

The Past of Law: The Politics of the Rule of Law in South Africa

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Introduction

In 1996, the Final Constitution of the Republic of South Africa came into force, marking the beginning of a new era in South African law. Section 1(c) of the Final Constitution lists among the founding values of the new Republic the ‘supremacy of the constitution and the rule of law’.²

The commitment of the new order to the supremacy of the constitution and the rule of law does not in itself mark a departure from the past. The apartheid legal order implemented a racist ideology through law but was formally no less committed than the new order to both the supremacy of the constitution and the rule of law. If one abstracted from the ideology and focussed on the formal features of the apartheid legal order, it replicated the constitutional structure of the British legal order.

South Africa had a Parliament elected by the enfranchised part of the population-- adult whites. The politicians from the political party with the majority of seats formed the government and governed only as long—more than forty years!--as they enjoyed the confidence of the majority of parliamentarians. All government or executive action required a warrant in law, save for the existence of a prerogative (or legally uncontrolled) power in certain matters that was itself derived from the British tradition. An independent judiciary had the task of interpreting the law and so could determine when government officials were

acting within the scope of the authority delegated by the legislature, but did not have the authority to invalidate statutes. In sum, if the rule of law exists when the principle of legality is observed, not only did the apartheid legal order acknowledge the supremacy of the constitution, but in virtue of the kind of constitution it acknowledged--one based on the principle of legality--it also established the rule of law.

The fact that law was used as an instrument of apartheid ideology would then simply show that the principle of legality or the rule of law is by itself morally insignificant. What matters is the content of the law--the nature of the ideology of which the law is the instrument. It would follow that the explicit commitment in the Final Constitution to the supremacy of the constitution and the rule of law is in itself empty. What matters is not that commitment but that the Final Constitution guarantees a list of rights and liberties and gives to the judiciary the authority both to ensure that exercises of public power have a legal warrant and that any legal warrant is consistent with constitutional guarantees. The new beginning marked by the Final Constitution is thus one in which South Africans are guaranteed certain substantive rights and judges have the task of ensuring that statutes as well as exercises of delegated power are consistent with the guarantees. In short, there would be little interest into an inquiry into the rule of law as an independent concept since 1996.

However, what makes such an inquiry interesting is that the empty conception of the rule of law is not only controversial in legal theory, but was also contested in legal practice during apartheid. Lawyers who mounted challenges to government oppression through law often argued to the courts that the judiciary should read statutes in the light of common law presumptions protective of the individual interest in liberty and the equality of those subject to the law. On this view, only to the extent that a statute explicitly requires that these interests are not to be protected by the statute should judges countenance that the legislature

intended to subvert rather than serve the interest of all those subject to the law in liberty and equality. The idea is that the commitment of the legal order to the supremacy of the constitution and to the principle of legality includes constitutional albeit unwritten commitments to protecting these interests. Should officials implement statutes in ways that go beyond these unwritten constitutional constraints, so judges should find that they acted outside the scope of their legal authority. I will call this conception of the rule of law the substantive conception.

The substantive conception was accepted by only a small minority of an all-white bench and from the end of the 1950s the National Party government ensured that the Appellate Division, South Africa's highest court, was for the most part stocked with judges who held the empty conception of legality. In their view, the only limits on any legislative delegation of authority to an official were the limits explicitly stated in the statute, plus some formally understood and very limited grounds of review of decisions: bad faith, bias, and utter irrationality.³ So on the few occasions when judges decided a matter on the basis of the substantive conception, one could predict that the Appellate Division would overrule them. Moreover, it was just as predictable that the government would use its power in Parliament to override any inconvenient judgment and would also ensure that its statutes in the future made it more explicit that Parliament's intention was that such implicit limits did not apply. Nevertheless, the efforts of this minority of lawyers and judges are generally thought to have supported a sense within some of the leadership of the African National Congress and other groups committed to ending apartheid that the substantive rule of law is an ideal to which legal orders should generally aspire.

But even if one takes the commitment to the rule of law in the Final Constitution to be to this substantive conception, it still does not follow that an inquiry into the rule of law

since 1996 is fruitful. If the rights and liberties guaranteed by the Final Constitution not only include all the substantive content of the rule of law but much more besides, perhaps the rule of law has no independent role to play in legal discourse after a constitution such as South Africa's is entrenched.

However, the rule of law has remained an important and controversial topic within South Africa's constitutional jurisprudence and debate about its details is likely, if anything, to become even more contentious in the near future, as the South African government decides how to respond to some recent judgments of the Supreme Court of Appeal (SCA) and the Constitutional Court (CC).

In this paper, I will focus on one case which illustrates these points. My paper for the follow up conference will sketch further developments. First, a word about methodology.

There are many ways of approaching the topic of the rule of law since 1996 and a focus on one case decided by South Africa's highest courts might seem much less fruitful than, say, a study of the extent to which ordinary South Africans find that public officials act according to law, rather than arbitrarily or even corruptly. However, if the courts do not follow a substantive conception of the rule of law, there is little hope of ever reforming the practice of public officials if it is indeed arbitrary, corrupt, or just plain incompetent.

