Politics in the Courtyard

Defending the South African Constitutional Court's involvement in politics

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1 Introduction

Constitutional courts around the world frequently pronounce on society's most profound moral and political questions. From abortion to affirmative action, and from same-sex marriage to the death penalty, such courts often find themselves "call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution [of their nation]" (*Planned Parenthood v Casey*, 505 US 833 (1992) at 867).

This essay seeks to defend the South African Constitutional Court's involvement in such issues, even when trenching upon the core functions of other branches of government. I hope to do this by tracing historical, legal, empirical, and philosophical reasons to show that this involvement not only enhances but is necessitated by our country's democratic project. I will also argue that institutional restraints tend effectively to prevent the Court from overstepping its authority.

2 Crossing the bridge

It will be useful to begin by placing our Constitutional Court in its historical context. First, we must turn to the roots of South Africa's constitutional project itself.

The intense cruelty and oppression that characterised apartheid is well-known. The attendant abuse of state power was facilitated by a system of parliamentary sovereignty, which in effect insulated the coordinated executive and legislature from institutional safeguards (Nyane, 2020:320). Suggesting that courts were merely the instruments of those branches, the erstwhile Appellate Division held, in chilling terms, that

> "Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and […] it is the function of courts of law to enforce its will" (*Sachs v Minister of Justice* 1934 AD 11 at 37).

A decisive break from this state of affairs was finally heralded in late 1991, when gruelling negotiations led to the formation of the Congress for a Democratic South Africa (CODESA), which would be in charge of drafting a new constitution for the nation (De Vos & Freedman, 2014:44). And, crucially, a commitment was made that this Constitution would be "the supreme law" of the nation, "guarded over by an independent, non-racial and impartial judiciary" (CODESA, 1991).

The path to a new constitution was laden with obstacles, and in the process, CODESA gave way to the Multi-Party Negotiating Forum (MPNF) (De Vos & Freedman, 2014:44). On the

one hand, the liberation movements did not find it legitimate for the unelected MPNF to hand down a permanent governing document (*Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), para 12). On the other hand, the ruling National Party and other minority groups insisted, for their own protection, on certain constraints against the popular will (*Certification of the Constitution of the Republic of South Africa*, para 12).

Compromise finally came as a "solemn pact" (*Certification of the Constitution of the Republic of South Africa*, paras 13-15). The MPNF would first draw up a transitional document— the interim Constitution—laying down certain principles according to which a final constitutional text would have to be drafted (De Vos & Freedman, 2014:46). Then, once a parliament had been democratically elected according to the interim Constitution, it would sit as a Constitutional Assembly to draft the final Constitution (De Vos & Freedman, 2014:47).

The "solemn pact" needed a guarantor. Here, the framers of the interim Constitution did something unprecedented: they established a Constitutional Court that would "certify" that the Constitutional Assembly's finished work complied with the agreed principles (*Certification of the Constitution of the Republic of South Africa*, para 1). In order for this lofty endeavour entrusted to the Court to succeed, there could be no question as to the Court's independence and impartiality. In turn, Roux (2013:162) observes that, because the democratic mandate of the African National Congress (ANC) "depended on the legitimacy of the underlying constitutional order", the ANC's fulfilment of its major role in appointing the first panel of judges would have had to ensure the Court's independence and impartiality.

From this history, we can draw a couple of preliminary conclusions about the political role of the Constitutional Court. First, by entrusting the Court at its very inception with making the final determination over whether to certify or reject South Africa's ultimate political instrument, we know that a key political role was envisaged for the Court from the beginning of our constitutional project. Second, as Roux (2013:162) explains, a symbiotic relationship naturally emerged between the Court and the newly empowered ANC. Several adverse decisions against the ANC-controlled executive and legislature were handed down early on, including an initial rejection of the Constitutional Assembly's work on the final Constitution (*Certification of the Constitution of the Republic of South Africa*, para 484). By respecting the Court's independence, and publicly promoting the Court's impartiality in making such decisions, the ANC could demonstrate fidelity to the constitutional order it helped to inaugurate (Roux, 2013:162). In turn, fears from other quarters concerning the new dominance of the ANC

were partially allayed through the refuge of neutral arbitration that the Court provided (Roux, 2013:163). In this way, the political branches together with the Court were able to promote national reconciliation so as to legitimise and stabilise the new, democratic government (Roux, 2013:163).

