

The Past and Future 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’. The Constitution entrenches standard liberal rights and freedoms, but goes well beyond; for example, section 23(1) gives a right to fair labour practices, section 24(a) a right to an environment that is not harmful to health, section 26(1) a right to adequate housing, and section 33(1) a right to just administrative action.

The sections which entrench positive rights, for example, to adequate housing, do make it clear that the state’s duty to fulfil the right is subject to the availability of adequate resources. But it seems clear that the state is obliged to take action, and with some of the rights, for example, the right to just administrative action the state was put under an explicit duty to enact national legislation giving effect to that right. Section 36 does permit the state to justify limitations of entrenched rights by showing that the limitations are ‘reasonable and justifiable in an open and democratic society’. But that same section sets out a proportionality test for deciding whether a limitation is justified, thus making it clear that judges have the final word on the constitutionality of legislation.

Writing in 1990, Heinz Klug drew attention to how surprising was this constitutional turn in the post colonial era—the embrace of judicial review in place of the customary post colonial grant in Africa to government of ‘nearly untrammelled legislative authority’.² He also

commented that what he perceived to be the success of South Africa's constitutional project had been 'reinforced' by the 'judicious politics' of the court the Constitution had set up as the apex court on constitutional matters, the Constitutional Court. That Court, Klug concluded, had 'repeatedly asserted its right to decide central questions of governance, while simultaneously limiting its role to a clearly specified judicial function which pays open respect and deference to the new democratic institutions and politics'.³ In this paper, I will discuss Klug's conclusion through an inquiry into the rule of law, the principle of legality set out in section 1(c). My discussion in general supports his conclusion. But it also indicates some troubling trends on the part of government.

Klug correctly emphasizes that the success of constitutionalism in a post colonial setting must depend on the judicious politics of the courts in establishing their democratic legitimacy, on what one might think of as a sense of the project of constitutionalism as primarily about cooperation and collaboration rather than confrontation. But it takes, as they say, two to tango. As I will show, while the CC has continued to play that role, it is not so clear that the government is willing to continue the dance. I will indicate in my conclusion that the tensions exposed in this account of the politics of the rule of law in South Africa are not confined to the particular context of a government and a judiciary seeking to manage a transition from an authoritarian past to a democratic future. They illuminate, that is, quite general questions about the nature and worth of the rule of law.

The Principle of Legality

The commitment in new order South Africa 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 ignored 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.⁴ 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 not what marks the difference from the apartheid era since such a commitment is merely formal, requiring that any exercise of public

power be authorized by law. Rather, what marks the difference is the fact that the Final Constitution also guarantees a list of rights and liberties.

The new beginning marked by the Final Constitution thus seems 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 rights. In short, an inquiry into the rule of law as an independent concept since 1996 might seem of little interest.

However, two factors make such an inquiry productive. First, it mattered a great deal during apartheid that there were lawyers and judges who did not accept that the principle of legality imposes requirements of form alone. Lawyers who mounted challenges to government oppression through law often argued before 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 commitments to protecting these interests, expressed in a common law legal order in principles developed by judges. Should officials implement statutes in ways that violate these commitments, if they violate, that is, the common law principle of legality, judges should find that the officials acted outside the scope of their legal authority. Thus in issue during apartheid was whether the legal order was committed to a substantive or merely formal conception of legality or the rule of law.

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 subscribed to a formal 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.⁵ So on the few occasions when lower court 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 politically inconvenient judgment and would also ensure that its statutes in the future made it 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 the leadership of the African National Congress (ANC) and other groups committed to ending apartheid that the substantive rule of law is an ideal to which legal orders should generally aspire.

The second reason why an inquiry into the rule of law as an independent concept since 1996 is productive is that one should not underestimate the importance of the guarantees provided by the formal conception of legality. That most South African lawyers and judges subscribed during apartheid to the formal conception, and that the government officially subscribed to that same conception, meant that the courts would come to the aid of those able to mount a challenge to official exercises of power when these clearly fell outside the scope of the authority delegated by the relevant statute. Indeed, one study of the Appellate Division, South Africa's apex court during apartheid, concludes that the Court decided in favour of challenges to the government in more or less the same ratio as apex

courts in other jurisdictions.⁶ In sum, no illegal act of a public official could be rendered legal by executive fiat and thus the apartheid state was not the Prerogative State, Ernst Fraenkel's term for the Nazi state in which officials had the authority to displace legal controls whenever they thought this appropriate.⁷

However, a legal order that maintains only the formal conception can undermine its commitment to legality. Consider that decisions in the early 1960s by the Appellate Division signalled to the officials of the apartheid state that as long as they had a bare formal warrant in law for their decisions in important areas of government policy, including security, 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.⁸ In other words, pockets of the prerogative state can emerge within the law, if courts subscribe to the formal conception alone and the legislature does not impose explicit rule of law controls on public officials, or even indicates, more or less explicitly, that it does not intend such controls to apply.

Nevertheless, as long as the formal conception is maintained, officials can be called to account when it can be shown that they have acted illegally, even on the rather bare understanding of legality espoused by the formal conception. If judges do not uphold the law, on any conception of the rule of law, and if public officials do not regard it as their duty to implement the law, the very existence of legal order is in doubt. In addition, the existence of the formal conception always contains the promise of the substantive conception. It gives

lawyers and judges minded to do so a toehold for working up the substantive conception, until the point where the judges are overruled by higher courts or overridden by statute.