Consider that decisions in the early 1960s by the Appellate Division, then the country's highest court and the predecessor of the SCA,⁴ signalled to the officials of the apartheid state that as long as they had a bare formal warrant in law for their decisions, the courts would not generally act to control them. As I have argued elsewhere, those decisions allowed the government to have its cake and eat it too. Because the courts were ready to equate the rule of law with rule by law, the government could have statutes enacted that gave its officials authority to act in a legally uncontrolled fashion at the same time as the courts

endorsed the officials' actions as in accordance with the rule of law.⁵ The apartheid state was not quite the Prerogative State, Fraenkel's term for the Nazi state in which officials could displace legal controls whenever they thought this appropriate.⁶ But in some respects it was worse, because it enjoyed a thin veneer of legality over official arbitrariness, which the majority of judges did much to maintain.

Thus, the CC was established precisely because the parties to the constitutional negotiations concluded that it was necessary to have a specialized Court dedicated to transforming the law of the land in accordance with the values entrenched in the new constitutions, initially, the Interim Constitution and then the Final Constitution.⁷ The parties had agreed that the old order judges would keep their jobs in the new order. However judges, who for the most part had been complicit not only in implementing apartheid law, but also in facilitating its implementation by their adoption of the empty conception of the rule of law, were not considered fit to undertake the transformative task. In addition, if the Court charged with transformation had been staffed by judges drawn from the almost exclusively male, white bench of the old order, no matter the rule-of-law credentials of each judge, the Court would have enjoyed little legitimacy. Finally, the issue was not merely that the Court had to aspire to representing South Africa as a whole. It was considered important to have people on the bench whose personal experience gave them an understanding of what transformation involved which would not readily be available to judges entrenched in the thoughtways of the past.

The question then arose about how to allocate jurisdiction. The Interim Constitution answered that question by depriving the SCA of jurisdiction to hear constitutional challenges, although it retained its status as the final court of appeal on all the matters on which it had previously decided. Among those matters were challenges to the

validity of government decisions on the basis that they did not accord with the common law principle of legality. So the possibility existed of the South African legal order having two systems of constitutional law: the unwritten constitution, presided over by the SCA, and the written constitution, presided over by the CC. That possibility was politically fraught as litigants could attempt to forum shop and the SCA could abet this attempt by casting challenges to government officials in a common law mould. In fact, in a series of cases the SCA attempted to preserve its jurisdiction as the final court of appeal on the common law constitution until the CC put an end to what was shaping up as an ugly turf war in *Pharmaceutical Manufacturers*.⁸ There, in direct response to the jurisprudence of the SCA, it stated that:

There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.⁹

This decision ensured that the CC, not the SCA, was the final court of appeal on any matter to do with the legal control of public power. But it also seemed to assert that the common law principle of legality had no independent role to play in the South African legal order--the content of legality is determined by the written Constitution, which means the Constitution as it is finally interpreted by the CC, keenly aware of its transformative role and stocked with judges supposedly best suited to ensure that that role is carried out.¹⁰

Under the Final Constitution, the SCA has a wide jurisdiction to hear constitutional matters. In addition, it is now the case that the majority of its members are new order judges, by which I mean that their first judicial appointment was to the bench during the new order.

But tensions about jurisdiction and conceptions of the rule of law continue, as I will now show.

Litigating the Rule of Law: *Minister of Health v. New Clicks South Africa (PTY) LTD*

The litigation in the matter I will refer to as *New Clicks* arose out of amendments to the Medicines Act of 1965,¹¹ a statute which had been enacted in order to achieve quality control of the supply of medicines to the South African public. In 1997, the ANC government introduced new measures into the Act, directed towards making medicines more affordable. The measures only came into force in May 2003, through a proclamation following the Medicines and Related Substances Amendment Act, 59 of 2002. The measures, and their place within the statute, were not, as the CC was to point out, carefully worked out.¹²

In 2004, some of these stakeholders in the pharmaceutical industry mounted a challenge to the regulations made to give effect to the pricing system established by the Act. These regulations were made by the Minister of Health on the recommendation of the Pricing Committee, itself established by the Act. The stakeholders challenged the functioning of the Pricing Committee, its procedures, and the substance of the regulations promulgated by the Minister on the Pricing Committee's recommendation. At the core of their argument was the claim that fees prescribed for dispensing medicines would require pharmacies to run at a loss, thus threatening the viability of the dispensing profession. Indeed, claims were made that pharmacies were being forced to close because of the dispensing fee set by the government.¹³ The matter was thus treated as a matter of urgency by all the parties and by the Cape High Court.

In early June, the stakeholders were granted interim relief which suspended the operation of the regulations pending a final determination. Later in June, the matter was heard by a panel of three judges. The panel included the Judge President, Hlophe JP, who joined in the judgment of Yekiso J, dismissing the challenge, and reinstating the regulations. Traverso DJP dissented.¹⁴

The stakeholders immediately sought leave to appeal against the order and on 20 September 2004 argument was heard. The Court reserved judgment instead of making, in accordance with practice, an immediate order. In October, the stakeholders wrote to the registrar of the court asking when Hlophe, who had indicated at the hearing that he would hand down the judgment, might give his ruling. They received no reply. By November, they had become frustrated by the apparent unwillingness of the High Court to give its judgment on their application for leave and they decided to apply directly to the SCA for leave to appeal. They tried first to meet with Hlophe to explain their reasons, but he was, for what the SCA called “unknown reasons”, unable to meet them.¹⁵ They then applied to the SCA and the next day were informed by Hlophe that he was finalising his reasons; but he gave no indication of when he would deliver the judgment, nor any explanation of the delay. The SCA set down the matter for argument on 30 November and 1 December. On 29 November, Hlophe announced that he would deliver judgment on the 3 December, which he did. He refused leave to appeal, a judgment in which he was joined by Yekiso, with Traverso again dissenting.¹⁶

