analysis cannot vindicate all of liberal constitutionalism's claims about its beneficial effects. All that we can get from the cases is some sense of what sorts of issue are being litigated; who the litigants are; how the CCSA is responding in its judgments as a matter of doctrine, rhetoric and institutional posture; and what the feedback effects of the Court's approach on the social processes reflected in its judgments are. Even with these pared-down expectations, the task is considerable. The sheer volume of cases – fifty-two – means that it is not possible in a single article, or indeed in this entire volume, to be comprehensive. Some basis for sampling needs to be found.

In the case of this article, as explained in more detail below, twelve decisions were chosen for reasons of political salience, i.e. their importance to broader policy debates and institutional processes and in terms of the number of South Africans affected. The sampled decisions were then broken into two further sub-groups: those dealing with democratic rights and the functioning of constitutional institutions and those dealing with issues of social transformation and historical (in)justice. The sample deliberately leaves out cases on refugee rights and minority trade union rights on the grounds that these are separately discussed in this volume.

Analysis of the sampled cases reveals no instance in which any of the three lawfare concerns was borne out. Far from displacing democratic politics, many of the cases are about preserving the institutional preconditions for democratic politics. Far from being politicised, the CCSA was able in the cases discussed to present what it was doing as the impartial enforcement of constitutional standards. And, thirdly, while there is some evidence in the cases of the attempted abuse of the judicial process, the cases reveal that the CCSA has been able to devise ways of combating this problem.

If not evidence of lawfare, then, what do the cases show? The concluding section of the paper argues that the politically salient cases decided in the CCSA's 2018 term reveal a Court that is increasingly functioning as the moral conscience of the nation. While this is an aspect of judicial review under a supreme-law constitution everywhere it occurs, there is an explicitly *moralising* tone in several of the CCSA's judgments. Cases are decided not on the basis of the legal application of constitutional norms qua

moral principles, but directly by appeal to common-sense ethical standards. In the face of an entrenched, poorly performing and deeply corrupt governing party that the electorate has nevertheless, for complex reasons, declined to vote out of office, the Court has given voice to the moral outrage that many South Africans feel. A significant number of cases thus turn, not on finer points of law and even less the judges' political ideology, but on simple assessments of whether public office bearers have behaved well or badly – done the right thing or not. Other decisions, to be sure, are more technical, and there is some evidence of ongoing disagreement on the Court about where the boundary between its authority and that of the political branches lies. In these cases, while understanding the Constitution as an instrument of social transformation, the Court has maintained its commitment to legalism – to grounding its decisions in the constitutional text and making them consistent with past rulings. The Court in this sense deals with the second lawfare concern in the way that we would have expected it to do – by presenting its decisions as emanating from a coherent body of legal norms.

All of this suggests that the CCSA is in robust health. The Court sits at the centre of politics but has not yet been consumed by politics. Rather than sounding unwarranted alarm bells about lawfare, commentators should acknowledge this achievement for the remarkable feat that it is. This outcome was not preordained, and the justices who have served on the Court, and particularly the members of the Chaskalson Court who laid the foundation for this achievement, should be commended.

At the same time, of course, this is only part of the story. The CCSA does not operate in isolation; however much we might admire its achievements, it is subject to political forces that it cannot control. As I have argued elsewhere,[21] one of the inevitable consequences of the adoption of a liberal constitution is that its performance is assessed on the basis of outcomes for which the constitutional framework is not wholly responsible. Just as the property clause in s 25 of the Constitution is wrongly blamed for the failure of South African land reform, so is the entire 1996 Constitution liable to be falsely accused of holding back the progress of social and economic transformation. There is only so much that the Court can do, and so much that public interest litigators can do, to ensure that officials do their jobs properly, that wise policies are adopted, and that scarce resources required for development are not squandered. Beyond this, transformation outcomes are dependent, not on the constitutional framework, but on whether the right social and economic policies are adopted and implemented.

Nevertheless, support for the1996 Constitution is inevitably linked to public perceptions of its performance. Ultimately, therefore, the fate of liberal constitutionalism in South Africa will be determined, not by the courts, but by the outcome of the current debate over the merits of South Africa's negotiated constitutional transition. On the one side, stand those who are calling for a rededicated commitment to the values underpinning the 1996 Constitution and the institutions it establishes. On the other, stand those who would exploit the slow progress of social and economic transformation to call for the adoption of a different kind of constitution. The real risk that South Africa faces is that proponents of the second view might seek to undermine the constitutional institutions that currently ensure that this debate can be openly and fairly conducted. Even as they join in this debate, therefore, friends of liberal constitutionalism will need to be vigilant to protect the independence and proper functioning of constitutional institutions.

I ORIGINS OF THE TERM 'LAWFARE'

The term 'lawfare' first appeared in the Comaroffs' work in 2011, in an introduction to a symposium on 'colonialism, culture and the law'.[22] After quoting Martin Chanock's point about law being the 'cutting edge of colonialism',[23] they cite a nineteenth-century historical source about the Setswana practice of referring to the 'appurtenances' of English colonial law as a 'mode of warfare'.[24] This sets up their initial

[21] T Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (2013) 160.
[22] JL Comaroff 'Colonialism, Culture and the Law: A Foreword' (2001) 26 *Law & Social Inquiry* 305.
[23] Ibid 305 (citing Martin Chanock *Law, Custom, and Social Order: The Colonial Experience Malawi and Zambia* (1985) 4).
[24] Ibid 306.

definition of 'lawfare' as 'the effort to conquer and control indigenous peoples by the coercive use of legal means'.[25]

In this first usage, then, 'lawfare' resonates with a long literature on the abuse of law, and the ideology of legalism in particular, during the colonial era.[26] As is all too familiar to South Africans, the rule of law has a dark side.[27] The ideology of law's separation from politics that undergirds this idea in liberal constitutional theory can be distorted in colonial settings to justify the division of society into two spheres, one in which law indeed rules and the other in which colonized peoples are made the objects of law's repressive commands, all the while being told that, if they could just become 'civilized' enough, they, too, could enjoy the benefits of the rule of law. The Comaroffs' use of the term 'lawfare' to describe this phenomenon does not fundamentally revise the existing literature, but it does emphasize the violence of colonial law in a way that more benign terms like 'rule by law' or the 'dual state' fail to do. As such, it is a useful addition to our vocabulary.

Around the same time as the Comaroffs were composing their symposium introduction, the term 'lawfare' was independently introduced to a very different audience by Major General Charles Dunlap,[28] then a deputy judge advocate general in the legal arm of the US Air Force. In a 2001 Harvard University working paper, Dunlap referred to the way that human rights groups were allegedly using international human rights law to obstruct US foreign policy. 'Lawfare', Dunlap wrote:

> describes a method of warfare where law is used as a means of realizing a military objective . . . There are many dimensions to lawfare, but the one [increasingly] embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather [than] seeking battlefield victories, per se, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. [29]

The Comaroffs and Major General Dunlap, I suspect, could not be further apart on the ideological spectrum. And yet there is a common element in their respective definitions of 'lawfare'. In both instances, what is being alluded to is the way that the rule of law's positive, power-restraining overtones can sanitize and mask a more instrumentalist, abusive use of law for political purposes.

Following Dunlap's intervention, 'lawfare' was taken up by Israeli lobby groups to refer to the way that Palestinian sympathizers allegedly use human rights law to undermine Israel's national security interests and the rights of Jews in the diaspora more generally.[30] If you Google 'lawfare', one of the top hits is thus to the 'The Lawfare Project', a site that solicits donations to assist Jews across the world in combating this alleged practice.[31] I say 'alleged' because there is considerable doubt about whether the practice actually exists or, if it does, whether it should be interpreted in the way that the pro-Israeli lobby does. Former Constitutional Court Justice, Richard Goldstone's UN Fact Finding Mission report on the December 2008 Israeli incursion into Gaza, for example, quickly became exhibit no. 1 in this particular use of the term.[32] Whether or not you agree with the findings and recommendations in Goldstone's report, there can be no question that it was a sincere attempt to apply international law in a complex setting.

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[25] Ibid.

[26] See, for example, M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001); J Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (2008) (using Ernst Fraenkel's idea of the 'dual state' to analyse the bifurcation of the South African legal order before 1994).

[27] See M Krygier 'The Rule of Law: An Abuser's Guide' in Andras Sajo (ed), *Abuse: The Dark Side of Fundamental Rights* (2006) 129.

[28] L Nadya Sadat and J Geng 'On Legal Subterfuge and the So-Called "Lawfare" Debate' (2010) 43 *Case Western Reserve Journal of International Law* 153.

[29] CJ Dunlap, Jr. 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001) at 11. Quoted in Sadat and Geng (note 28 above) at 157.

[30] Sadat and Geng (note 28 above).

[31] www.thelawfareproject.org. See also en.wikipedia.org/wiki/Lawfare_Project.

[32] https://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48_ADVANCE1.pdf.

Lawfare, this episode shows, is a highly manipulable term that can be used to refer to very different phenomena, by commentators on opposite sides of the ideological spectrum, and with varying degrees of plausibility. In recent years, the term has been adapted again, this time to describe the use of law, particularly in Latin America, to sideline legitimately elected democratic leaders. The paradigmatic example of this is the way in which former Brazilian President, Luiz Inácio Lula da Silva, was sentenced to prison on allegedly trumped up corruption charges, thus preventing him from running in the 2018 Brazilian presidential elections. The legal backdrop to this incident seems to have been behind the decision on the part of a group of São Paulo attorneys to establish the Lawfare Institute – a left-leaning research and public advocacy group that is in many ways the Lawfare Project's polar opposite.[33]

The Comaroffs themselves have extended their use of the term 'lawfare' to add new layers of meaning. In a 2004, paper, for example, they argued that the '[t]he faith in the capacity of [the 1996 South African Constitution] to resolve social problems by appeal to legalities verges on fetishism: The Constitutional Court is presented with an extraordinarily broad range of issues on which to adjudicate'.[34] While 'lawfare' does not feature in this part of their argument, the Comaroffs go on to draw an explicit parallel between the colonial abuse of law and the use of 'the culture of constitutionalism and the language of law'[35] in the post-colonial state. Referring to their 2001 definition of 'lawfare',[36] the Comaroffs argue that '[it] seems overdetermined … that, with the passage into postcoloniality, this same culture, this language, should come of age as the argot of authority, the source of civility, the guarantor of unity amidst difference – and should also be invoked by those who would perpetrate their own kind of cultural justice'.[37] The central idea here is that the colonial state's use of law in the suppression of indigenous peoples' cultural difference provides the model for, and evinces certain historical continuities with, the post-colony's suppression of cultural difference in the name of a modern nation state based on allegedly universal principles of human rights and the rule of law.

Two years later, the Comaroffs gave fuller expression to this idea in the introduction to their edited volume on *Law and Disorder in the Postcolony*.[38] The main argument of this piece is that modern liberal constitutional states, and especially those in formerly colonised parts of the world, are caught in a contradiction between their espousal of universalist notions of human rights, democracy and the rule of law and their need to foster culturally diverse ways of being. In a section on 'the fetishism of the law: sovereignty, violence, lawfare and the displacement of politics',[39] the Comaroffs repeat their observation about 'the almost salvific belief in [the] capacity [of national constitutions] to conjure up equitable, just, ethically founded, pacific polities'.[40] They then go on to document the various ways in which the advent of liberal constitutionalism in the post-colony drives law to the centre of social and political life. Documenting the 'explosion of law-oriented nongovernmental organizations in the postcolonial world',[41] they argue that 'nongovernmental organizations of this sort are now commonly regarded as the civilizing missions of the twenty-first century' and that they are 'asserting their presence over ever wider horizons, encouraging citizens to deal with their problems by legal means.'[42] This point is then used as the segue to a comment on the rising rate of litigation in South Africa and the fact that 'conflict among the African National Congress elect' is increasingly being fought out in the courts rather than through 'more conventional political means'.[43] The same is true of other forms of social conflict, they note:

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[33] http://lawfareinstitute.com/ (John Comaroff is one of ten members of the Lawfare Institute's consulting board).
[34] J Comaroff and J Comaroff 'Policing, Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa' (2004) 29 *Law & Social Inquiry* 513, 521.
[35] Ibid 540.
[36] Ibid 540 (defining lawfare as 'the deployment of legalities to do violence to people and their property by indirect means').
[37] Ibid 540.
[38] JL Comaroff & J Comaroff 'Law and Disorder in the Postcolony: An Introduction' in J Comaroff and JL Comaroff (eds) *Law and Disorder in the Postcolony* (2006) 1, 22ff.
[39] Ibid 22.
[40] Ibid.
[41] Ibid 25
[42] Ibid.
[43] Ibid 26.