3 The constitutional role

The historical context just read depicts a country crossing "a bridge away from a culture of authority" towards "a culture in which every exercise of power is expected to be justified" (Mureinik, 1994:32). To this end, all organs of state are answerable to the courts under our Constitution. Our Constitutional Court describes its role as being "the ultimate guardian of our Constitution and its values" (*Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), para 22). It sees that role as conferring an express duty to intervene in the affairs of other branches of government when this is required "to prevent the violation of the Constitution" (*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC), para 92). This view is unequivocally supported by the structure and text of the Constitution. We are told explicitly that courts must declare invalid "any law or conduct that is inconsistent with the Constitution" (section 172(1)(a) of the Constitution of the Republic of South Africa, 1996)—a broad power of judicial review. (I use the term "judicial review" throughout this essay to mean the power of a court to invalidate legislation and executive conduct (Heywood, 2007).) In constitutional matters—those involving "interpretation, protection or enforcement of the Constitution" (section 167(7) of the Constitution, Republic of South Africa 1996)—courts "may make any order that is just and equitable" (section 172(b) of the Constitution, Republic of South Africa 1996). This is a "wide remedial power" (*Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC), para 89). And within this scheme, the Constitutional Court is the "highest court" (section 167(3)(a) of the Constitution, Republic of South Africa 1996), exclusively entrusted, among other sensitive matters, to resolve constitutional conflicts between organs of states (section 167(4)(a) of the Constitution, Republic of South Africa 1996), and to rule finally on the constitutionality of legislation and presidential conduct (section 167(5) of the Constitution, Republic of South Africa 1996).

Structurally, because our system of separation of powers is "clear though not absolute" (*South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), para 23), the Constitution accommodates enquiries from the Constitutional Court into the domain of other branches. Needless to say, in light of South Africa's history, the framers of the Constitution

intended to place a duty on the Court to hold other branches accountable, so that "never again" (*South African Transport and Allied Workers Union v Garvas* 2013 (1) SA 83 (CC), para 63) will the "unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era" (*Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC), para 1) rear its head.

It follows from this analysis, then, that if the Constitutional Court is legally obliged through the Constitution to deal with sensitive political matters and institutional disputes when this is required to safeguard our constitutional order, we can only defend such involvement by justifying the constitutional basis itself.

4 Judging the Constitution

At the heart of the case against judicial review is its propensity to override democratic decisions—a problem famously termed "the counter-majoritarian difficulty" by Bickel (1986:16). Why should eleven unelected judges get to "thwart[] the will of representatives of the actual people of the here and now" (Bickel 1986:17)? Look at what happened, opponents of judicial review say, when the US Supreme Court struck down 170 statutes regulating labour (Waldron, 2006:1348)—including those setting maximum work hours (*Lochner v New York*, 198 US 45 (1905)), a minimum wage (*Adkins v Children's Hospital*, 261 US 525 (1923)), and a ban on child labour (*Hammer v Dagenhart*, 247 US 251 (1918))—based on the Justices' ill-conceived insertion of their own economic conceptions into a vague constitutional protection of liberty.

In this Part, I will defend South Africa's conception of judicial review. In the next, I hope to demonstrate why, even if I am wrong about this, our Constitutional Court is institutionally straitjacketed from causing much danger to the nation.

Waldron's seminal criticism of judicial review distinguishes between "core" and "non-core" cases (Waldron, 2006:1359). He imagines the core case as a society meeting four criteria: (1) a democratically elected legislature in "reasonably good working order"; (2) an "unrepresentative" judiciary, also in similar working order; (3) a broad commitment to upholding rights throughout society and government; and (4) "persistent, substantial, and good-faith disagreement about rights" and the implications of a commitment to rights (Waldron, 2006:1360).