It was clear that the government’s lawyers thought that if any appeal against the High Court’s decision was to be heard it should be heard directly by the CC, as the matter was both urgent and the case turned on constitutional issues which would be determined ultimately by the CC whatever the SCA’s decision. Indeed, they had urged the stakeholders

to avoid asking for leave to appeal to the SCA and instead to go directly to the CC with the government's support, a route which did not require a leave to appeal application to the Cape High Court.¹⁷ Hlophe had expressed a similar view in his judgment refusing leave to appeal.¹⁸ He also made it clear that he was offended that the applicants had approached the SCA with a view to finding out the availability of hearing dates.¹⁹

The government's lawyers contended that the SCA had no jurisdiction to hear the appeal as the High Court had not yet given its decision. But the SCA directed that the question of jurisdiction and the merits be dealt with at one hearing. At the hearing itself, the government's lawyers declined the SCA's requests to address the merits; indeed, they declined an invitation to postpone the hearing so that they could have time to prepare argument on this issue, essentially the same argument they had made in June to the High Court.

Harms JA who gave judgment for a five-judge panel held that the High Court had constructively refused leave to appeal, that it was in the interests of justice to hear argument as to the merits as well as the other issues at one hearing, and that the regulations were invalid.²⁰ He chastised the government lawyers in strong terms for their lack of respect for the SCA²¹ and he accused Hlophe of undermining the rule of law through his dilatory stance.²² He also seemed offended by the thought which he perceived to be shared by the government lawyers and Hlophe that the SCA was not the appropriate forum to decide constitutional claims.²³

The CC heard the appeal on 15-16 March 2005. It took until 30 September 2005--an unusual amount of time--to deliver judgment and its judgment is unusually long by its own standards, 446 pages, as well as compared to the length of the SCA's judgment, 28 pages.²⁴ While the eleven-judge panel of the CC differed both about the details of how they reached

their particular conclusions and in regard to the particular conclusions, they upheld the SCA's jurisdiction to hear the matter and its decision to hear argument on the merits of the appeal despite the fact that the SCA had not heard argument from the government's lawyers on this issue. In various combinations, the CC upheld several of the stakeholders' challenges, dismissed others, or found that it could cure defects in the regulations by reading phrases in or out. In addition, Chaskalson CJ expressed his displeasure with the attitude of the government lawyers to the SCA,²⁵ though none ventured to comment directly on the dispute between the SCA and the Cape High Court.

Race, Jurisdiction and Transformation

Well before the matter reached the CC, it had become politically charged. For example, Zachie Achmat, of the Treatment Action Campaign, a leading AIDS activist, commented that the case was a “test. ... If the constitutional court backs off and supports Judge Hlophe on process, they are killing of the SCA if they support him on substance, the government can do what it likes”. And another “senior legal source” said of the matter: “this is a watershed divide between executive-minded judges and the rest”.²⁶ In addition, a rumour that Hlophe and not Yekiso had written the majority judgment of the Cape High Court surfaced at one point. Hlophe concluded the hearing on leave to appeal with a warning to those who were spreading the rumour. He went on to complain in interviews about “a calculated attempt to undermine the intellect and talent of African judges” and there was speculation that he thought that Traverso, the only white judge was the source of the rumour.²⁷ Hlophe said that such rumours were proof of white resistance to transformation of the judiciary.²⁸

Thus Arthur Chaskalson, Chief Justice of South Africa and head of the Constitutional Court commented in his judgment (the last he would give as Chief Justice), that because the case pitted industry against government policy, it had come to be seen as a “test of [the Court’s] independence, implying that if it finds against the government it will be independent, but not if it finds for it”.²⁹ Chaskalson immediately rejected this impression, saying that the case was not “about the wisdom of public policy”.³⁰ All the courts had to do was assess on the basis of detailed legal submissions “whether the regulations [had] been made in accordance with the requirements of the Constitution and the law”. There was, he said, “nothing unusual about this. Our courts have frequently been called on to deal with similar questions in the past and will no doubt be called upon to do so in the future. This is the role of courts in a democracy”.³¹

Chaskalson’s claim, “We do law not politics here”, is a standard judicial trope when judges are forced into the political arena. But it does not follow that his or the other judges’ reasoning simply masks a political stance. While the politics of the rule of law in the post-apartheid era are affected by the politics of race and of the transition, the issues remain distinctly legal. At stake, as I will now show, is the issue of what the “similar” and thus normalizing or legitimating “past” to which Chaskalson refers is: the immediate past of post-apartheid constitutional adjudication or the past, more accurately pasts, of legality during the apartheid era.

Two distinctions play an important role in the political context of this and other cases in which government policy is challenged. The first is between old and new order judges, between the judges who had been appointed during the apartheid era and who remained in office after 1996 and judges who were appointed after 1996 by Presidents Mandela and Mbeki, on the advice of the Judicial Service Commission. The second

distinction, a delicate one to discuss, not least because it relies on the racist categories of the past, is between white judges and all others, either black South Africans or South Africans of Indian or mixed descent. The old order judges were, as I have indicated, white and also almost all male. In the new era, the government has been determined to transform the judiciary by appointing judges who are black or from other racial groups than white and also to appoint female judges. The two distinctions do not map neatly on to each other since new order judges include both female and male whites. But race affects perception of allegiance. For example, the fact that the sole dissenting judge in the Cape High Court was the only white judge on the panel, meant that those who regarded a decision against the government as evidence of the grip on power of an old order judiciary, identified with white South Africans and determined to frustrate progressive change, might view her as part of that problem.