> Conflicts once joined in parliaments, by means of street protests, mass demonstrations, and media campaigns, through labor strikes, boycotts, blockades, and other instruments of assertion, tend more and more – if not only, or in just the same way everywhere – to find their way to the judiciary. Class struggles seem to have metamorphosed into class actions.'[44]

At this point, then, the transition of 'lawfare' from a term used to describe the abuse of law and the ideology of legalism by colonial regimes to a term used to describe the questionable benefits of the increasing centrality of law in post-colonial states is complete.

On one level, this extended understanding of the term involves a purely descriptive, and not terribly novel, claim. The Comaroffs are not the first and certainly won't be the last scholars to take note of the way that liberal constitutions, and especially those that provide for judicial review, tend to judicialize politics.[45] What the Comaroffs add to the vast literature on this topic, however, is an observation about the dynamics of this tendency in the post-colonial African state, and South Africa in particular. By using the term 'lawfare' to describe both the abuse of law by colonial regimes and the proliferation of litigation in post-apartheid South Africa, they suggest a certain elective affinity, if not actual causal relationship, between these two phenomena. While their argument is not explicitly spelled out, the connection seems to be that both the colonial and post-colonial states are founded on the liberal rule of law's inherent capacity to mask the violence that is done to non-Western, indigenous peoples in the name of supposedly universal, civilised standards of good governance. Understood in this way, their argument takes on a normative inflection. It is not just a description, but also a critique of the effects of liberal constitutionalism in South Africa.

I will have more to say about the Comaroffs' claims in the next section. For the moment, simply note that their critical account of the role of liberal constitutionalism in South Africa is just one of severable possible narratives. While there are undoubtedly complex continuities between the way law was used in the colonial state and its operation in the post-colonial state,[46] there are other ways of seeing this connection. On the liberal view, at least, the 1996 South African Constitution retrieves and vindicates, not the repressive, violent and deeply hypocritical way that the apartheid government used law, but the nobler vision of law as a constraint on politics that survived the National Party's depredations. The point was precisely to redeem the unfulfilled promise of the liberal rule of law by creating a state that would extend the same rights as had been enjoyed by the settler population to the black majority. To be sure, this enterprise is fraught with difficulty, not least the task of accommodating African cultural values within a constitutional system that is based, at least to some extent, on European enlightenment ideas. But the suggestion that this necessarily amounts to the 'perpetrat[ion]' of some kind of 'cultural justice'[47] appears to stem from an ingrained distaste for liberal constitutionalism on the Comaroffs' part rather than an assessment of its actual effects.

This is not to deny that tremendous reliance was indeed placed on law by those who designed the 1996 South Africa Constitution. The constitution-making process was undoubtedly an aspirational moment when a new society was re-imagined and expressed in legal form. If there was an unjustified *faith* placed in law at the time, however, it was by the Comaroffs' ideological fellow travellers, the CLS proponents of 'transformative constitutionalism', who called on the legal community to treat the 1996 Constitution as an 'ideological project'.[48] Liberals were generally more circumspect about the role of the Constitution as an *instrument* of social change in that sense, seeing it rather as a *framework* for democratic

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[44] Ibid at 27.

[45] See, for example, T Moustafa 'Law Versus the State: The Judicialization of Politics in Egypt' (2003) 28 *Law & Social Inquiry* 883; T Ginsburg 'The Constitutional Court and the Judicialization of Korean Politics' in A Harding & P Nicholson (eds.), *New Courts in Asia* (2009) 113; JA Couso 'The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America' in JA Couso, A Huneeus and R Sieder (eds) *Cultures of Legality: Judicialization and Political Activism in Latin America* (2010) 141.

[46] The most detailed treatment of this topic is Meierhenrich (note 26 above).

[47] Comaroff and Comaroff (note 34 above) 540.

[48] KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 12 *South African Journal on Human Rights* 146.

politics. In Etienne Mureinik's influential metaphor, for example, the 1993 – and by extension, the 1996 – Constitution was a bridge from a 'culture of authority' to a 'culture of justification'.[49] That understanding of a liberal constitution's one-stage-removed role in social and economic transformation is also apparent in the CCSA's early judgments, in which it sought to defer to the African National Congress (ANC) as the main agent of this process.[50] In more recent years, to be sure, the CCSA has lost confidence in the ANC's capacity to drive the constitutionally imagined transformation of South African society. Unlike the Indian Supreme Court, however, it has not taken over this role itself. Rather, it has focused its attention on shoring up the constitutional institutions that make a genuinely transformative democratic politics possible.

There are thus reasons to doubt that the Comaroffs' reading of the 1996 Constitution as perpetuating a renovated version of colonial lawfare would withstand sustained scrutiny. Nevertheless, they have not been short of popularisers. In their 2009 book, *Precedent and Possibility*,[51] and then in the revised 2019 edition of that book,[52] Michelle Le Roux and Dennis Davis draw on the Comaroffs' conception of 'lawfare' to comment on various aspects of contemporary South African constitutionalism.

The introduction to the 2019 edition explicitly acknowledges the ambivalence of the key term. 'Lawfare', Le Roux and Davis write, should be understood as having a duality to it; it can be a good or a bad thing'.[53] Some of Le Roux and Davis's examples of this phenomenon, such as their reference to Hugh Glenister's 'tireless efforts' in the Hawks matter and the litigation to prevent Menzi Simelane's appointment as National Director of Public Prosecutions (NDPP), are thus clearly positive.[54] Elsewhere, 'lawfare' is used to describe actions and social phenomena of which Le Roux and Davis clearly disapprove, such as former President Jacob Zuma's various attempts to use procedural devices to delay his prosecution on charges of corruption,[55] and the various respects in which South Africa's courts have allegedly 'become the site of pure political contestation because politicians seek to usurp judicial powers to achieve their objectives'.[56]

Le Roux and Davis's concession that 'lawfare' is an ambiguous term, and their insistence on using it as a label to describe more or less any instance in which a politically controversial matter is decided by the courts, undermines the term's analytic usefulness. As noted already, constitutional systems that provide for judicial review require courts to decide politically controversial matters. The whole point of adopting such a system is to subject the exercise of political power to constitutional standards. Inevitably, that means that political disputes that previously would have been resolved by other means come to the courts. That this has been the consequence of the adoption of the 1996 South African Constitution is so unremarkable as to be almost not worth saying. The real question is not why this is happening but what effects it is having on democratic politics, the legal system and ultimately the lives of ordinary South Africans. Theorising about and thinking through this question requires sustained attention, a deep knowledge of the local and comparative literature, and some openness to empirical contradiction. None of those qualities is on display in Le Roux and Davis's book, which seems to have been written for a popular audience.[57]

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[49] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

[50] In *Government of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), for example, the Court famously left it to the legislature to fill the gap in South Africa's housing policy that this case identified.

[51] Davis & Le Roux *Precedent* (note 19 above) 185-186.

[52] Le Roux & Davis *Lawfare* (note 17 above).

[53] Ibid at ??. While the Comaroffs' usage of the term is more consistently pejorative, both in their original 2001 article and in their later pieces, they do acknowledge the term's two-sidedness. See, for example, John Comaroff's explanation of the term 'lawfare' in an online Youtube video (https://www.youtube.com/watch?v=skCRotOT1Lg).

[54] Le Roux & Davis *Lawfare* (note 17 above) at ??.

[55] Ibid at ??.

[56] Ibid at ??.

[57] I say this because the book's treatment of the scholarly literature is very superficial, with complex arguments (including those found in the Comaroffs' work) reduced to soundbites and much of the local and comparative literature ignored. The book neither sets out a coherent, normatively grounded theoretical framework nor explores any particular thesis about the origins or effects of the phenomenon it describes.

Nevertheless, the effect of Le Roux and Davis's intervention is that 'lawfare' has entered the South African constitutional lexicon and public debate more generally.[58] Given the term's polysemic nature, there is a need to bring some conceptual clarity to the discussion. Leaving aside its use as a positive term to describe instances where tenacious litigants use the 1996 Constitution to hold political actors to account (as in the Glenister/Hawks example), there seem to be at least three different phenomena that 'lawfare' describes, each of which is associated with a separate concern.

The first is a concern about *the debilitation of democratic politics*. This is the sense of the term associated with the Comaroffs' critique of liberals' misplaced faith in the 1996 Constitution as the solution for all of South Africa's problems. The essential idea here is that liberal constitutionalism works a kind of diversionary effect – in promising to subject the abuse of political power to law it causes everyone to forget about other ways in which power may be contested and democratic struggles waged. Making matters worse, politics is channelled into an institution, the CCSA, that can't resolve the issues it is asked to resolve. Thus, not only is democratic politics debilitated, but social conflicts continue unabated. Understood in this way, this concern connects to an older US civil rights literature about the perils of waging important political battles through the courts. It also resonates with an incipient critical South African literature about the way in which the 1996 Constitution has allegedly removed vital issues from democratic politics – sanitising and depoliticising them in ways that benefit the white minority and the continuation of neo-apartheid.

The second concern is the more familiar worry about the effect of constitutional judicial review on the independence of the judiciary. With so many politically contentious cases being decided by the courts, this concern goes, they will inevitably be drawn into the political disputes that they are asked to decide, with knock-on effects for their impartiality and their ability to act as an independent check on the abuse of political power. Call this the *politicisation of the judiciary* concern.

The final concern is a combination and particularisation of the previous two. It is the worry that the opportunities that the 1996 Constitution provide for litigants to delay cases by taking procedural points or appealing decisions all the way to the CCSA will allow corrupt or otherwise inept public officials to avoid accountability for their actions. This concern combines the first concern's worry about political battles being fought through the courts with the second concern's worry about the effect of liberal constitutionalism on the functioning of the court system. Call this the *abuse of the judicial process* concern.

II DRILLING DOWN ON THE THREE CONCERNS

This section examines the three concerns associated with the use of the term 'lawfare' in South Africa. It first elaborates on each concern and then asks in each case whether the concern is liable to being overstated.

A Lawfare as the Debilitation of Democratic Politics

The first concern is about the way judicial review allegedly diverts political struggles into litigation, thus limiting other forms of democratic politics. While featuring in the Comaroffs' work as an observation about post-apartheid South African society, this concern has a long pedigree. Its antecedents can be traced to debates in the 1960s and 1970s in the US, which still have echoes today, about how the civil rights litigation of that era diverted attention away from the sort of political mobilisation that would have achieved genuine social change.[59] In the familiar story, the Critical Legal Studies movement split over this issue, with feminist and critical race theorists largely resistant to the strong form of this critique.[60]

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[58] See H Corder 'Critics of South Africa's Judges are Raising the Temperature: Legitimate or Dangerous?' *The Conversation* (August 22, 2019) (referring to 'lawfare' as the term now commonly used in South Africa to describe the tendency of 'politicians and civil society' to 'turn to the courts').

[59] Though much criticised, the locus classicus remains GN Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* 2ed (2008).

[60] See D Meyerson *Understanding Jurisprudence* (2007) 114-15.

This controversy continues in the US today, with arguments about whether *Roe v Wade*,[61] despite its apparent support for abortion rights, has not in some way set back the cause of women's freedom of choice. Had the case been delayed, the argument goes, and the victory won in the court of public opinion through ordinary democratic means, the current policy debate over abortion would be less polarised. Similar questions have been raised about the same-sex marriage line of cases,[62] although in this instance the general view is that public interest litigators, aided by a Supreme Court that was sensitive to changing public opinion, did far better.[63] The key issue, it is now agreed, is how public interest litigation is conducted and how the results of any such litigation are fed back into the democratic process. While litigation may demobilise change-seeking groups by seducing them into thinking that court-room victories amount to real social change, this is a problem that can be addressed through the choice of litigants and the sequencing of the issues litigated.