Waldron admits that outside of this core, there may be societies in which judicial review is necessary. The pathologies that he imagines such a society might suffer are remarkably applicable to South Africa—"dysfunctional legislative institutions, corrupt political cultures, legacies of racism" (Waldron, 2006:1406). According to Afrobarometer (2021), over 70% of South Africans have little to no trust in the ruling party. There is similar distrust in our parliament (Afrobarometer, 2021). And as Issacharoff (2013:27) points out, the executive "is unlikely to be effectively constrained by a legislature controlled by the same dominant party." Worse yet, 76.2% of South Africans fear retaliation if they speak out against corruption (Afrobarometer, 2021).

But we cannot escape Waldron's critique of judicial review by placing South Africa outside his core case; Waldron characterises judicial review in non-core cases as a form of "obfuscation and disenfranchisement [that is] worth bearing for the time being" (Waldron, 2006:1406). For him, the practice is only acceptable as the lesser of two evils, and its defenders must do so "with a degree of humility and shame in regard to the circumstances that elicit it" (Waldron, 2006:1406). To truly defend our constitutional system, we must imagine South Africa as a core case and confront Waldron's objections head-on.

4.1 Democratic processes

To understand the impact that judicial review has on democracy, we need to explore the value of democratic decision-making. The critical question is: Why should I accept a decision taken on behalf of society if I disagree with it?

Waldron (2006:1353) distinguishes between "process-related" and "outcome-related" facets of decision-making to argue against judicial review. I will deal with his process-related reasons first. These, he explains, relate to the inherent fairness in a given decision-making system (Waldron, 2006:1386). In the context of a representative democracy, this fairness lies in political equality; the system affords each person "the greatest say possible compatible with an equal say for each of the others" (Waldron, 2006:1388-1389). Therefore, Waldron asserts, a representative legislature that functions reasonably and respects rights will give legitimate, if not always correct, answers to society's divisive questions (Waldron, 2006:1389). Conversely, because judges are at best appointed by democratic representatives, but are neither actual representatives for society themselves nor accountable to the people, their legitimacy to make such decisions is comparatively much lesser (Waldron, 2006:1391).

I think that Waldron's conclusion, on his own assumptions, is unsustainable. Even within a society with broad respect for rights and a well-functioning legislature, political equality can easily erode. Consider the following example. Reasonable people in a society disagree about the role of a right to liberty. Some think it means wealthy people can contribute as much as they like to political campaigns. Others think that in such a context, the right to equality carries more importance; financial contributions to political campaigns should not exceed a certain limit, otherwise the less wealthy members of society are disadvantaged. Let us assume the legislature decides in favour of the first group. It could be that the wealthy, with an inspired respect for rights, contribute to candidates who similarly respect rights. It could also be that the wealthy contribute to candidates who will promote their interests. Either way, the wealthier you are, the more you can influence elections—such as by financing advertisements and public appearances. In consequence, certain fundamental premises to democracy are undermined. I will discuss two that Dworkin (1996:25) identifies: equal concern and moral independence—that is, an entitlement to make value-based judgments without coercion—for all members of society. In place of equal concern, the example society values the preferences of its wealthier members more. And with wealth being a requirement for full political influence, someone seeking office who finds the entanglement between money and politics repulsive is effectively unable to exercise that moral independence.

This sketch highlights a few problems with Waldron's argument. It shows how a core case, despite operating under Waldron's assumptions, can descend into a non-core case. It can be argued that allowing unfettered financial contributions to political campaigns is a pathology that takes this society outside of Waldron's core case in the first place. But then this must mean that Waldron's argument depends on a specific vision of what is reasonable in rights-discourse, so a majority acting outside of such reason can be restrained. Is this not another way of saying we need a set of basic rules—a constitution—that society must abide by?

We can be even more specific. A defender of Waldron's reasoning might contend that my example is incompatible with his assumption of political equality. Then it follows that Waldron's reasoning requires political equality to be a supreme value—impervious to disagreements about rights. This again is reminiscent of a need for constitutionalism (and judicial enforcement of its supremacy).

Finally, Waldron's explanation depends on his assumed conditions persisting. If it is even partly correct that the purpose of judicial review is to maintain political institutions in

working order, then Waldron's reasoning would in practice deny an ailing government system any benefits of judicial review when that system needs them most. Take a core case society, for example, whose political institutions are eroding in the grasp of a self-interested, dysfunctional government. Such a government would surely not welcome checks on its power, and thus has no reason to implement judicial review, even though under Waldron's reasoning, that society might now require it.