Of the five judge panel in the SCA, two of the judges were new order, one of these is black, the other of mixed race: respectively, Mthiyane, appointed to the bench in 1997 and to the SCA in 2001 and Navsa, appointed to the bench in 1995 and to the SCA in 2000. Of the whites, Harms, who gave the judgment of the court, is an old order judge, having been appointed to the bench in 1986 and to the SCA in 1993.³² While Cloete (1991) and Brand (1992) were appointed to the bench in the last years of the old order, they were appointed to the SCA during the new order: Brand in 2001 and Cloete in 2003. However, the fact that the panel was dominated by whites and led by an old order judge could reinforce an impression that the decision was one of a court still mired in the old order. In contrast, of the eleven judges of the CC who decided the matter, only four are white and all are new order judges.

These observations would be uninteresting were it not for the fact that there are clear differences between the jurisprudential approach of the SCA and the CC, as well as within the CC itself. To some extent, these differences are reflected in the mere fact of the difference in length of the judgments. While the length of the CC's judgment is partly the product of the fact that all eleven judges had something to say while the SCA's judgment was given by Harms alone, it is noteworthy that Chaskalson's judgment is 174 pages to Harms' 28 and that of the 28 pages Harms devoted only 15 to the merits, the rest being taken up with the dispute between the SCA, the government lawyers and the Cape High Court.

Of course, it is also the case that Harms was responding to the urgency of the matter, so wrote and delivered his judgment in around three weeks, and it is also the case the extreme length of the CC's judgments make them difficult to follow, indeed probably impossible for any lay person, and the delay in issuing its judgment meant that almost seventeen months had elapsed in all from the time of the first hearing to the time of final judgment. Nevertheless, as the legal columnist of the Mail & Guardian, "Serjeant at the Bar", commented, "the final product of the court does serve as a partial mitigation for this delay".³³

For when it came to the merits, Harms had little to say about the relationship between constitutionalism and the rule of law and chose to bypass altogether a question which had occupied the Cape High Court, and was to occupy the CC--whether the Promotion of Administrative Justice Act 2 of 2000 (PAJA) governed the regulations made by the Pricing Committee. PAJA had been enacted in order to comply with section 33 of the Final Constitution, which entrenched the right to administrative action that is "lawful, reasonable and procedurally fair" but also required that within three years legislation be

enacted to give concrete expression to that right. Harms said that he did not have to deal with the question whether PAJA applied because all agreed that the regulations had to “withstand the test of legality” and it was “unlikely that this Act, written in light of the Constitution and supposedly written to codify administrative justice principles, reduced the level of administrative justice”.³⁴

It was by no means obvious that PAJA did apply to the making of regulations by an executive body and the judges in the CC split on this issue: five judges, including Chaskalson, held that PAJA did apply,³⁵ five held that they did not have to determine this issue, while Sachs J held that PAJA did not for the most part apply, but that the constitutional principle of legality governed.

Despite the fact that the outcome did not turn on whether the PAJA was applicable, Harms’ cursory treatment of the issue is symptomatic of a general lack of attention to the nuances of the legal situation that confronted the courts. He did not deal at all with the question of the standard of review, that is, the content of legality, nor did he make much attempt to understand the pricing committee’s work in the context of a complex administrative state into which it has been inserted in order to carry out a rather important mandate. Finally, he did not confront the question of whether the Final Constitution makes a difference to judicial review, other than to make the following remark about the challenge to the “appropriateness” of the dispensing fees:

What is appropriate was not left to the discretion of the minister and also not to that of the committee. In this regard there is a clear break from the approach adopted in matters such as security legislation during the pre-Constitutional era. There, the jurisdictional fact was quite often the opinion of one or other functionary and, provided the functionary held the opinion, courts were rather hamstrung. Here the

jurisdictional fact is not someone's opinion but an objective fact, namely a dispensing fee that must be 'appropriate'. Whether it is appropriate can be tested judicially.³⁶

Harms' remark glosses over the fact that the courts of the apartheid era were partly responsible for hamstringing themselves.³⁷ While the apartheid government went out of its way to write statutes that would eviscerate review for legality, most of the judges were, as I have indicated, entirely on side with this process. Moreover, it is not clear why he should use as his contrast class security legislation, which is often regarded as exceptional, when in issue before him was an altogether "ordinary" legislative delegation of power.³⁸

The irony is that in the new, "constitutional" era, Harms flips from the empty view of legality to a view that is so substantive that it looks as though he is applying a correctness standard. In his view, a "brief analysis of the evidence on record" showed "that there is no bona fide dispute of fact".³⁹ But the lengthy analyses of several of the judges of the CC of the record show that there was at the least a bona fide dispute and, in addition, that it was by no means as easy as Harms found it to conclude that the entire regulatory scheme was not authorised by the statute.⁴⁰ So the claim that there was no bona fide dispute gives the unfortunate appearance, compounded by the language of "objective facts", that the judge was taking sides on correctness. Thus, despite some perfunctory remarks disclaiming this role,⁴¹ Harms laid himself open to the charge of second guessing the legislature and the executive as to the wisdom of policy. His judgment is the exact converse in this respect of Yekiso in the Cape High Court, since Yekiso spent most of his judgment on the issue of whether PAJA applied and then provided cursory reasons to support the government's arguments.⁴²