The US literature suggests that the claim that the adoption of a liberal constitution necessarily debilitates democratic politics by diverting political struggles into litigation is one that can be overstated. In probably the most sophisticated treatment of this topic, Gordon Silverstein has shown how the phenomenon of 'juridification' in the US is sometimes best described as 'shaping', sometimes as 'constraining', sometimes as 'saving' and only occasionally as 'killing' off politics.[64] This more nuanced picture casts doubt on the Comaroffs' sceptical account of the effects of the 1996 Constitution. Without a more detailed study of the kind Silverstein conducted in the US, it is dangerous to make assumptions about the impact of liberal constitutionalism on the quality of democracy. As we will see when we get to the Constitutional Court's 2018 record, many of the effects Silverstein identifies are detectable in the South African setting. Even in those instances where judicial review kills off politics, it is not certain that this is not the normatively preferred result.

There is another version of the democratic debilitation critique, however, which is more specifically South African and more thoroughgoing. On this version, liberal constitutionalism doesn't just channel democratic politics into the courts. It closes off democratic discussion of certain important political issues altogether. The main proponent of this view is Joel Modiri, who argues that the 1996 Constitution, in as much as it was conceived as a response to the specific problem of apartheid, deflects attention away from the longer-term cultural and material effects of colonialism in South Africa.[65] What the 1996 Constitution did, Modiri thinks, was provide the basis on which a small section of the black community could be inducted into white society, largely on the latter's terms. This conformed to the ANC's reformist approach to the problem of settler colonialism. In its espousal of an essentially Western model of governance and legal system at the expense of indigenous African models and traditions, however, the Constitution perpetuated rather than addressed the injustices of South Africa's 300-year colonial history.[66]

This argument's indebtedness to the Comaroffs' critique of the continuities between the way law was abused in the colonial state and its oppressive modalities in the post-colonial state is plain to see.[67] Although he doesn't himself use it, Modiri would likely agree that 'lawfare' is an apt term to describe the continuous process of material expropriation and cultural usurpation that has been going on in South Africa since the arrival of Dutch settlers at the Cape in 1652. The 1996 Constitution, he thinks, has been used as the means through which white cultural values, intellectual traditions and professional skills are valued over indigenous African values, traditions, and skills. Thus have 'white lawyers, activists and academics emerged as the primary intellectual and moral custodians of constitutional democracy in South Africa'.[68]

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[61] 410 US 113 (1973).
[62] Culminating in the US Supreme Court's decision in *Obergefell v Hodges* 576 US __ (2015).
[63] Rosenberg *Hollow Hope* (note 59 above).
[64] Silverstein *Law's Allure* (note 20 above).
[65] See, for example, J Modiri, 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34 *South African Journal on Human Rights* 300.
[66] Ibid.
[67] Modiri cites several of the Comaroffs publications (ibid at 306-07 nn 31-36).
[68] Ibid 311.

Modiri's argument deserves a careful, point-by-point response of the kind that Firoz Cachalia has provided.[69] For my limited purposes here, however, it is not necessary to engage with his argument at length. All that I need to show is that Modiri's version of the lawfare critique, like the others considered in this paper, is prone to overstatement and disregards the actual effects of liberal constitutionalism in South Africa.[70] If I can do that, I will have created enough space for the project I want to pursue in this piece – an assessment of the state of South African constitutionalism through the lens of the CCSA's 2018 record.

The first point is that social transformation – or decolonisation – is necessarily a fraught process, and that there are many forces beyond the 1996 Constitution that stand in its way. Thus, the mere fact that South Africa remains in many respects untransformed/undecolonised does not mean that the 1996 Constitution or the liberal model of government it enshrines is to blame. The argument has to focus on the institutions that the Constitution establishes, the form of democratic politics that they enable and whether there is something about those two things that is anti-transformative.

The second point is that Modiri is obviously correct that the 1996 Constitution represents the ANC's reformist tradition rather than a more radical Africanist understanding of the causes of the ongoing oppression of black South Africans. But that is because the ANC won the overwhelming majority of the votes at the first democratic elections. It is thus hard to see how a democrat could regret this fact. To be sure, the Constitutional Principles appended to the 1993 Constitution restrained what the ANC could do.[71] To that extent, the 1996 Constitution overrepresents white minority interests. But by and large the constitution that South Africa has is the constitution that the ANC wanted it to have. The property clause, for example, was freely chosen by the ANC, and not required by the Constitutional Principles.[72] Like the other provisions, it focuses on South Africa's more recent, twentieth-century past rather than the entire period of its colonial history. The clause represents a pragmatic assessment in that sense of the extent to which the historical clock could be wound back. But this was a legitimate choice by a democratically elected party. It is therefore not one that should be regretted but one that needs to be continuously re-evaluated in the light of experience – its merits and effects debated within the framework of democratic politics.

On that critical point, it is not clear that the 1996 Constitution does close down the sort of democratic discussion Modiri wants to have. The Constitution hasn't prevented, as it turns out, the debate over the property clause or the need for a more thoroughgoing land reform process.[73] Nor has the Constitution prevented the rise of the Economic Freedom Fighters (EFF), whose critique of the conditions of black South African life Modiri's argument in some respects echoes. On the contrary, the Constitution has arguably preserved the democratic space for a party like the EFF to emerge.

It is of course possible that South Africans would have been debating the stubborn effects of settler colonialism sooner had the ANC not exerted such a great influence on the 1996 Constitution. But if Modiri is right about the importance of the longue durée, it is not clear that this would have left us in a better position. Whichever political party had controlled the constitution-making process, it would have been confronted with the 'deep structures'[74] of South Africa's colonial past. Even if the balance of political forces had been such that a more radical Africanist constitution had been adopted, this constitution, too, would have struggled with the challenge of converting its aspirations into meaningful social and economic change. Given South Africa's declining terms of trade, its skills shortage, and all the

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[69] F Cachalia 'Democratic Constitutionalism in the Time of the Postcolony: Beyond Triumph and Betrayal' (2018) 34 *South African Journal on Human Rights* 375. See also Le Roux & Davis *Lawfare* (note 17 above).

[70] Modiri 'Conquest' (note 65 above) has very little to say about the Constitutional Court and its jurisprudence apart from a few remarks about the possibility of realistic, non-Utopian 'constitutionalisms from below' (ibid 323).

[71] Schedule 4 of the Constitution of the Republic of South Africa, 1993.

[72] See *First Certification Judgment* (*Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC)) at para 72 (holding that 'no universally recognised formulation of the right to property exists' and implying that, even had the 1996 Constitution not contained a property clause at all, it would have survived challenge under the Constitutional Principles.

[73] J Dugard 'Unpacking Section 25: Is South Africa's Property Clause an Obstacle or Engine for Socio-Economic Transformation?' (2018) 9 *Constitutional Court Review* ??

[74] Modiri 'Conquest' (note 65 above) 314.

other well-known reasons for South Africa's lack of economic growth, it is not at all clear that such a constitution would have performed any better than the 1996 Constitution. At any rate, whether it did so or not would have depended on its tendency to support wise policy decisions, implemented by an effective public service, operating under a government that enjoyed wide public support. In short, we would be in exactly the same position as we are today, save that liberal constitutionalism would not be the preferred whipping boy for all of South Africa's problems.

I hope that these brief comments are not seen as making light of the serious questions that Modiri raises. He has launched a conversation that needed to be broached and which is already enriching public discourse. I am simply asking him to remain true to his laudable constitutional realism. If he thinks that liberals have placed too much faith in the 1996 Constitution as a vehicle for social and economic change, then he shouldn't himself place too much faith in any other kind of constitution. What South Africa needs, as Cachalia argues, is a constitution that provides the framework for democratically driven social transformation.[75] The 1996 Constitution arguably does all of that and more. At least, it is worth examining the extent to which it has been, and is being, used for these purposes rather than dismissing this possibility out of hand.

B Lawfare as Politicisation of the Judiciary

The notion that the introduction of a system of judicial review, and particularly supreme-law judicial review, risks politicizing the judiciary has a very long history. From Alexander Bickel's worry about the counter-majoritarian dilemma,[76] to Jeremy Waldron's critique of judicial review as amounting to judicial majority voting,[77] commentators have been concerned about the legitimacy of giving judges what amounts to a political function. Le Roux and Davis's discussion of this issue adds very little to our understanding of how great this risk is or whether it has been realized in South Africa. They cite almost no local or foreign literature on the topic, and their own discussion amounts to mentioning the possibility of politicisation without establishing it.

The first danger of overstatement in this instance is thus that it risks confusing the new theatres that constitutional courts are asked to enter with the consequences from them as an institution. Clearly, constitutional judicial review does demand of courts that they take on high-stakes political cases. But it is not as though the tension between law and politics doesn't exist in all systems, even without judicial review. As Le Roux and Davis's book itself illustrates,[78] an aspect of this tension existed in the apartheid era. This is precisely why the lessons that were learned and the legal-cultural norms and understandings that emerged during that era, are still relevant today, despite the massive institutional changes that have occurred since 1994.

The other problem is that this concern assumes that the courts necessarily will be politicised when that is far from certain. Courts over the years have developed ways to resist this outcome, and some of them do it very successfully. The German Federal Constitutional Court, for example, is central to politics in that country but has maintained a public reputation as an impartial institution.[79] Even the US Supreme Court, where politicisation has arguably run the furthest, still enjoys relatively high institutional legitimacy ratings.[80] On the strength of these examples, the politicisation of the judiciary is clearly not an inevitable consequence of the adoption of judicial review. The question is how the court concerned

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[75] Cachalia (note 69 above).

[76] AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2ed (1986).

[77] J Waldron 'Five to Four: Why Do Bare Majorities Rule on Courts?' (2014) 123) *Yale Law Journal*. See also Waldron's earlier, better known piece: J Waldron 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

[78] Le Roux & Davis *Lawfare* (note 17 above).

[79] DP Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989).

[80] See JL Gibson & G Caldeira, 'Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?' (2011) 45 *Law & Society Review* 195 (finding that the American public accepts that the justices are influenced by their ideologies, but nevertheless thinks that they maintain a 'principled' commitment to those ideologies that is above purely partisan politics).

responds to its mandate and whether it is able to maintain a reputation for legally motivated decision-making, or at least avoid a reputation for partisan political decision-making.

Whether a court has been politicised is also to some extent measurable. James Gibson has thus conducted several surveys of public attitudes towards the courts in South Africa. His results generally indicate that the public is not all that aware of what the Constitutional Court does, but to the extent that they are, the Court has a higher reputation than other institutions of government.[81] Standard measures of judicial independence also indicate that the courts in South Africa have generally not been politicised.[82] In addition to these quantitative measures, commentators with knowledge of the decisions can offer opinions about whether decisions are so implausible as to suggest political decision-making. That is the method that will generally be used in this article.

C Lawfare as Abuse of the Judicial Process

The concern here is that unscrupulous individuals will either use the judicial process to persecute political opponents or to evade accountability for their actions. Clearly, this is a possibility,[83] but a mere increase in the number of cases in which public office bearers go to court is not indicative on its own that this concern has been realized. As with the politicisation of the judiciary, the question in each case is always whether the judicial process has in fact been abused or whether litigants have merely made use of their rights.

Even if it could be shown that there have been a significant number of instances where politically powerful or wealthy litigants have delayed the onset of justice against them, this would not necessarily be cause for a damning indictment of liberal constitutionalism. Some problems could be fixed by procedural reforms or through judges acting more strictly (e.g. by imposing personal costs orders). In the final analysis, this might also just be a price that is worth paying for the benefits that liberal constitutionalism affords.

III THE CASES

The 52 cases decided by the CCSA in its 2018 term covered a wide range of issues, as indicated at the outset. It is not possible to analyse all of these decisions here. The focus needs to fall on some reasonably representative subset of cases that can be used to assess whether the three lawfare concerns are warranted. At the same time, our sample should not bias the analysis one way or the other.