Apart from this, however, Waldron makes a convincing Kantian argument that political participation by ordinary citizens is an end in itself—and not merely the means for legitimate decision-making (Waldron, 2006:1375). In this way, the citizen is treated as an equal member of society (Waldron, 2006:1389). But as Lafont (2016:269) demonstrates, the same argument can be applied to public participation in the process of judicial review. Court cases, and the issues they contain, are brought by citizens—and this too is a form of political participation on their part (Lafont, 2016:269). With equal access to courts, this also better protects those members of the population whose issues with legislation are not foreseeable in the drafting process (Lafont, 2016:273). The raising of such issues allows citizens to "trigger political deliberation" and possibly mobilise civil society in the protection of rights, especially because legal contestation requires substantive discussion focused on principles (Lafont, 2016:276). The legislature, on the other hand, often has to sacrifice principles for political compromise (Lafont, 2016:276). Some South African examples bear witness to the efficacy of legal contestation in facilitating public participation in politics. In 2002, the Treatment Action Campaign successfully mobilised to challenge the government's failure to reduce mother-to-child transmission of HIV through freely available anti-retroviral medication (*Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC)). And in 2009, the Abahlali baseMjondolo movement won a case challenging KwaZulu Natal's harsh eviction law (*Abahlali baseMjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC)).

Finally, I address the common argument (see Amy, 2020) that countries with high Human Development Index scores (United Nations Development Programme, 2021), such as Norway, the Netherlands, and New Zealand, have eschewed judicial review. In response, it can equally be said that some of the lowest scoring countries—Guinea-Bissau, Liberia, and Iraq—do not allow judicial review either (United Nations Development Programme, 2021). At best, this reveals that societies with a strong commitment to the rule of law at a particular time are able to do without judicial review. But for countries with a history of state abuse of

human rights—South Africa, Germany, and Japan come to mind—discarding judicial review merely because the country has become a core case in Waldron's abstraction is, to borrow the late Justice Ginsburg's words, "like throwing away your umbrella in a rainstorm because you are not getting wet" (*Shelby County v Holder*, 570 US 529 (2013) at 590).

4.2 Democratic outcomes

We now move to an outcome-related evaluation of judicial review. Here, the question is: Why should a constitutional court's decisions on moral and political issues be preferred over those of the legislature?

Dworkin's (1996) answer offers a useful starting point. First, he views the essence of democracy as a system of decision-making that treats citizens with "equal concern and respect" (Dworkin 1996:17). Within this system, he considers courts to be the "forum of principle" (Dworkin, 1981:469). He argues that, if the purpose of majoritarian decision-making is to confer equal status on citizens, then courts would be justified to step in when required to correct a failure of majoritarianism to treat citizens with equal concern and respect (Dworkin 1996:17).

This view of democracy accords with the South African Constitution, whose preamble envisages a "democratic and open society in which government is based on the will of the people and every citizen is equally protected by law" (Republic of South Africa, 1996). And as described above, the Constitution confers strong powers of judicial review to protect these values.

Waldron criticises this system on the basis that adjudication using abstract values, such as those embodied in a bill of rights, is so indeterminate that judges can arrive at virtually any decision they like (Waldron, 2006:1382). He notes that some courts, such as the US Supreme Court, attempt to constrain this indeterminacy by dwelling so much on justifying their interpretation of the rights that they subordinate discussion on the underlying moral substance (Waldron, 2006:1381).

This objection is probably too US-centric; Waldron admits himself that newer constitutions might not suffer the same problems (Waldron, 2006:1383). This is plainly evident from the jurisprudence emanating from the South African Constitution, whose provisions expressly require a purposive interpretation (*African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC), para 34). Far from embodying vague "platitudes"

(Waldron, 2006:1381), our Constitution states its transformative purpose in emphatic terms, giving clear moral direction to the judges interpreting it (Klare, 1998).

Next, Waldron argues that, whereas legislatures can discuss moral issues for what they are, courts obfuscate them in legalistic discussions of precedent and other formalities (Waldron, 2006:1383). In the South African context, this argument holds little weight. For one, parliament might overlook a pertinent issue, whereas a court would be obliged to hear that issue if it is brought. Secondly, just as the courts have a procedure to follow, so does parliament, and it is equally likely in both institutions for important matters to get bogged down in bureaucracy. And lastly, legalistic discussions themselves have moral value. The choice whether to apply precedent, for example, is really a choice between the value of certainty in the law and the value of the benefits of overruling that precedent.