In contrast, Chaskalson took great care in showing that the constitutional standard for review was one of reasonableness, a more exacting standard than the one which

prevailed during the apartheid era, even in ordinary administrative law, of utter irrationality. He reasoned that this new standard was supported by the general value commitments of the Constitution and by PAJA, an enactment of the national legislature in fulfilment of those commitments. But at the same time he wanted to emphasize that the standard was reasonableness in the context of the statute and so he was anxious, with the other CC judges, to assist to the extent possible the working of the regulatory scheme and the executive's understanding of the best way to implement it, and, in addition, to remit to the executive in so far as this was possible issues for it to work out in light of problems detected by the Court. His and other CC judges' willingness to undertake this task, as well as their effort to understand the positive role of the administrative state in a constitutional order, are what account for the striking difference in length of the judgments.⁴³

In addition, the majority of the CC was careful to avoid the appearance of correctness review. Both Chaskalson and Ngcobo J found that the Pricing Committee had not provided a sufficient answer to the pharmacies' claim that the dispensing fee would destroy the viability of the pharmacies and impair access to health care. Since the pharmacies had a sufficient body of evidence to show that this was a real possibility, the applicants were under an obligation to provide this information. As Chaskalson put it, "Accountability, responsiveness and openness' on the part of government are foundational values of our Constitution".⁴⁴ And Ngcobo, while he recognised that the SCA had a basis for determining that the fee was inappropriate, preferred to put his judgment on the basis that the record showed that the Pricing Committee had not properly applied its mind to the factors which it was bound to consider.⁴⁵ Similarly, Sachs commented that because the state "was embarking upon an important new regulatory enterprise ... the principle of accountability imposes on it a special responsibility in the particular circumstances to show that it has taken all reasonable

steps to assess, take account of and justify the potential knock-on effects on the pharmacy profession of its new intervention. The more the risk, the greater the precaution ... In the long run the Ministry, the profession and the public will be better served by calculations that are manifestly reasonable, than by assertions that might or might not be true but lack convincing substantiation”.⁴⁶

In contrast, Mosenke J found that the dispensing fee was appropriate. He painstakingly went through the expert evidence on both sides in order to show that the pharmacies had failed to establish a conclusive case that the pricing regulations would lead to the closure of “most or many or some of the pharmacies”.⁴⁷ Given this, he found that the regulations were appropriate—they were:

lawful in as much as they are rationally connected to the admittedly legitimate purpose of rendering medicines and Scheduled substances affordable and accessible to the public. Finally, keeping in mind the reasonableness test articulated in *Bato Star*, I am unable to find that the decision of the Pricing Committee and of the Minister is one *that no reasonable person could have arrived at*.⁴⁸

However, if by reasonableness test in *Bato Star*, Mosenke meant the test he quoted from that decision earlier in his judgment,⁴⁹ this was not the test he applied in *New Clicks*. The Court in *Bato Star* established a test whose application depends on the circumstances of the case. Judges would have to take into account a range of factors including: “the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected”.⁵⁰

The point is not one about mere wording⁵¹ but about how that wording is implemented, even though one should not underestimate the signal sent by the apparent

citation of the irrationality test. What Moseneke neglects is the fact emphasized by Chaskalson as well as by Ngcobo and Sachs that the Pricing Committee had not undertaken the task of demonstrating that its regulations were reasonable. Indeed, it would be fair to say that far from observing the requirement that judges should not second guess the government when it comes to the wisdom of policy choices, he took on the job of doing the work the Pricing Committee had failed to do.

Interim Conclusion

Tamar Kahn, the Science and Health Editor of *Business Day*, called the judgment “truly Solomon-like, one that preserves the good in the disputed laws, while giving precise instructions to remedy the flaws”,⁵² while Pat Sidley, Head of Communications at the Council of Medical Schemes, said in the *Mail & Guardian* that the CC “finally saw to it that a well-intentioned piece of law designed to help consumers would see the light of day”.⁵³ In general, the judgment is viewed as having provided the impetus to get government and the pharmacies to negotiate in good faith a dispensing fee that would implement the objective of making medicine more affordable while sustaining the infrastructure necessary to deliver the medicine to the public.

However, had the majority of the Court found the dispensing fee appropriate, there would have been no such impetus. As “Serjeant at the Bar” commented, the most important lesson to be drawn from this saga” lay in the “different levels of deference that certain of the judges revealed to the state”.⁵⁴

I have pointed out the irony in Harms’s flip from the empty conception of legality to a conception so substantive that his judgment might be thought to support fears that only

the CC would take seriously the transformative aim of the Pricing Committee within the new, transformed legal order. But at the same time, the Cape High Court's stance, especially its efforts to prevent any appeal to the SCA, presented not an appearance but the reality of a future in which the rule of law would amount to a conception of legality so empty that the past of apartheid rule by law would have returned with a vengeance.⁵⁵ Indeed, had the CC upheld the Cape High Court's judgment on the merits and had it refrained from endorsing the SCA's stance on procedure, there would be, as we have seen Achmat warn, some reason to believe that South Africa was on the path to becoming, despite the Final Constitution, a Prerogative State disguised by a veneer of legality.⁵⁶