With those criteria in mind, this section presents short summaries of two broad categories of case: cases dealing with democratic rights and the functioning of constitutional institutions; and cases dealing directly with questions of social transformation and historical (in)justice. This sample gives a fair opportunity for an assessment of the lawfare critique. The first category thus collects a number of cases involving public office bearers, allowing us to examine why they went to court and whether the charge that democratic politics is being diverted through the courts is warranted. At the same time, many of the cases were controversial enough to allow consideration of the politicisation of the judiciary concern. Finally, if there were instances in 2018 in which public office bearers used the judicial process to avoid accountability, they are likely to appear in this batch.

The second category collects cases in which the transformation of South African society or issues of historical (in)justice, such as the land question, were either explicitly or indirectly at issue. This sample allows us to look at the question whether the liberal-constitutionalist frame that was used to decide these

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[81] JL Gibson, 'The Evolving Legitimacy of the South African Constitutional Court' in F Du Bois & A Du Bois-Pedain (eds) *Justice and Reconciliation in Post-Apartheid South Africa* (2008) 229.

[82] See the discussion of Afrobarometer's findings in IV.B below.

[83] See H Corder & C Hoexter "'Lawfare" in South Africa and its Effects of the Judiciary' (2017) 10 *African Journal of Legal Studies* 105, 114-116 (discussing Jacob Zuma's use of 'Stalingrad' tactics to avoid accountability for his alleged involvement in corruption).

cases somehow reduced their scope so that larger issues of colonial injustice were not raised and/or indigenous cultural practices suppressed. In the nature of things, this approach means that those dimensions of social and economic transformation that didn't make it into the Court in 2018 are left out of account. The exercise won't capture the entirety of the 1996 Constitution's exclusionary operation in that sense. But the second category of cases nevertheless allows us to examine, to the extent that issues of social and economic transformation were in fact raised, how they were dealt with.

Within the space available in this section, I can only give a very brief summary of each case. The summaries do not attempt to cover all of the legal issues raised. Rather, I say just enough to provide a flavour of the case and to set up the assessment in section IV.

A Democratic Rights and the Functioning of Constitutional Institutions

1 My Vote Counts

My Vote Counts was a facial challenge under s 32 of the 1996 Constitution to the constitutionality of the Promotion of Access to Information Act 2 of 2000 (PAIA). The applicant, a non-profit company 'founded to improve the accountability, transparency and inclusiveness of elections and politics in the Republic of South Africa',[84] argued that access to information on private funding of political parties and independent candidates was crucial to a fully informed vote. Private funders inevitably expect something in return for their support – if not actual policy influence then at least broad ideological loyalty. Voters need reliable information about these possible influences on the party or candidate they were voting for. Moreover, to be effective, such information has to be available, not just on request through the cumbersome procedure that the PAIA provides, but through a permanently available and updated public record. PAIA's failure to provide for such a record was fatal to its constitutionality.[85]

In its decision, the CCSA confirmed the order of constitutional invalidity made at first instance by the Western Cape High Court.[86] Informed voting, the Court agreed, required that information on political parties must not just be held by them but also be easily accessible to voters.[87] When s 32 of the 1996 Constitution was read with s 7(2) (the state's duty to respect, promote and fulfil constitutional rights) and s 19 (the right to vote), it was clear that the state was under a duty 'to pass legislation that provides for the recordal, preservation and reasonable accessibility of information on private funding'.[88] While PAIA had been passed to give effect to s 32, it was deficient in various ways. For one, it failed to provide for access to information on private funding of independent candidates because they did not fall under the definition of 'private body' in s 1 of the PAIA.[89] While PAIA applied to political parties qua juristic persons, political parties were not required to have juristic personality. This, too, therefore constituted a gap in PAIA's coverage.[90] But the most serious problem, the Court held, was that PAIA is a requester not a recordal regime. In particular, ss 18 and 53 of PAIA made obtaining information on private funding harder than it should be.

For all these reasons, PAIA was constitutionally deficient. The gap in the legislative framework, the Court held, could be remedied either through the amendment of PAIA or through the enactment of another statute or some combination of these things.[91] What was important was that there be a legislative regime for the 'holding, preservation and reasonable disclosure of information on private funding'.[92] Beyond this, however, the Court was not prepared to specify what that regime should look like. Like the

[84] https://www.myvotecounts.org.za/what-we-are-about/
[85] *My Vote Counts* (note 7 above).
[86] *My Vote Counts NPC v President of the Republic of South Africa* 2017 (6) SA 501 (WCC).
[87] *My Vote Counts* (note 7 above) at para 34.
[88] Ibid at para 44.
[89] Ibid at para 63.
[90] Ibid at para 65.
[91] Ibid at para 76.
[92] Ibid at para 80.

High Court, it accordingly refused to grant the specific order that the applicant had requested, viz. that whatever legislative solution Parliament devised should provide for the 'continuous and systematic' recordal of information.[93] That aspect of the order, a majority of the Court held, was unnecessarily intrusive on the legislature's policy-making prerogatives. In their concurring judgment, Froneman J and Cachalia AJ agreed with this stance, but held that it was not compelled by separation-of-powers concerns.[94]

2 Mlungwana

Like *My Vote Counts, Mlungawana* took the form of a facial challenge to the constitutionality of national legislation, this time to s 12(1)*(a)* of the Regulation of Gatherings Act 205 of 1993, which requires the convenors of a public meeting of more than 15 people held for political purposes to give notice of the meeting to their local municipality.[95] The applicants were members of the Social Justice Coalition (SJC), 'a membership-based organisation operating within the City of Cape Town and its environs, including Khayelitsha'.[96] The SJC, the Court noted, had been established to lobby for improved municipal services, such as the provision of clean and safe sanitation. In pursuit of these objectives, 15 members of the SJC had chained themselves to the entrance of the Cape Town Civic Centre. They were joined by other members of the organisation, bringing the demonstration within the definition of 'gathering' in s 1 of the Act. As prior notice of the gathering had not been obtained, all were arrested on charges of participating in an unlawful gathering. Subsequently, 10 were convicted of having convened the gathering without giving notice, while the charges against the others for participating in an unlawful gathering were dropped.

In a relatively straightforward judgment, the CCSA accepted the applicants' main argument that the criminalisation of the failure to give notice of a gathering had a 'chilling effect' on the exercise of the right to freedom of assembly in s 17 of the 1996 Constitution.[97] While s 12(2) of the Act did provide a defence on the basis that the gathering had been spontaneous, the Court noted, the applicants had not relied on this defence in their criminal trial and there was no obligation on them to do so.[98] The case thus fell to be decided on the question whether s 12(1)*(a)* of the Act unjustifiably limited the right to freedom of assembly. Dismissing the state's argument that s 12(1)*(a)* was a mere regulation rather than a limitation of the right,[99] the Court moved to apply its five-factor limitations analysis. The right to freedom of assembly, the Court held, was an important right given both its systematic denial in the past and the role it plays in contemporary South African democratic politics.[100] While the state had a legitimate interest in ensuring that this right was exercised with due regard to public safety and the police's ability to monitor gatherings, the criminalisation of the failure to give notice was unduly restrictive.[101] The threat of criminal sanction, given the severity of the consequences of conviction, was likely to deter many legitimate forms of protest.[102] Against this, there were other ways in which the state's legitimate objectives could be achieved without burdening the right to the same extent.[103] In short, the problem was that the 'fit' between the objectives sought to be achieved and the sanction of criminalisation was not 'tight' enough.[104] In the result, the Court struck down s 12(1)(a) with immediate effect, albeit limiting the application of its decision to the case at hand and all future cases.

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[93] Ibid.
[94] Ibid at para 94.
[95] *Mlungwana* (note 4 above).
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] *Mlungwana* (note 4 above).
[101] Ibid.
[102] Ibid at para 87.
[103] Ibid.
[104] Ibid.

3 *Corruption Watch*

Corruption Watch took the form of a challenge to the constitutionality of a settlement agreement offered to former NDPP, Mxolisi Nxasana, in return for vacating his office.[105] The applicants were three NGOs that have been actively involved in many of the CCSA's good governance cases: Corruption Watch, Freedom Under Law and the Council for the Advancement of the South African Constitution. Their application to the CCSA sought the confirmation of the North Gauteng High Court's order invalidating the settlement agreement between former President Jacob Zuma, the Minister of Correctional Services and Nxasana in his then capacity as NDPP. In addition to invalidating the settlement agreement, the High Court had ordered the repayment of the settlement offer paid out to Nxasana (in the region of R17 million less tax), declared the subsequent appointment of Shaun Abrahams as NDPP invalid consequential on the invalidity of the settlement agreement, and invalidated two provisions of the National Prosecuting Authority Act 32 of 1998 ('the NPA Act') that allowed the President to extend the NDPP's term after retirement and suspend the NDPP without pay.

The central issue in the case was whether the settlement agreement and the impugned provisions of the NPA Act compromised the constitutionally guaranteed independence of the NDPP and the National Prosecuting Authority (NPA). Section 179 of the 1996 Constitution requires there to be an independent prosecuting authority with the NDPP at its head but leaves the details to national legislation. While s 12(8) of the NPA Act provides for the NDPP voluntarily to vacate his office, it was agreed that this section was not applicable on the facts. Rather, the question to be decided was whether the settlement offer made to Nxasana compromised the independence of the institution. At the time of the offer, Nxasana had been facing an inquiry into his non-disclosure of a criminal conviction against him. As an alternative to proceeding with that inquiry, he was offered the opportunity to vacate his office in return for the payment of the salary to which he would have been entitled had he served his full ten-year term. While insisting on his fitness for office, Nxasana accepted the offer.

The CCSA held that the criminal justice system lies at the centre of a well-functioning constitutional democracy.[106] For this system to work effectively, the NDPP and the NPA need to be entirely independent of the President. This constitutional scheme was threatened by the 'carrot and stick' method that President Zuma had used to force Nxasana out of office. Nxasana either had done what he was accused of doing or he hadn't. That question needed to be resolved through proper proceedings, failing which, the inquiry should have been terminated. Instead, by alternately threatening disciplinary action and then offering a massive payout as an inducement to leave office, the President had compromised the independence of the office.

The invalidity of the settlement agreement meant that Nxasana's departure from office was constitutionally improper. His own conduct, however, in accepting the settlement offer while denying the allegations against him, also fell short of the standards expected of the NDPP.[107] The just and equitable remedy, therefore, was that Nxasana should refund the payment made to him but not be re-instated as NDPP. Likewise, the subsequent appointment of Shaun Abrahams as NDPP was vitiated by the irregularity of the process that had proceeded it. Finally, the CCSA invalidated ss 12(4) and (6) of NPA Act in so far as they permitted the extension of the NDPP's term of office beyond retirement age and the unilateral suspension of the NDPP without pay.[108]

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[105] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC).
[106] Ibid.
[107] Ibid.
[108] Ibid.

4 *Helen Suzman Foundation*

Helen Suzman Foundation v Judicial Service Commission centred on the question whether the deliberations of the Judicial Service Commission (JSC), in the execution of its mandate to advise the President on the appointment of judges, could be requested under rule 53(1)*(b)* of the Uniform Rules of Court.[109] This question arose in the context of the Helen Suzman Foundation's approach to the Western Cape High Court to review and set aside the JSC's October 2012 decision advising the President on appointments to the Western Cape High Court. In the course of those proceedings, the Foundation had become aware that the JSC's final deliberations had been recorded. It accordingly requested that these be made available in terms of URC 53(1)*(b)*. (URC 53 applies to applications for review of proceedings inter alia of bodies performing administrative law functions. It provides for applicants in review proceedings to apply for the 'record' of such proceedings.)

The Supreme Court of Appeal (SCA) had held that applications under URC 53(1)*(b)* for release of the JSC's deliberations should be decided on case-by-case basis, weighing the need for full disclosure against protection of the confidentiality of the JSC's deliberations (both so as to ensure the robustness of the discussion and also so as not to discourage future applications to the JSC). The CCSA, in its judgment, found this approach to be unnecessarily cautious. Stressing the importance of the judiciary to South Africa's constitutional project,[110] the Court dismissed the JSC's confidentiality concerns, both as they pertained to the robustness of its discussions and as they pertained to discouraging future applicants. The JSC was composed of people, the Court held, who should be prepared to stand publicly by any comments they made about candidates in the JSC's deliberations. Likewise, for applicants, nothing could be more revealing of their character than the JSC interview itself.[111] The fact that s 12(2) of the PAIA disallows access to the JSC's deliberations was irrelevant, given the different purpose of the PAIA.[112] The CCSA accordingly ordered release of the JSC's deliberations under URC 53(1)*(b)*, with precedential effect for all future such applications.