4.3 Practical consequences

Leaving my discussion of Waldron at that, I wish to highlight, with examples, two benefits of judicial review in the South African context.

At the time our Constitutional Court directed Parliament to afford same-sex couples a right to marry (*Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC)), a vast majority of South Africans disapproved of homosexuality (World Values Survey, 2004). Today, the opposite position holds true (Statista, 2020). The Court's display of equal concern and respect for these couples surely contributed to this transformation (Brown, 2014:470), which in turn dignified same-sex couples with the equal societal status long denied to them. This shows how the Court's application of constitutional values can promote greater societal concern and respect for marginalised groups.

The Court's role in mediating disputes between political institutions has also enhanced democracy. In 2012, the Premier of the Western Cape appointed a commission of inquiry into police-related problems in Khayelitsha (*Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC), para 7). The Minister of Police disputed her power to do this (*Minister of Police*, para 10). For our present purposes, the salient point is that the Constitutional Court had to mediate between two office-holders with a democratic mandate—one provincial, the other national. In deciding in favour of the Premier, it also promoted a particular democratic theory: that political issues are best decided by the most local actor empowered to make them (Ercan & Hendriks, 2013). This in turn demonstrated equal concern and respect for voters in the Western Cape.

5 Justice under fire

The example just given also evokes another topic worthy of discussing: the increasing involvement of the judiciary in political affairs (the literature calls this "judicialisation" (Gildenhuys, 2020; Nyane, 2020)). Alongside this pattern, attacks on the judiciary from the ruling party are on the rise. Whilst criticising the Constitution last year, Minister Lindiwe Sisulu referred to our judges as "mentally colonised Africans" who issue "rulings against their own" (Sisulu, 2021). Similarly, former President Zuma claimed a "judicial dictatorship" is emerging in South Africa (Ferreira, 2021). This marks a pronounced shift from the ANC's initial respect and support for the Court's foray into political matters. Are we seeing symptoms of a dominant party seeking to insulate itself from accountability? This issue merits discussion.

5.1 Dangers of domination

According to Woolman (2015:382), scholars of comparative constitutionalism have identified concerning patterns in nascent democracies seized by dominant-party rule. Such dominance, he notes, "not only constrains any given constitutional court from vouchsafing the barest commitments to the rule of law, it places the very project of democratic constitutionalism at risk" (Woolman (2015:382)). Issacharoff (2013:22) puts it crisply: "Without rotation in office, the three 'C's' of consolidated power take hold: clientelism, cronyism, and corruption."

These pathologies have doubtlessly taken root in South Africa. Over 70% of South Africans perceive corruption to be on the rise (Afrobarometer, 2021). As early as 2009, Choudry (2009:3) observed the ANC's "colonisation of independent institutions meant to check the exercise of [its] political power". Issacharoff (2011:2-3) describes an effort on the ANC's part to place itself beyond "customary forms" of accountability. And because the executive "is unlikely to be effectively constrained by a legislature controlled by the same dominant party," this leaves the Constitutional Court as the only meaningful restraint (Issacharoff 2013:27).

5.2 Resisting domination

Emerging democracies much like ours have confronted dominant party rule through their constitutional courts. Take Issacharoff's (2013:14) example of Colombia. The President of that country successfully sought a constitutional amendment for a second term in 2004 (Issacharoff, 2013:14). When he attempted the same manoeuvre for a third term, Colombia's

Constitutional Court struck down the empowering amendment on the grounds that it violated the democratic premise underlying the country's constitution (Issacharoff, 2013:15).

Commentators have taken our Court's involvement in politics to be a part of a similar effort (Choudhry, 2009; Issacharoff, 2013; Gildenhuys, 2020). In 2011, for example, the Constitutional Court invalidated legislation that aimed to disband the "Scorpions", an independent investigating directorate, in favour of the "Hawks", a unit with the same purpose, but under the authority of the national police (*Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC)). It was feared that, by relocating such an investigative body to executive control, this legislation would nullify a crucial independent check on the ANC's rule (*Glenister*, para 163). Similarly, the Court in 2012 invalidated President Zuma's appointment of Menzi Simelane as the National Director of Public Prosecutions, on the grounds that the President failed to consider credibility findings made against Simelane (*Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC)).