Yet there is also an irony in Chaskalson's judgment. Unlike Harms, he does not assert a radical discontinuity between the present and the past of a "pre-Constitutional era". Indeed, in order to find that PAJA required a reasonableness standard, he had to deal with the fact that PAJA stipulated exactly the standard of review—irrationality—that Chaskalson thought characterized the old era.⁵⁷ He thus had to read what looked like a legislative interpretation of the standard of review contemplated by section 33 of the Final Constitution not literally, but in the light of section 33 and of the general structure of the Final Constitution. In addition, not only could the legislature be interpreted as having attempted to reduce the content of legality suggested by section 33, but on a literal interpretation, its definition of reviewable administrative action left out much of what the administrative state does. Indeed, so much was left out that if it followed that what was left out was not susceptible to control by the principle of legality, PAJA itself would be vulnerable to challenge on constitutional grounds. Such a challenge would be embarrassing for the CC as it would be forced to face concluding that the government had sought by statute to reduce

the control of the rule of law over its actions to the point where it had violated its constitutional commitments.⁵⁸

Chaskalson's strategy avoids the path that leads to this conclusion by bringing rule- or regulation-making within the scope of PAJA and by reinterpreting the standard of review stipulated by PAJA. In doing so, he harkened back to a different past—the past of the small minority of South African judges who, during the apartheid era, tried their utmost to interpret statutes as if they were intended to comply with constitutional commitments to a substantive conception of the rule of law. But at the same time, in seeking to support rather than thwart the regulatory scheme, he invoked the more recent past of his Court's interpretation of both the Interim and Final Constitutions—a past which differs from that of the apartheid era since judges have an authentic basis for supposing that the national legislature and government are involved in an effort to realize their constitutional commitments to the rule of law.

However, it is important to know that Moseneke is thought to be the Chief Justice in waiting and that Madala, Mokgoro, Skweyiya and Yacoob JJ concurred in his judgment. That is, the majority of six judges who concurred that the dispensing fee was inappropriate included all the white judges of the Court as well as one judge, Langa the present Chief Justice, who has only 3? years left on the bench. In addition, and this will be the topic of my follow up paper, the government has reacted to the *New Clicks* saga with troubling proposals about the administration of justice.

Notes for follow up paper

Shortly after the SCA gave its judgment in *New Clicks*, the ANC held its annual conference and on 8 January 2005, the National Executive Committee of the ANC spoke to the issue

of transformation of the judiciary, saying that while much had been done, it was still “confronted by the ... important challenge to transform the collective mindset of the judiciary to bring it into consonance with the vision and aspirations of the millions who engaged in struggle to liberate our country from white minority domination”. The statement went on:

The reality can no longer be avoided that many within our judiciary do not see themselves as being part of the masses, accountable to them, and inspired by their hopes, dreams and value systems. If this persists for too long, it will inevitably result in popular antagonism towards the judiciary and our courts, with serious and negative consequences for our democratic system as a whole.⁵⁹

While the target of these remarks is wider than the SCA’s judgment, there is no doubt that the judgment played a role in prompting them.⁶⁰ The ANC responded to adverse comment on its statement by claiming that the remarks were neither a “threat” to judges nor an “‘attack’ on white judges”, only an “honest assessment of the state of transformation within the judiciary”.⁶¹ However, the Minister of Justice has since proposed legislation which would give the government control over the administration of justice, a control which could include deciding which judges should sit on particular panels. In addition, she has proposed amending the Constitution to deprive judges of the authority to suspend legislation found to be in violation of the Constitution, taking away from the Judicial Service Commission the authority to appoint judges president and their deputies and giving it to the President, and making the CC the final court of appeal on all matters.⁶²

While initially the government seemed determined to rush these proposals through Parliament without any genuine attempt to consult the legal profession, a storm of protest from the judiciary, which included threats to resign, from lawyers, from opposition parties as

well as from the International Bar Association led to a government decision to allow time for more debate. But Thabo Mbeki has expressed his puzzlement that there could be such opposition.⁶³

Steven Friedman has commented that “keeping the courts independent will depend on making rapid progress to a judiciary which does reflect society’s racial make-up. Instead of seeing calls for ‘transformation’ as a threat, those who value the courts’ independence need to welcome change—but insist that it is designed to ensure a genuinely nonracial bench which does not polarise along racial fault lines. Given our history, that is an ambitious task. Without it, the independence of the courts will always be under threat.” But, Friedman went on, that even if this objective were achieved, the courts’ independence would remain vulnerable as long as “grassroots citizens” saw the judicial system as a “barrier to justice”, particularly as criminal cases were thrown out of court on procedural grounds when the public was convinced of the guilt of the accused. He also warned that politicians who enjoyed attacking the judges risked extending the public’s lack of confidence in the judiciary, which would undermine democracy since neither it nor “postapartheid goals” could be achieved without independent courts. “Ensuring that the judicial system works for people at the grassroots is a key task for those who govern too.”⁶⁴

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² Constitution of the Republic of South Africa Act 108 of 1996.

³ See Cora Hoexter, "The Principle of Legality in South African Administrative Law" (2004) *Macquarie Law Journal* 165 for a compelling account of how South African judges went about abdicating their role to uphold the rule of law even in "ordinary" administrative law matters. See further, see Jonathan Klaaren and Glen Penfold, "Just Administrative Action" in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman, eds., *Constitutional Law of South Africa* (Cape Town: Juta, 2002, 2nd edition) 63-1.

⁴ For the sake of contrast, I will refer to the Court prior to the transition as the AD and as the SCA after the transition, even though the change in title happened in 1996?

⁵ Consider how the US Supreme Court has asserted federal jurisdiction over aspects of the Bush administration's 'war on terror', but has done so in a way that permits the administration to get away with a bare minimum of legal controls, so that in substance the fate of, for example, "enemy combatants" seems at the whim of the administration.