5 *South African Social Security Agency*

The *South African Social Security Agency* case[113] was the latest in a long series of cases involving the payment of social assistance grants. The broad factual background is that the South African Social Security Agency (SASSA) administers the payment of social grants on behalf of the Department of Social Development. SASSA's powers include the power to enter into contracts for the payment of the grants. A private company, Cash Paymaster Services (Pty) Ltd (CPS), had been awarded the contract to pay social grants after a tender process, but this process had been declared invalid by the Court in 2013.[114] Later, in 2014, the CCSA declared the contract between SASSA and CPS invalid and ordered that a new tender process be run.[115] This order was suspended until 2017 to give SASSA enough time to award the new tender. After SASSA missed this deadline, an NGO, the Black Sash, successfully applied on an urgent basis to have it extended.[116] When that extended order, too, threatened to expire without a new service provider in place, SASSA approached the Court on an urgent basis for a further extension.

The Court held that SASSA had been given ample opportunity to advertise and award the tender. The fact that the tender hadn't been awarded was thus largely due to its own failings. Ordinarily this would have been be grounds for refusal of the application, but in this instance the interests of justice, and

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[109] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC).
[110] Ibid at para 32.
[111] Ibid at paras 38-39.
[112] Ibid.
[113] Note 8 above.
[114] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) ('*AllPay 1*').
[115] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) ('*AllPay 2*').
[116] *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC) (*Black Sash 1*).

particularly the interests of social welfare beneficiaries, meant that the urgent application should be granted. After consideration, the CCSA decided not to impose a personal costs order against the Minister, Ms Bathabile Dlamini or SASSA's acting CEO, Ms Pearl Bhengu, for their handling of the matter. Dlamini and Bhengu's conduct, the Court held, though criticisable, fell short of the standard of bad faith and gross negligence required for such an order.

6 Black Sash 3

Black Sash 3 was decided one month after *South African Social Security Agency*.[117] It is significant as the first case in which the CCSA ordered the payment of personal costs by a national government minister for conduct in the course of litigation associated with the performance of her duties.[118] Whereas the Court in *South African Social Security Agency* had considered this question in the context of SASSA's application to extend the suspension of its order, its decision in *Black Sash 3* related to the preceding litigation in which the Black Sash Trust had applied on an urgent basis to have the Court's initial order extended.[119] After granting the Black Sash Trust's application in *Black Sash 1*, the Court had ordered that the Minister of Social Development show cause why she should not be joined to the proceedings and pay the costs thereof in her personal capacity.[120] In response to that order, Minister Dlamini had tendered an affidavit that raised various factual disputes about what the Court referred to as a 'parallel' process of responsibility.[121] After considering the existence of these disputes in *Black Sash 2*, the CCSA ordered that the Minister should be joined in her personal capacity and that a fact-finding inquiry be held into her conduct in terms of s 30 of the Superior Courts Act 10 of 2013. The inquiry, chaired by retired judge, Bernard Ngoepe, found that Minister Dlamini had indeed appointed a parallel team of people to report directly to her rather than to the CEO of SASSA, and that she had not disclosed this fact in her affidavits tendered to the Court following its decision in *Black Sash 1*.[122] In light of these factual findings, and further arguments before it, the CCSA held in *Black Sash 3* that Minister Dlamini should personally pay 20% of the Black Sash Trust's and Freedom Under Law's costs in bringing the original application. In so doing, the Court re-iterated its remarks in *Black Sash 2* that the common law provision for personal costs orders was now 'buttressed by the Constitution'.[123] Rather than breaching the separation of powers, the Court held, the awarding of personal costs against a national government minister was within its power to enforce compliance with the Constitution.[124]

7 Law Society v President

Law Society v President[125] concerned a constitutional challenge to former President Jacob Zuma's participation in the decision-making process that led to the suspension of the operations of the Southern African Development Community ('SADC') Tribunal. The lengthy build-up to the case started with the Zimbabwe government's policy of uncompensated expropriation of land owned by white farmers.[126]

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[117] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law Intervening)* [2018] ZACC 36 (*Black Sash 3*).
[118] A personal costs order was made against former President Jacob Zuma in *Republic of South Africa v Office of the Public Protector* 2018 (2) SA 100 (GP) after he delayed the establishment of a commission of inquiry into state capture that had been ordered by the Public Protector. See Corder & Hoexter (note 83 above) 116.
[119] *Black Sash Trust v Minister of Social Development* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (*Black Sash 2*)
[120] *Black Sash* 3 at para 1.
[121] Ibid at para 3.
[122] Ibid.
[123] Ibid at para 10.
[124] Ibid.
[125] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC).
[126] The policy began in 2000, after the ruling party, ZANU-PF, lost a constitutional referendum. See Daniel Compagnon *A Predictable Tragedy: Robert Mugabe and the Collapse of Zimbabwe* (2011).

After failing in Zimbabwe's courts, a group of affected farmers took their case to the SADC Tribunal, which decided in their favour.[127] Instead of taking steps to enforce the order, the SADC Summit, the organisation's supreme body, resolved to frustrate the decision. This they did initially by refusing to appoint judges to the Tribunal,[128] and then by adopting the 2014 Protocol on the Tribunal, which removed its jurisdiction to decide on individual complaints against member states.[129] In the North Gauteng High Court and then the CCSA, the applicants challenged President Zuma's participation in these events as a violation of s 167(5) the 1996 Constitution, and particularly of the obligations it imposes on the President to act lawfully, rationally and constitutionally in the exercise of his executive powers.

In a complicated and at times difficult-to-follow decision that is comprehensively analysed elsewhere in this volume,[130] Mogoeng CJ dismissed the respondents' preliminary argument that the case was premature as the Protocol had not yet been ratified by the South African Parliament or entered into force.[131] As to the main complaint, the Chief Justice held that the President's actions in participating in the irregular amendment of the SADC Tribunal's jurisdiction for purposes that ran contrary to the 1996 Constitution's commitment to the rule of law and the right of access to courts, was unlawful, irrational and unconstitutional.[132]

B Social Transformation and Historical (In)justice

1 Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association

Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association dealt with the constitutionality of a national government policy ('the policy') providing for the restructuring of the insolvency industry.[133] The policy regulated the distribution of provisional sequestration work to insolvency practitioners on the basis of race and gender. In particular, the policy established four categories of insolvency practitioner by race and gender and mandated a rotational system for their appointment by the Master, with preference given to people from historically disadvantaged race and gender groups.

The High Court and the Supreme Court of Appeal (SCA), in their consideration of the matter, had held that the policy was rigid, arbitrary and capricious and amounted to a prohibited quota system.[134] The policy, the SCA held, unduly fettered the Master's discretion to appoint trustees and was ultra vires to that extent. It also breached the principle of legality in as much as it failed to promote the interests of creditors under the Insolvency Act 24 of 1936.[135]

While finding the policy unconstitutional, a majority of the CCSA disagreed with the SCA's reasoning. For the majority in the CCSA, the problem with the policy was that its fourth preferential category grouped together white males and members of other race groups who had become citizens after 1994. This, the Court held, violated the principle established in *Van Heerden*[136] that social transformation policies should be reasonably capable of achieving their desired outcome. Given the variety of measures

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[127] *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* [2008] SADCT 2 (28 November 2008).
[128] *Law Society* (note 125 above) at para 15.
[129] Ibid at para 9.
[130] See the papers in this issue of the journal by Sanya Samtani, Dire Tladi and Andreas Coutsoudis and Max du Plessis.
[131] *Law Society* (note 125 above) at paras 21-45.
[132] Ibid at paras 46-85.
[133] *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC).
[134] *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development* [2015] ZAWCHC 1; 2015 (2) SA 430 (WCC); 2015 (4) BCLR 447 (WCC); *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2016] ZASCA 196; 2017 (3) SA 95 (SCA) (SCA decision).
[135] SCA decision at para 65.
[136] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC).

to prevent the acquisition of citizenship by members of disadvantage groups before 1994, the majority held, there was no rational reason why that date should have been used to discriminate between categories in the quota system.[137]

In dissent, Madlanga J, with Kollapen AJ and Froneman J concurring, stressed that the policy only covered provisional sequestrations, leaving the administration of final sequestration orders to be dominated by white practitioners.[138]

2 Rustenburg Platinum Mine v SAEWA obo Bester and Others

In this case, the CCSA set aside an order of the Labour Appeal Court, holding that the dismissal of a white employee for referring to a fellow employee as a 'swart man' (black man) was appropriate.[139] The Court considered that the use of the term to refer to a co-employee in circumstances where it suggested that employee's conduct was typical of persons of that race was racist. In considering whether dismissal was an appropriate sanction, the CCSA took into account the fact that the employee had persisted in his denial of having used the words and had moreover engaged in further angry and abusive conduct during the hearing of the matter. The Court in conclusion stressed that the white employee had not undergone the necessary personal transformation that the 1996 Constitution expects of all South Africans.[140]

3 Duncanmec (Pty) Limited v Gaylard NO and Others

This case concerned the lawfulness of the dismissal of nine National Union of Mineworkers of South Africa members for racially offensive conduct in singing allegedly threatening struggle songs in the course of a labour protest.[141] The CCSA accepted for purposes of its decision that the song, which included the word 'boer', was racially offensive but upheld the arbitrator's decision that the dismissal had not been reasonable in circumstances.

4 Rahube v Rahube and Others

In this case, the CCSA declared s 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 constitutionally invalid insofar as it automatically converted holders of any deed of grant or any right of leasehold into holders of rights of ownership. Since the majority of existing rights holders were likely to be male, the Court held, the provision for automatic conversion of their rights without a process of inquiry into the how they had acquired the rights and who might be affected violated the applicant's right to gender equality in s 9(1) of the 1996 Constitution.[142]

5 Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another

This case concerned a dispute between the long-term occupiers of land and two companies that had been granted mining rights.[143] The applicants were descendants of a community that had purchased a farm in 1919. Because of racial zoning laws applicable at the time, the land could not be registered in their

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[137] *Minister of Justice and Constitutional Development* (note 133 above) at paras 43-48.
[138] Ibid at paras 61-104.
[139] *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] ZACC 13; (2018) 39 ILJ 1503 (CC); 2018 (8) BCLR 951 (CC); [2018] 8 BLLR 735 (CC); 2018 (5) SA 78 (CC).
[140] Ibid at para 62.
[141] *Duncanmec (Pty) Limited v Gaylard NO and Others* [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335.
[142] *Rahube* (note 9 above).
[143] *Maledu* (note 9 above).

ancestors' names but was instead held in trust by the responsible minister. Ownership of the land subsequently passed to the tribal authority, which, together with the Minister of Rural Development and Land Reform, gave permission for mining operations. The High Court, in its decision, had granted an eviction order on the grounds that the applicants they were not the registered owners and that the tribal authority was authorised to enter the agreement resulting in their eviction. The CCSA overturned this decision on appeal. It held that the award of the mining rights did not extinguish the applicants' rights under the Interim Protection of Informal Land Rights Act 31 of 1996, a post-apartheid statute that had been enacted to give effect to the constitutional property clause's requirement of security of tenure.

IV ASSESSING THE LAWFARE CRITIQUE IN LIGHT OF THE CASES

Even this very quick summary of 12 of the 52 cases decided in the CCSA's 2018 term gives an indication of the range, complexity and importance of the issues with which the Court was confronted. From ensuring the independence of the NDPP to overseeing the payment of social grants, the Court was asked to decide a number of politically salient cases. The sample is not, of course, entirely representative of what is going on in the judicial system or the extent of juridification of South African life more generally: the magistrates' courts, High Courts, the Supreme Court of Appeal and the Labour Appeal Court have dockets that are probably more reflective of the actual state of affairs; and the sample's focus on court decisions precludes analysis of the broader social, economic and cultural effects of liberal constitutionalism. We should thus be cautious about drawing firm conclusions. Nevertheless, if the lawfare critique has any bite, we should see some evidence at least of its three main concerns: (1) the tendency of constitutional litigation to take the place of democratic politics; (2) a judiciary struggling to maintain its independence in the face of the controversial cases it is being asked to decide; and (3) the judicial process being abused by political office bearers. In fact, however, in relation to each of these three concerns, the evidence points the other way. The cases show a Court that is playing a central role in *bolstering* democratic politics, *resisting* politicisation, and *sanctioning* attempts to abuse its processes.