This intrusion into political domain has been criticised. Nyane reasons that the lack of a "political questions" doctrine—under which purely political questions are not justiciable in courts—has given the Constitutional Court unfettered reach into the work of other branches (Nyane, 2020:326). I think this reach is justifiable on two counts. First, our constitutional commitment to "a culture in which every exercise of power is expected to be justified" (Mureinik, 1994:32) creates a right for all citizens to an accountable and representative government. Without courts providing remedies, says Bishop (2012:1), rights are "like a broken pencil. Pointless."

It would be dangerous for courts to abdicate from this responsibility. The US Supreme Court illustrated this well when, in 2019, it announced that it had no power to invalidate partisan gerrymandering in state electoral maps, even though these maps were by the Court's own admission "incompatible with democratic principles" by effectively preventing other parties from winning elections in certain areas (*Rucho v Common Cause*, 588 US ___ (2019) at 30). The decision was divided along ideological lines, with the five Republican appointees in the majority, and the four Democratic appointees in dissent.

This ties into the second reason for the Constitutional Court to deal with political matters. Because what constitutes a political matter is "always blurred" (Nyane, 2020:326), whether a court takes a matter under the political questions doctrine is merely a matter of strategic

semantics. In this way, as the US Supreme Court demonstrated, refusing to be political can be political.

5.3 "The least dangerous branch"

In any event, the reach of courts into the political domain is institutionally limited. Recall the US cases striking down labour regulations in the early 20th century. When President Roosevelt began implementing his economic reform programmes in the wake of the Great Depression, the Supreme Court stood in his way. In response, Roosevelt enquired into expanding the nine-member Court so that he could appoint more Justices sympathetic to his cause. This culminated in the famed "switch in time that saved nine" (Barrett, 2020) when Justice Owen Roberts apparently changed his vote in a case concerning a minimum wage law (*West Coast Hotel Co. v Parrish*, 300 US 379 (1937)), laying the groundwork for the Court's future acquiescence to Roosevelt's policies—and thus removing the need for expanding the Court.

These events illustrate the comparatively constrained power of courts in a constitutional system. Their membership and structure are ultimately at the behest of the executive and legislature, upon whom they are also dependent for the enforcement of their decisions. Having "no purse and no sword", they can only rely on "moral authority" (*S v Mamabolo* 2001 (3) SA 409 (CC), para 16).

This is why, Roux (2013:15) explains, our Constitutional Court maintained a delicate balance between principle and institutional security in deciding controversial cases. Where it had structural support from the ANC, it could rule against public opinion to uphold constitutional principles, such as when it invalidated the death penalty or when it declared that same-sex couples could get married (Roux, 2013:33). Where it had public support, it could direct the government to correct its defective HIV/AIDS treatment policy (Roux, 2013:265). Where it had neither, it was deferential to the government (Roux, 2013:398).

Mendes (2010:39) speculates that the Court uses "esoteric" decision-making to get around this in cases like *Democratic Alliance* and *Glenister*, where it seeks to constrain the ANC's political excesses without explicitly saying so. But as Gildenhuys (2020:351) points out, this tactic can only work if the Court offers convincing legal reasons for its politically influential decisions. When it fails to do so, opponents of the Court are at large to characterise its work as an undisciplined power-grab. The Court cannot afford this erosion of its moral authority, which weakens its institutional capacity, and therefore cannot untether itself from principled reasoning.

6 Conclusion

I hope to have demonstrated in this essay that our transformative constitutional project can only work—and perhaps can only survive—if the Constitutional Court is an active political player and institutional mediator.

Addressing the Justices at the inauguration of the Constitutional Court, President Mandela prophetically called on them "to stand on guard not only against direct assault on the principles of the Constitution, but against insidious corrosion" (Mandela, 1995). In the face of unprecedented aspersions on the judiciary, fulfilling this duty is crucial at this time, and that is exactly what the Court has done so far.

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