⁶ Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Oxford University Press, 1941).

⁷ See Richard Spitz with Matthew Chaskalson, *The Politics of Transition: a hidden history of South Africa's negotiated settlement* (Johannesburg: University of the Witwatersrand Press, 2000), chapter 11 “The Constitutional Court”.

⁸ *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

⁹ *Ibid*, paragraph 44.

¹⁰ For an outstanding analysis of South Africa’s post-apartheid constitutional jurisprudence on the rule of law, see Frank R. Michelman, “The Rule of Law, Legality and the Supremacy of the Constitution” in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz, A Stein and S Woolman, eds., *Constitutional Law of South Africa* (Cape Town: Juta, 2005, 2nd edition) chapter 11.

¹¹ The Medicines and Related Substances Control Act, 101 of 1965.

¹² Case CCT 59/04, hereafter *New Clicks CC*, paragraph 2.

¹³ See, for example, Lynn Bolin, “Small SA pharmacies ‘will soon be extinct’”, Mail & Guardian Online, 21 October 2004, quoting a New Clicks executive to the effect that small retail pharmacies will soon be extinct in South Africa unless new regulations governing medicine pricing and dispensing margins are changed. It was also claimed that the regulations could lead to a rise in the cost of medicines.

¹⁴ *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Minister of Health and Others* 2005 (2) SA 530 (C); hereafter *New Clicks Cape*.

¹⁵ *Pharmaceutical Society of South Africa v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA), hereafter *New Clicks SCA*, paragraph 5.

¹⁶ *Pharmaceutical Society of South Africa v Tshabalala-Msimang and Another; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 231 (C), hereafter *New Clicks* leave to appeal.

¹⁷ However, this route risked the CC refusing to hear the appeal on the ground that it preferred to have the benefit of the SCA's views before it decided the matter, as the SCA pointed out in its judgment—*New Clicks SCA*, paragraph 10.

¹⁸ *New Clicks* leave to appeal, 236. As Chaskalson CJ was to point out, *New Clicks CC* paragraph 74, this view was rather inconsistent with Hlophe's claim that there were no grounds for appeal.

¹⁹ *Ibid*, 233-34, where he said that the stakeholders' stance "borders on contempt for this Court".

²⁰ *New Clicks SCA*.

²¹ *Ibid*, paragraphs 12-14.

²² *Ibid*, paragraph 39.

²³ *Ibid*, paragraph 10.

²⁴ As I do not yet have the published version of the CC's judgment, the comparison is between the versions on the internet.

²⁵ *New Clicks CC*, paragraph 82.

²⁶ Nic Dawes, "A drug test for the judiciary", *Mail & Guardian Online*, 23 December 2004.

²⁷ The Mail & Guardian stated that it “spoke to several lawyers with different attitudes to the transformation debate, but none of them was prepared to be quoted on the record on the merits of the appeal or the reasons for the delay. Citing the sensitivity of the current situation”: Nic Dawes, “Traverso drawn into Cape judges uproar”, Mail & Guardian Online, 8 October 2004.

²⁸ Eventually, Pius Langa, who had succeeded Chaskalson as Chief Justice of the Constitutional Court, stepped in in a bid to quiet the brewing race storm by discussing Hlophe’s allegations with him at a meeting of the heads of the country’s courts. See Ben MacLennan, “Judge given chance to explain racism row”, Mail & Guardian Online, 17 October 2005.

²⁹ The first bench of the Constitutional Court contained five old order judges, including Ismail Mahomed who was first appointed to the bench in 1995.

³⁰ *New Clicks* CC, paragraph 32.

³¹ *Ibid*, paragraph 33.

³² Nic Dawes, “A drug test for the judiciary”, Mail & Guardian Online, 23 December 2004, quotes one “leading advocate” as having said that because Judge Harms had been compromised by his role in 1990 as head of the Harms commission, which failed to uncover the truth about apartheid death squads, the final message would need to come from the Constitutional Court: “If one hopes for a society where the judiciary is independent it may depend on where people like [Constitutional Court Judges] Ngcobo and Moseneke, who have some credibility with the government, come down. If they agree with the SCA, this whole race thing will go away,” he said.

³³ “Monster judgment for drug pricing”, Mail & Guardian Online, 17 October 2005.

³⁴ *New Clicks SCA*, paragraph 94.

³⁵ Ngcobo J, unlike the other four, did not hold that PAJA applied to all rule- or regulation-making, but that it did apply to this particular exercise undertaken by the Pricing Committee and the Minister—*New Clicks CC*, paragraph 470.

³⁶ *New Clicks SCA*, paragraph 75.

³⁷ See Cora Hoexter, “The Principle of Legality in South African Administrative Law”, for the argument that the traits of formalism and parsimony which characterized apartheid era jurisprudence still affect the reasoning of South Africa courts, even in some of the landmark decisions on legality by the CC. She also shows the strong impact of these traits on the PAJA.

³⁸ I do not however accept this distinction between the exceptional and the ordinary—for detailed argument see my *The Constitution of Law: Legality in a time of emergency* (Cambridge: Cambridge University Press, forthcoming).

³⁹ *New Clicks SCA*, paragraph 89.

⁴⁰ Indeed, Harms’ wholesale dismissal of the regulatory scheme might give the impression that the Court was in some sympathy with the general antipathy of the main expert witness for the stakeholders towards regulatory interventions into the free market.