A Debilitation of Democratic Politics?

There is no doubt that democratic politics in South Africa is dysfunctional in many ways. The ANC's electoral dominance has meant that the real struggle for political power in South Africa occurs within that party, in ways that the 1996 Constitution can only partly regulate. After twenty-five years of single-party rule, South African democracy is plagued by serious problems of patronage and corruption.[144] At the same time, the ANC is so riven by factional disputes that it is no longer able to focus on, let alone deliver, a coherent programme of policy-driven social change.[145] Instead, the ruling party has lurched from leadership struggle to leadership struggle, with each new year bringing a fresh set of corruption allegations and commissions of inquiry.[146] On the side of the political opposition, the picture is not much better. The Democratic Alliance has had its own leadership battles and has generally been unable to shake its

[144] Two of the most recent books documenting the extent and nature of corruption in South Africa are Pieter-Louis Myburgh *The Republic of Gupta: A Story of State Capture* (2017) and James-Brent Styan & Paul Vecchiatto *The Bosasa Billions: How the ANC Sold its Soul for Braaipacks, Booze and Bags of Cash* (2019). See further Public Protector *State of Capture* (Report No 6 of 2016–2017) and State Capacity Research Project *Betrayal of the Promise: How South Africa is Being Stolen* (2017).

[145] See Mcebisi Jonas *After Dawn: Hope after State Capture* (2019) (explaining the policy options to kickstart inclusive growth but acknowledging that the ANC is currently politically constrained in its ability to implement them).

[146] The two most prominent recent commissions are the Judicial Commission of Inquiry into Allegations of State Capture (Zondo Commission), launched in August 2018 and still running as of September 2019, and the Mokgoro Commission of Inquiry into the conduct of Deputy National Director of Public Prosecutions, Nomgcobo Jiba and Special Director of Public Prosecutions, Lawrence Mrwebi (Mokgoro Commission).

reputation as a minority-group party.[147] Its vote slid for the first time in the 2019 elections and it appears to have maximised its appeal at around 20%. The EFF, on the other hand, was able to increase its share of the vote in 2019, from 6% to 11 %.[148] While it is still some way off from being able to govern in its own right, it is threatening the ANC's absolute majority. The problem in this instance, however, is that the EFF's populist policies offer little real prospect of generating the inclusive economic growth that South Africa needs.[149] Without a new realignment in politics, the most realistic prospect is that the ANC will continue to contain the EFF's populism by itself moving in that direction.

It is one thing, however, to say that South Africa's democracy is dysfunctional in various ways, and another to say that the 1996 Constitution is responsible for this. All of the troubling features just listed have other obvious causes, such as the country's racially skewed capital-ownership structure, which inhibits economic growth and jobs creation, and thereby provides a constituency for populist political parties to promote policies that will inhibit economic growth even further.[150] More importantly – as dysfunctional as South Africa's democracy is, none of the dysfunctional features specifically associated with the lawfare critique is obviously present, even if we go beyond the 2018 cases. Thus, while opposition parties have been involved in many prominent cases over the last ten years,[151] there is no sense in which they have been waging policy battles through the courts. Rather, these cases have been about asking the judiciary to ensure that constitutional institutions that are meant to control the abuse of public power indeed fulfil that function.[152] Aside from political parties, this type of case has also been brought by civil society groups and NGOs whose pro-poor agendas are more or less in line with the ANC's stated policy commitments. Thus, far from undermining democratic politics, constitutional litigation is being used to reinforce the democratic process and to hold the ANC to its own electoral promises.[153]

The lawfare critique is also not made out in respect of the ANC's internal leadership struggles. True, many of the cases that the CCSA has decided have been related to these struggles. All of the voluminous litigation around the NDPP,[154] for example, has stemmed from a concern about the capacity of the NPA to perform its work independently in a situation where some of the people to be prosecuted are high-ranking ANC members. In addition, the cases about the fairness of provincial ANC elections directly affect the outcome of intra-party political struggles in a context where provincial leaders are playing a more prominent role in the party.[155] In deciding these cases, however, the CCSA cannot be said to have usurped the ANC's processes. Rather, it has acted to enforce existing procedural rules.

These features of the CCSA's record, familiar to those who have been following its decisions over the last ten years, were again on display in 2018. The *Corruption Watch* case,[156] for example, looks superficially like a case in which the 1996 Constitution diverted an internal ANC political struggle into the courts. The origins of this case may thus be traced all the way back to the battle between former

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[147] At the time of the 2019 general elections, 62% of the DA's parliamentarians were people who would have been classified white under the apartheid system, in a country where only 9% of the population would now be so classified. Former Western Cape provincial leader, Patricia de Lille, formed a new political party, Good, after her membership of the party was terminated in May 2018.

[148] In the 2019 general election, the EFF won 10.79% of the vote, an increase of 4.44% on its 2014 result. The Freedom Front Plus, Inkatha Freedom Party and African Christian Democratic Party also increased their share of the vote by marginal amounts. None of these parties represents a credible threat to the ANC, however.

[149] The ANC' embrace of the call for Expropriation Without Compensation (EWC), for example, is generally regarded as an attempt to head off the populist threat posed by the EFF.

[150] See Jonas *After Dawn* (note 145 above) 111.

[151] See, for example, *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) (challenging the appointment of Menzi Simelane as NDPP); *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) (enforcing remedial action ordered by the Public Protector in the Nkandla matter); *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 (8) BCLR 1077 (GP) (overturning the NPA's decision to drop corruption charges against Jacob Zuma).

[152] Corder & Hoexter (note 83 above) at 119.

[153] Firoz Cachalia 'Precautionary Constitutionalism, Representative Democracy and Political Corruption' (2018) 9 *Constitutional Court Review* ??.

[154] Ibid at 113.

[155] See, for example, *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC).

[156] [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC).

Presidents Thabo Mbeki and Jacob Zuma for the 'soul' of the party'[157] – a struggle that continues today in the efforts of President Cyril Ramaphosa's administration to combat corruption and prevent the resurgence of residual elements of the Zuma faction.[158] As noted in IIIA.3, Zuma's settlement offer to former NDPP, Mxolisi Nxasana, had been made in the context of the on-again off-gain corruption charges against him. Nxasana, it is generally agreed, had proven insufficiently controllable by the Zuma faction, and thus needed to be replaced with the seemingly more compliant Shaun Abrahams. The outcome of the *Corruption Watch* case, in that sense, was crucial to Zuma's ability to continue resisting prosecution, at least for the 10 years of Abrahams's tenure.

Saying that the outcome of a case is important to one side's prospects of success in an internal political-party battle, however, is crucially different from saying that the case took the place of ordinary democratic politics. In the *Corruption Watch* litigation, after all, the Court was not being asked to decide between the competing factions. Rather, the case was about whether the settlement agreement and certain provisions in the NPA Act undermined the independence of the NDPP. It was a case, in other words, in which the Court was being asked to protect the integrity of the institutions affected by the internal struggle and their capacity impartially to regulate it. Rather than diverting the internal struggle into the Court, what the *Corruption Watch* case did was to empower another constitutional institution, the National Prosecuting Authority, to play its designated role. At the same time, the case illustrates the way in which the 1996 Constitution provides avenues through which concerned civil society organisations, who are not party to the ANC's internal disputes, can enliven the Court's jurisdiction to protect South African democracy against the institutionally destructive consequences of the ANC's electoral dominance.[159]

All of the other cases discussed in section III.A may be understood in the same way. *My Vote Counts* was about protecting the integrity of the democratic process against the corrupting influence of private political-party funding.[160] *Mlungwana* illustrates the role that the CCSA is playing in keeping open the space for the sort of traditional democratic politics – street protests – that the Comaroffs claim has been channelled into litigation.[161] (In Silverstein's terms,[162] *Mlungwana* is an instance of law 'saving' this style of politics.) The decision in *Helen Suzman Foundation*, though immediately about whether the JSC's deliberations could be compelled under URC 53, was ultimately about preserving judicial independence.[163] Finally, *South African Social Security Agency* and *Black Sash 3* were about enforcing ministerial accountability in a dominant-party democracy where the electorate does not routinely sanction non-performance.[164]

Collectively, these cases reveal the role the CCSA is playing in shoring up the institutions and accountability mechanisms on which the democratic system depends. To be sure, there is some selection bias at play here – all of the cases just mentioned were included in the sample precisely for this reason. But this does not detract from the function that the CCSA is performing in these cases. When considered together with the fact that there were no instances of cases in which the Court's decision discouraged more traditional forms of democratic politics, the cases provide powerful evidence that this aspect of the lawfare critique is not made out.

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[157] WM *Thabo Mbeki and the Battle for the Soul of the ANC* (2007).
[158] See, for example, Pieter-Louis Myburgh, *Gangster State: Unravelling Ace Magashule's Web of Capture* (Penguin, 2019).
[159] In this journal, Sujit Choudhry argued that the CCSA, in order to counteract the ANC's dominance, should explicitly develop a number of 'anti-domination doctrines' ('"He had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2010) 2 *Constitutional Court Review* 1). Samuel Issacharoff, too, has argued that the CCSA should become more interventionist in this sense ('The Democratic Risk to Democratic Transitions' (2014) 5 *Constitutional Court Review* 1.) The CCSA's 2018 Term reveals that the Court has been able to do this, not so much by developing the cross-cutting doctrines Choudhry called for, but by expanding the reach of its powers on a case-by-case basis, particularly under the doctrine of legality.
[160] Note 7 above
[161] *Mlungwana* (note 4 above).
[162] Silverstein *Law's Allure* (note 20 above).
[163] *Helen Suzman Foundation* (note 109 above).
[164] *South African Social Security Agency* (note 8 above) and *Black Sash* 3 (note 117 above).

Modiri's more general critique – that the 1996 Constitution has taken the deep-structural effects of colonialism off the democratic agenda[165] – is by its nature not something that an assessment of the CCSA's case law can establish, one way or the other. The *SASSA* case,[166] for example, is fairly inconclusive on the question of whether the 1996 Constitution provides a genuine framework for social and economic transformation or merely legitimates the unjust status quo. In holding Minister Dlamini to account for her mishandling of the second social grants tender process, the CCSA was attending to the integrity of a welfare programme on which millions of South Africans depend for their survival. It was therefore a case that was crucial to the stability of the post-apartheid political settlement. But this fact only counts as an argument in favour of liberal constitutionalism if you think that this political settlement was just or at least the closest approximation to a just settlement in the circumstances. If you do not accept that premise, the analysis is quite different. From a more critical perspective, South Africa's extensive social welfare system would not be necessary if the racialised structures of 'white monopoly capital'[167] had been broken down, thus freeing black South Africans to fend for themselves. On this view, the *SASSA* Court was simply tinkering at the margins. Its decision, as laudable as it may seem, did nothing to address the structural causes of poverty and unemployment in South Africa. Worse than this, by protecting the integrity of the social grants system, the Court unwittingly contributed to the legitimation of the post-apartheid political settlement, which (on the critical view) substitutes welfare for genuine social and economic change.

On its own, the *SASSA* case can't be enlisted to settle this debate one way or the other. Everything depends on your normative 'prior', as American political scientists like to say.

The two land reform cases look similarly inconclusive. *Rahube*,[168] as we have seen, took the form of an equality clause challenge to late-stage National Party legislation aimed at enabling black South Africans to upgrade their land tenure rights. In striking down s 2(1) of the impugned Act,[169] the CCSA's decision corrected an obvious gender bias in the original policy. It showed, in that sense, how a liberal constitution can be used to challenge discriminatory land-titling programmes, thus preventing the locking-in of unjust landholding patterns. On the other hand, *Rahube* did nothing to address the deep-seated consequences of South Africa's 300+ years of colonial land dispossession. That issue is regulated by the Restitution of Land Rights Act 22 of 1994, which is subject to the restrictive terms of the 1993 constitutional settlement.[170] Likewise, the second land reform case, *Maledu*,[171] enforced land rights acquired in 1916, after the main acts of colonial 'conquest' had taken place.