⁴¹ *New Clicks SCA*, paragraph 41.

⁴² In *New Clicks Cape*, Yekiso dealt with the merits in around 20 pages of a 38 page judgment. But there is very little analysis in these pages. As in the rest of the judgment, he mostly describes the history of particular legal measures and gives their details.

⁴³ *New Clicks CC*, paragraphs 98-420.

⁴⁴ Paragraph 404.

⁴⁵ See especially paragraphs 543 and 576. Ngcobo’s reasoning exposes the SCA’s missed opportunity. That is, Harms at times spoke of the problem in the calculation of the dispensing fee in terms of a failure of justification or explanation but preferred in the end to decide on the basis that the Pricing Committee had been wrong.

⁴⁶ Paragraphs 663-64.

⁴⁷ Paragraph 783.

⁴⁸ Paragraph 786, my emphasis.

⁴⁹ Paragraph 725, quoting from paragraph 45 of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* (2004) 4 SA 490 (CC).

⁵⁰ *Ibid.*, paragraph 43.

⁵¹ See, for example, Ngcobo’s statement of the reasonableness test at paragraph 522: “Such a fee would have to be challenged on the ground that it is one that a reasonable decision maker could not fix”.

⁵² “Bid for healing formula as court rules on drug pricing”, Business Day Online, 3/10/2005. See her follow up piece, “Cool heads prevail in medicine battle”, Business Day Online, 16 May 2006.

⁵³ “At last, the law inscribed on tablets”, Mail & Guardian Online, 10 October 2005.

⁵⁴ “Monster judgment for drug pricing”, Mail & Guardian Online, 17 October 2005.

⁵⁵ See Jonathan Lewis, “Executive-Mindedness Reinvented?”, (2005) 21 *South African Journal on Human Rights* 127.

⁵⁶ In *New Clicks* leave to appeal, Hlophe suggested at 237 that no other court was likely to differ from the majority decision in *New Clicks Cape* because of the importance of the objective of making medicine affordable to all. He invoked the value of *ubuntu* or community

as an interpretative principle in aid of this proposition. His judgment thus evoked the worst examples of the apartheid era judgments in which national spirit seemed to animate interpretation.

⁵⁷ *New Clicks CC*, paragraphs 186 and 187, relying on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC), at paragraphs 44-45. See Cora Hoexter, “‘Administrative Action’ in the Courts”, *Acta Juridica*, forthcoming for an analysis of the deficiencies of PAJA, in particular the fact that it seems to set a threshold for what counts as administrative action for the purposes of review that excludes vast swathes of the activity of the administrative state. While Hoexter praises Chaskalson’s judgment in *New Clicks*, she also expresses concern that the CC did not resolve the issue of threshold. With her, I take Chaskalson’s, Ngcobo’s and Sach’s judgments to entail that there is one unified system of administrative law with the issue of the content of legality to be determined according to particular contexts. In another essay, Hoexter notes that during the “early days of the constitutional negotiations, it was dispiriting to find that the ANC, then a liberation movement, supported just the sort of test that might have found favour with the National Party government: a standard of ‘such gross unreasonableness ... as to amount to manifest injustice’”. See Hoexter, “Standards of Review of Administrative Action: Review for Reasonableness” in Jonathan Klaaren, ed., *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy. Proceedings of a Symposium to Mark the Retirement of Arthur Chaskalson, Former Chief Justice of South Africa* (Siber Ink: Cape Town, 2006) 61, at 62. Two essays in this volume discuss *New Clicks CC*: Hugh Corder, “Reviewing ‘Executive Action’” 73 and Jonathan Klaaren, “Five Models of Intensity of Review” 79.

⁵⁸ For discussion of PAJA’s constitutionality, see Klaaren and Penfold, “Just Administrative Action”, 63-5 - 63-8.

⁵⁹ <http://www.anc.org.za/ancdocs/pr/2005/pr0108.html>. See further, the Minister of Health, Manto Tshabalala-Msimang, commenting that the case raised issues about the “transformation of the judiciary”: “We will not compromise”, Mail & Guardian Online, 1 February 2005.

⁶⁰ See Nic Dawes and Fikile-Ntsikelelo Moya “ANC divided on the judiciary” Mail & Guardian Online, 14 January 2005. They identify three positions in the ANC. The first, associated with the Minister of Health, Tshabalala-Msimang, “felt the judiciary was too independent and an obstacle to the will of the executive. Another, ANC officials said, was “concerned primarily with what it saw as that slow pace of change in the racial composition of the judiciary, particularly in the lower courts”. “A third body of opinion maintained the more traditional ANC line that a lack of transformation manifested itself as a lack of access to justice for the poor, and the failure of too many judges to demonstrate empathy for people who lived in circumstances alien to them. This group essentially believed that only through more thorough transformation could constitutional values be more fully realised.”

⁶¹ ANC Statement on Comments on Judiciary, 10 January 2005, <http://www.anc.org.za/ancdocs/pr/2005/pr0110.html>

⁶² See Serjeant at the Bar, “Judgment day looms for the judiciary”, Mail & Guardian Online, 24 January 2006.

⁶³ See Sanchia Temkin, “World body chides SA’s legal plans”, Business Day Online, 24 April 2006 and Fikile-Ntsikelelo Moya, “Judges to talk tough at key meeting”, Mail & Guardian Online, 1 February 2006.

⁶⁴ “To stay independent, our courts must win the trust of the people”, Business Day Online, 16/03/2005.