But perhaps this concedes too much to the critical view. Constitutions, especially those committed to transformation, must perforce address current imbalances of social and economic power rather than their historic causes. In *Maledu*, the applicants' access to land, as much as it depended on rights that were acquired after the main process of colonial land dispossession had occurred, was threatened in the here and now, by two mining corporations that had been given permission to mine by the responsible tribal authority and the Minister of Rural Development and Land Reform. To that extent, the case pitted the descendants of a relatively well off, but still vulnerable, community against the post-colony's new power holders – the 'alliance of chiefs, black business partners and mining corporations' that a recent critical-left analysis lists as one of the major social mechanisms in the 'formation of a new

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[165] See II.A above.
[166] *South African Social Security Agency* (note 8 above).
[167] This is the Zuma faction's and the EFF's preferred term for South Africa's racially skewed capital-ownership structure. It controversially featured in a social media campaign devised by public relations agency Bell Pottinger to discredit political parties and journalists critical of former President Jacob Zuma's links to the 'Guptas', a family of three brothers who it is alleged have been involved in corruption and state capture. As Jonas *After Dawn* (above note 145) at 126-27 points out, the term is not strictly speaking accurate given the unbundling of the four major corporations that used to dominate the Johannesburg Stock Exchange before 1994 and the extensive foreign ownership of South African capital.
[168] *Rahube* (note 9 above).
[169] Upgrading of Land Tenure Rights Act 112 of 1991.
[170] Section 121(3) of the 1993 Constitution provided that the land restitution process should not reach back earlier than 19 June 1913, the date on which the Natives Land Act 27 of 1913 was passed.
[171] *Maledu* (note 9 above).

black elite'.[172] While *Maledu* might thus have done nothing about the causes of colonial land dispossession, it did address the new vulnerabilities that less well connected black South Africans experience under the current ANC dispensation. In addition to the 38 applicants, the Land Access Movement of South Africa (LAMOSA), an NGO that represents the interests of communities dispossessed after 1913, joined the case as an amicus curiae. While denying LAMOSA's application to introduce new evidence, the Court began its judgment by quoting Frantz Fanon (no less), on the importance of land to 'colonised people'.[173] *Maledu* is thus hardly an example of a case in which the 1996 Constitution elided the fraught history of land dispossession in South Africa. Rather, it provided a public forum for discussion of precisely the issue that the Comaroffs and Modiri argue the 1996 Constitution is silent about – the continuities between the colonial abuse of law and the ongoing social and economic marginalisation of black South Africans in the post-colony.

Likewise, the two 'racially abusive language' cases – *Rustenburg Platinum Mine*[174]and *Duncanmec (Pty) Ltd v Gaylard*[175] – illustrate the subtle shift in the balance of *cultural* power that the 1996 Constitution is driving in the South African workplace.[176] In the first case, as we have seen, the CCSA upheld the dismissal of a white employee for referring to a black colleague by race, whereas in the second it held that the dismissal of black workers for singing a protest song that contained the racially insulting word 'boer' was unreasonable. The two cases are distinguishable on the basis that *Rustenburg Platinum Mine* involved a direct personal insult whereas *Duncanmec* involved racially offensive conduct in the course of a strike.[177] But they are nevertheless indicative of the way in which the 1996 Constitution's values are reaching down into day-to-day interactions like these to vindicate certain ways of behaving over others. It is alright for workers to sing a racially offensive struggle song if that is done to express their sense of oppression under a racially exploitative economic system.[178] It is not OK to refer to a colleague by race if that is done in the course of complaining about his conduct in a way that suggests that his behaviour was typical of persons of that race. These are fine distinctions at the intersection of labour law and cultural politics, but it is not obvious that the 1996 Constitution is not capable of making them. The charge that this Constitution 'perpetrates' an exclusively European enlightenment view of 'cultural justice'[179] is certainly not made out.

B Politicisation of the Judiciary?

The best evidence of the claim that the 1996 Constitution has politicised the judiciary would be social survey data that reflects a general loss of confidence in the independence of the courts. In the latest Afrobaromoter survey, however, 67% of residents agreed or strongly agreed with the statement that '[t]he courts have the right to make decisions that people always have to abide by',[180] and 71% agreed or

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[172] See Karl van Holdt *The Political Economy of Corruption: Elite Formation, Factions and Violence* Society, Work & Politics Institute Working Paper 10 (February 2019) 3.
[173] *Maledu* (note 9 above) at para 1 (quoting Frantz Fanon, *The Wretched of the Earth* (1963) 43).
[174] Note 139 above.
[175] Note 141 above.
[176] See the discussion in *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC) at para 65 of the racist overtones of the regulation of cannabis use and the concomitant denial of cultural rights. This theme has appeared in all the Prince litigation at both the High Court and CCSA level.
[177] See Joanna Botha's paper in this volume of the *Constitutional Court Review*.
[178] The Court in *Duncanmec* (note 141 above) at para 6 acknowledges that the 1996 Constitution has thus far had limited impact on eliminating racism because of the difficulty of changing human behaviour. The National Union of Mineworkers of South Africa (NUMSA) argued that racist struggle songs were justified because of the ongoing economic effects of apartheid (at para 24).
[179] Comaroff & Comaroff (note 34 above) at 540.
[180] Plus 94 Research, 'Summary of Results' of Afrobarometer Round 7 Survey, South Africa, 2018 (afrobarometer.org/sites/default/files/publications/Summary%20of%20results/saf_r7_sor_13112018.pdf).

strongly agreed that '[t]he president must always obey the laws and the courts, even if he thinks they are wrong'.[181] This is hardly evidence of a judicial system that is widely perceived to be illegitimate.

In more qualitative terms, the number of public accusations by prominent politicians that the judiciary has been politicised has certainly increased. Whereas in the first fifteen years of democracy this type of attack occurred relatively infrequently,[182] there have been a number of fairly serious attacks in the last decade. The trend began with former President Zuma's not clearly benevolently motivated 2012 inquiry into the impact of the CCSA's decisions on social transformation,[183] and then escalated into attacks on individual justices, who have been openly accused of bias.[184] In addition to the ANC, the political party that is fondest of this sort of rhetoric is the EFF, whose leader, Julius Malema, recently complained of 'women judges' who are 'threatened by male white Afrikaner lawyers'.[185]

The fact that such attacks have been increasing, however, does not mean that the courts have been politicised. Drawing this conclusion amounts to treating the making of accusations of politicisation as proof of their validity. Such a conclusion would not only be wrong. It would also be dangerous.[186] The obvious point about these attacks is that they are themselves political. In a situation in which the courts, along with the media, have at times been the only defence against the ANC's slide into corruption, it is in the interests of those who might one day face criminal charges to attack the courts. The most troubling aspect of the use of the word 'lawfare' is that it feeds into these tactics. By describing both the benevolent and the abusive use of the courts in the same terms, the 'lawfare' critique encourages the very process of politicisation it purportedly seeks to guard against.

In addition to the absence of partisan-political influence on the courts,[187] there is also no evidence of the weaker, American form of politicisation, i.e. the influence of the judges' personal ideological views on decision-making. That is largely because the 1996 Constitution, read in the context of its enactment, presents a much more coherent account of its animating moral values than the US Constitution. What American CLS scholar, Karl Klare, famously presented as a post-liberal 'ideological project' is simply the textually immanent political ideology informing the 1996 Constitution.[188] Unsurprisingly, therefore, it is hard to divide the current members of the CCSA into ideological blocs. Such disagreement as there has been has been about differences over the scope of the separation of powers doctrine.[189] With a bit of effort, one could try to make something of this – to suggest, for example, that there are more and less executive-friendly factions on the Court and that this has to do with their political loyalties or ideological affiliations. But there is no strong evidence of this. The differences on the CCSA over the scope of the separation of powers doctrine are more plausibly ascribed to constitutional-theoretical differences about the Court's appropriate relationship to the democratic branches and the balance to be struck between constitutional enforcement and respect for democracy.

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[181] Ibid.

[182] The only incidents of this sort from this period were former Health Minister Manto Tshabalala-Misimang's threat not to obey the CCSA's decision in the Treatment Action Campaign case if it went against the government and the ill-fated attempt in 2006 to amend the 1996 Constitution so as to give the Ministry of Justice more control over the courts (see Catherine Albertyn 'Judicial Independence and the Constitution Fourteenth Amendment Bill' (2006) 22 *South African Journal on Human Rights* 126).

[183] See Corder & Hoexter (note 83 above) at 124.

[184] Ibid at 124-25.

[185] https://www.news24.com/SouthAfrica/News/advocates-body-slams-effs-julius-malema-for-his-attack-on-sas-judges-20190816).

[186] This problem also affects the otherwise more cautious account in Corder & Hoexter (note 83 above) in so far as they refer to the courts as 'casualty' (at 120) of the process when it is in fact far from clear that they have been. This leads them into a more pessimistic analysis than is warranted.

[187] The only publicly recorded instance of attempted partisan-political influence on the CCSA concerns the still unresolved allegation that Justice John Hlophe of the Western Cape High Court attempted to influence two of the judges in their decision in a matter involving former President Jacob Zuma. Whether those allegations are true or not, the point is that the judges concerned resisted whatever influence Justice Hlophe might have sought to exert.

[188] See Klare (note 48 above).

[189] For an example of this in the CCSA's 2018 term, see Froneman J's concurring judgment, in which Cachalia AJ concurred, in *My Vote Counts* (note 7 above).

In short, the atmosphere of alarm about the possible politicisation of the courts that the proponents of lawfare seem to want to foster is not borne out by the facts. Both quantitively and qualitatively, the CCSA has built and maintained a reputation for law-governed adjudication. How has it done this? In previous work, I have suggested that we should resist monodisciplinary political science accounts of the Court as engaging in purely political, power-building strategies, and think instead in interdisciplinary terms of the Court as being at the centre of two distinct social subsystems – law and politics – each with its own conception of legitimate authority.[190] In that setting, what the Court does – what all constitutional courts do in systems where law is relatively well institutionalised – is to negotiate the constraints of law while at the same time drawing on the ideological power of the law to put itself in the best institutional position to fulfil its mandate.[191] Without attempting to be exhaustive, we can observe at least four adjudicative moves of this sort in the CCSA's 2018 record.

1 Main Posture: Legalism

'Legalism' as used here is a legal-cultural ideology that emphasises law's autonomy from politics. I say 'ideology' because legalism is best understood as a cluster of ideas about the nature of law that has the power to legitimate the exercise by a court of its functions even though it is unable to establish its claims empirically. Its success depends on inculcating in the public a certain faith in law – not the 'fetishized faith' that the Comaroffs allege liberals have in the 1996 Constitution's ability to solve all of South Africa's problems, but a faith in the capacity of law to act as a counterweight to politics. Legalism as an ideology in this sense is propagated in the public sphere in various forms. As far as the CCSA is concerned, it consists in the claim underlying each of its decisions, as it works its rhetorical effects, that the outcome was mandated by law and not by politics. Understood in this way, legalism is both an ideology and an umbrella term for a range of reasoning techniques through which the Court demonstrates that law provides a separate and distinct form of reasoning which is politically impartial – that for all of the political controversy of the questions put to it, once these questions are considered in court, they are converted from political into legal questions.[192]

Every decision the Court takes is replete with these techniques, but the way they convert political questions into legal questions is so taken for granted that we are mostly unaware of what the Court is doing. Take, for example, the *Corruption Watch* case.[193] As noted in the previous section, the political subtext of that case was that Shaun Abrahams was seen as a generally more compliant NDPP than Mxolisi Nxasana. The importance of the case, in that sense, had to do not so much with whether President Zuma would be sanctioned for authorising the settlement agreement entered into with the latter, but with whether his subsequent appointment of Abrahams would stand. As a legal matter, the choice between these outcomes hinged on the Court's approach to the question of whether the invalidation of Nxasana's settlement agreement necessarily vitiated the appointment of Abrahams. Two alternative possibilities were at issue, first that Nxasana himself should return to office, and second, that Abrahams, having been appointed in consequence of, but not having been involved in, the settlement agreement, should continue as NDPP.

In argument, the CCSA was asked to apply the SCA's decision in *Oudekraal* to the effect that administrative action 'continues to exist in fact and has legal consequences that cannot simply be

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[190] T Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (2013). See also R Dixon & T Roux 'Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa' in T Ginsburg and A Huq (eds) *From Parchment to Practice: Challenges of Implementing New Constitutions* (forthcoming 2019).

[191] For a closely related philosophical exposition of this idea, which draws on my work on South Africa, see R Mann, 'Non-Ideal Theory of Constitutional Adjudication' (2018) 7 *Global Constitutionalism* 14.

[192] This understanding of legalism was succinctly expressed by Australia's leading High Court judge, Sir Owen Dixon, on the occasion of his swearing in as Chief Justice in 1951.

[193] Note 105 above.

overlooked' until it is set aside by a court in review proceedings.[194] On one possible interpretation of that holding, the invalidation of Nxasana's settlement agreement, having taken place after the appointment of Abrahams, should have had no effect on it. The SCA, however, had clarified its holding in *Oudekraal* in *Seale* to make it clear that it was only administrative action that depended on the factual existence of the prior administrative acts that remained valid, and even then only until the prior administrative act was invalidated.[195] The CCSA had endorsed this reading of *Oudekraal* in *Kirland*.[196] After summarising this line of cases, the Court was thus able plausibly and convincingly to say that the law in the form of its prior decisions, consistently applied, dictated the invalidation of Abrahams' appointment.

There is no mystery in any of this. The Court is not manipulating or bending or twisting the law in any great way to achieve these legal truth effects. It is, for all intents and purposes, just doing doctrine – parsing judicial dicta, distinguishing cases where necessary, and applying plausible readings of past decisions to decide current controversies. Charges of the necessary politicisation of the judiciary under a system of judicial review, however, often seem to be premised on a radically rule-sceptical account of law, such that any attempt on the part of a courts to present its decisions as legally motivated is bound to be found out for the noble lie that it is. The *Corruption Watch* case and others like it in the CCSA's 2018 term illustrates that this account underestimates the power of law and misrepresents its nature. Legalism has the ideological resources, and South African legal reasoning practices the techniques, convincingly to translate controversial political questions into legal questions.

2 Particularising the universal and universalising the particular

Aside from resisting politicisation through plausible application of its own doctrines, how does the CCSA confront the particular critique that the 1996 Constitution's rights are Western rights? On this version of the critique, no amount of doctrinal work can blunt the charge that the Court is essentially enforcing an alien value system. Indeed, the more ably the Court enforces that value system as a matter of legal technique, the more reliably it acts as an agent of liberal cultural values.

The Court has not addressed this aspect of the lawfare critique head on in its judgments. Rather, what it has done has been to locate notionally universal human rights in the specific history of South Africa's struggle against apartheid and in the ongoing furtherance of what it refers to as 'our constitutional project'.[197] Thus, in *Mlungawana*, for example, the Court traced the origins of the right to peaceful assembly back to the denial of this right before 1994.[198] It then went on to demonstrate the contemporary relevance of this right to protests over municipal service delivery – thereby suggesting that the right to peaceful assembly is not an alien Western right but a right that emerged out of South Africa's own, unfinished tradition of struggle against the abuse of political power.[199] None of these passages is strictly speaking doctrinally required. Rather, they are intended to work a certain ideological effect in legitimating the post-apartheid constitutional project.

While I am not suggesting that these passages are deliberately intended to counteract the Western liberal rights critique, they do tend to have that effect. In the face of the charge that liberal rights are faux universal rights that really act as a Trojan horse for Western values, the Court reminds us that the rights in the Bill of Rights were fought for during the anti-apartheid struggle. Having been won, they remain relevant to the implementation of a Constitution that is presented as the continuation rather than the

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[194] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (as cited and paraphrased by the CCSA in *Corruption Watch* (note 105 above) at para 31).
[195] *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* [2008] ZASCA 28; 2008 (4) SA 43 (SCA) at para 13.
[196] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC).
[197] *My Vote Counts* (note 7 above) at para 52.
[198] *Mlungwana* (note 4 above) at paras 64-67.
[199] Ibid at para 69. In similar vein, the Court in *Law Society* (note 125 above) at para 4 bolstered its extensive reliance of international law by stressing the role that international law had played in 'expos[ing] the barbarity and inhumanity of the apartheid system of governance'.

negation of that struggle. In this way, notionally universal rights are given a South African flavour, indigenising them and demonstrating their relevance to contemporary democratic politics.

In *My Vote Counts*,[200] by contrast, many of the Court's arguments about the need for legislation to require the recordal and disclosure of private funding to political parties could have been made in any liberal constitutional democracy. The Court is here appealing to emerging global best practice on the conditions for free multiparty competition. While there are several references to the danger of corruption that undisclosed political party funding poses,[201] these remarks are not particularised to the challenges that South Africa faces.[202] Rather, they are kept at a fairly general level, portraying this form of corruption, quite correctly, as a universal problem that all constitutional democracies face. The Court's approach in this instance could be said to be exactly the opposite of that deployed in *Mlungwana* – 'universalising the particular' so as to demonstrate that the rights in the Bill of Rights, though emanating out of South Africa's own political experience, have broad international recognition and salience.

3 Comparative and international law

Closely related to the previous adjudicative techniques is the CCSA's ongoing practice of bolstering its decisions with references to foreign law. In *My Vote Counts*, the Court thus quoted a long extract from the US Supreme Court's decision in *Buckley v Valeo*.[203] The emphasis the Court placed on this decision was perhaps slightly odd, given the US Supreme Court's reputation as a court that has failed properly to address the influence of moneyed interests in politics. But the point seems to have been partly to convey the universality of the problems South Africa faces and partly to draw on what the Court took to be a helpful setting out of the link between private funding disclosure requirements and the prevention of electoral corruption. In other cases, the Court makes a point of referring to the case law of 'progressive constitutional democracies'[204] so as to explicitly locate its jurisprudence in an emerging liberal consensus about the role played by rights in the protection of the preconditions for genuine democracy.[205]

4 Common-sense ethical standards rather than moral philosophy

The final adjudicative move worth commenting on involves the way that the Court in its 2018 term appealed to common-sense ethical standards as opposed to presenting the 1996 Constitution, as it used to do, as an 'objective normative order'.[206] Partly this has to do with the changing composition of the Bench and the changing nature of the cases. It's been a while since the Court had a Germanophile among its members, and many of the cases it today hears do not involve questions of high political morality, such as the constitutionality of the death penalty, but rather the moral probity of individual conduct. In that changed setting, one would expect common-sense ethical standards to come to the fore. But it is still striking how the CCSA, in cases such as *Corruption Watch,*[207] for example, seems to base so much of its reasoning, not on complex theorisations of the Constitution's underlying value system but in simple statements of what the morally correct thing to do in the circumstances was.[208] We should be cautious about overthinking this or suggesting that this is a deliberate strategy of sorts, but there are obvious

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[200] Note 7 above.
[201] Ibid at paras 45-52. The CCSA cites both the UN Convention against Corruption and African Union Convention on Preventing and Combating Corruption (at paras 49 and 50).
[202] Perhaps because, until the recent Public Protector investigation into the funding of President Cyril Ramaphosa's ANC presidential election campaign, this problem had not received widespread media coverage.
[203] 424 US 1 (1976).
[204] *Mlungwana* (note 4 above) at para 69 with accompanying citations to the UNHRC (Finland) and ECHR (Russia).
[205] See also *Prince* (note 176 above) at paras 54-57 and 70-75 (referring to a range of approaches in foreign law to the criminalisation of marijuana use).
[206] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at paras 54-55.
[207] Note 105 above.
[208] See also *Law Society* (note 125 above) at paras 1-3.

advantages for the Court, given aspects of the 'Western values' critique, in presenting its decisions as the enforcement of common-sense, everyday ethical standards. One of the oft-repeated charges against constitutional judicial review is thus that it invites judges to substitute their subjective views of how the Constitution's complex value system ought to be understood for that of the democratic branches – in the process acting politically. The CCSA's common-sense ethical standards approach deflects this charge by appealing directly to South Africans' moral outrage about the way public funds are being misspent or political power is otherwise being abused.

C Abuse of the Judicial Process?

While a number of cases in the sample provide evidence of lengthy appeals processes, particularly those involving labour matters,[209] there is only one 2018 case that suggests that public office bearers, litigating at taxpayers' expense, may be able to use the legal process to avoid accountability. That case, of course, was the *South African Social Security Agency* case,[210] the latest in a long round of litigation arising from the ongoing saga of the social welfare grants payments crisis. The potential abuse of the judicial process at issue in this case had to do with the way the former Minister of Social Development, SASSA and Cash Paymaster Services (Pty) Ltd were effectively able to hold the Court to ransom by repeatedly failing to implement its orders or by bringing last-minute urgent applications to extend them. This tactic placed the Court over a barrel because it was not in a position to order the termination of the services without any appropriate substitute service provider, for reasons largely of the Minister and her administration's own making. In its decision in *SASSA*, the Court considered but, in the end, did not impose a personal costs order against the former Minister (Bathabile Dlamini) and the acting CEO of SASSA (Pearl Bhengu) as a sanction for their misconduct. While finding that the Minister did not perform an 'effective supervisory role', the Court held that her conduct did not meet the standard of bad faith or gross negligence required for the imposition of a personal costs order.[211] The Court took a different approach in *Black Sash 3*,[212] however, on the strength of the Ngoepe Inquiry's findings.

Far from allowing its processes to be abused, this suggests that the Court is starting to develop remedies that will prevent political office bearers from avoiding accountability. In 2019, we have seen these remedies being used to sanction the Public Protector.[213]

V CONCLUSION

If there is a common theme in the 12 cases discussed in this article, it is the way in which the CCSA is emerging as the moral conscience of the nation. This is more than the ordinary Dworkinian idea that a liberal constitution requires the court to give a 'moral reading' of its underlying values.[214] There is a distinctly *moralising* tone to many of the CCSA's judgments – especially those directed at public office bearers. 'You have let us down as a court, the South African people and ultimately yourselves,' the court is repeatedly saying.

The ANC's moral implosion as a political party has in this way resolved the 'counter-majoritarian' dilemma that is ordinarily associated with constitutional judicial review.[215] The extent of corruption and maladministration in the ANC means that the Court is no longer confronted with an internationally celebrated political party, with clear and untarnished social transformation plans, backed by an overwhelming democratic mandate. Instead, it is having to enforce the 1996 Constitution in the context

[209] Ibid.
[210] Note 8 above.
[211] Ibid at paras 46-47.
[212] Note 117 above.
[213] See *Public Protector v South African Reserve Bank* [2019] ZACC 29.
[214] R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (1996).
[215] AM Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2nd ed. (1986).

of a faltering government that has in many respects lost its way. In that context, rather than taking over the role of agent of social transformation, as the Indian Supreme Court did in the 1980s,[216] the Court has focused its efforts on shoring up democratic institutions so that they can properly drive the social transformation project once again.

The Court's approach in this respect conforms to a standard liberal understanding of the role of courts in social transformation. Liberalism, as a political theory, puts its faith in institutions and their ability to control and discipline human behaviour. The Court is right to keep on proselytising that faith, which is after all the faith that the 1996 Constitution explicitly adopts. Liberal constitutionalism's current difficulties stem, not from the fact that this faith is misplaced, but from the fact that the performance of constitutional institutions is only part of the story. Domestically, the Court on its own can't re-moralize politics if the electorate is not prepared to vote corrupt political office bearers out of office. And internationally, the Court's efforts will bear little fruit until the global economic order is controlled by genuinely liberal, as opposed to neo-liberal, institutions.

[216] The best recent discussion of this phenomenon is A Bhuwania *Courting the People: Public Interest Litigation in Post-Emergency India* (2017).