It might still seem that the rule of law has no independent role to play in legal discourse after a constitution such as South Africa's is entrenched, since 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. 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. As I will now show, a commitment to the substantive conception of the rule of law cannot settle contention about the rule of law, since the content of that commitment remains controversial. But I will also show later that the problems that attend the rule of law in South Africa go well beyond this kind of controversy. Indeed, they pertain to the maintenance of the rule of law, on any conception.

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

The Constitutional Court (CC) of South Africa was established 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.⁹ 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 allegiance to a merely formal 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.¹⁰

The question then arose about how to allocate jurisdiction. The Interim Constitution answered that question by depriving the Supreme Court of Appeal (SCA), the successor to the Appellate Division, of jurisdiction to hear constitutional challenges, although the SCA 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 matters to do with the common law principle of legality until the CC put an end to what was shaping up as an ugly turf war in *Pharmaceutical Manufacturers*.¹¹ 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.¹²

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 has no independent role to play in the South African legal order--the content of legality is determined by the written constitution, which means the Final Constitution as it is definitively 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.¹³

Under the Final Constitution, the SCA has a wide jurisdiction to hear constitutional matters.¹⁴ 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, as I will show, tensions about jurisdiction and conceptions of the rule of law continue, not only because the question of the content of the rule of law is controversial, but because in South Africa that controversy is inevitably affected by the politics of transformation. My discussion of this point relies on just one case, but, as we will see, it acted as a kind of lightning rod for tensions that show little sign of abating in the new South Africa.¹⁵

The litigation in the matter I will refer to as *New Clicks* arose out of amendments to the Medicines Act of 1965,¹⁶ 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 designed.¹⁷

In 2004, some of the 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. 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.¹⁸ 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, which included the Judge President, Hlophe JP, who joined in the judgment of Yekiso J, dismissing the challenge, and reinstating the regulations. Traverso DJP dissented.¹⁹

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.²⁰ 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 agreed to hear the matter and set it down 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.²¹

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 applying to the Cape High Court for leave to appeal.²² Hlophe had expressed a similar view in his judgment refusing leave to appeal.²³ 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.²⁴

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.²⁵ He chastised the government lawyers in strong terms for their lack of respect for the SCA²⁶ and he accused Hlophe of undermining the rule of law through his dilatory stance.²⁷ He also seemed offended by the belief, which he perceived to be shared by the government lawyers and Hlophe, that the SCA was not the appropriate forum to decide constitutional claims.²⁸

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 of 241 pages is unusually long by its own standards, as well as compared to the length of the SCA's judgment of 30 pages. 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,²⁹ 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 off 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’.³⁰ 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 of the three, was the source of the rumour.³¹ Hlophe reacted publicly, claiming that such rumours were proof of white resistance to transformation of the judiciary.³²

Thus Arthur Chaskalson, Chief Justice of South Africa and head of the CC flet compelled to comment 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’.³³ Chaskalson immediately rejected this impression, saying that the case was not ‘about the wisdom of public policy’.³⁴ 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'.³⁵

Chaskalson's claim, in effect '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 is the 'similar' and thus normalizing or legitimating 'past' to which Chaskalson refers: 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 by appointing 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 she could be perceived as ‘untransformed’ by those who regard any decision against the government as evidence of the grip on power of an old order judiciary determined to frustrate progressive change.

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. 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 give rise to a perception 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.

Not only are such perceptions common in South Africa³⁶ but in this matter they could latch onto what seem to be 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 105 pages to Harms’ 30 and that of the 30 pages Harms devoted only 16 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. 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'.³⁷

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'.³⁸

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 divided on this issue: five judges, including Chaskalson, held that PAJA did apply,³⁹ 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 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.⁴⁰

Harms' remark glosses over the fact that the courts of the apartheid era were partly responsible for hamstringing themselves.⁴¹ 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.⁴²

The irony is that in the new, constitutional era, Harms moves from the old order formal 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’.⁴³ But the lengthy analyses of several of the judges of the CC of the record show that there was at the very least a bona fide dispute and, in addition, that it was by no means as easy as Harms seemed to find it was to conclude that the entire regulatory scheme was not authorised by the statute.⁴⁴ 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,⁴⁵ Harms laid himself open to the charge of second-guessing the legislature and the executive as to the wisdom of policy.⁴⁶ 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.⁴⁷

In contrast, in the CC Chaskalson took great care to show 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 as far as 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 the 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.⁴⁸

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.⁴⁹ 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.⁵⁰ 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'.⁵¹

In contrast, Moseneke 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’.⁵² 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*.⁵³

However, if by the reasonableness test in *Bato Star*, Moseneke meant the test he quoted from that decision earlier in his judgment,⁵⁴ 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’.⁵⁵

The point is not one about mere wording⁵⁶ 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.

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’,⁵⁷ 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’.⁵⁸ 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.⁵⁹ 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’.⁶⁰

I have pointed out the irony in Harms’ move from the formal 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. In a context still charged with the politics of race and transformation, it was inevitable that his judgment would be perceived as a double ‘klap’ (the Afrikaans more onomatopoeic word for a slap) to both a black judge below and a black government, and could thus be perceived as a vindication of the government lawyers’ determination to cut the SCA out of the constitutional loop.

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 promise of the Final Constitution to guarantee the supremacy of law and the rule of law would begin to look empty.⁶¹ 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 have been, as Achmat warned, some reason to believe that South Africa was on the path to becoming, despite the Final Constitution, a Prerogative State, though one disguised by a veneer of legality.⁶²

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 seemed to stipulate exactly the standard of review—irrationality—that Chaskalson thought characterized the old era.⁶³ 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.⁶⁴

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 in the new order have an authentic basis for assuming 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 two black judges, Ngcobo and Langa. In addition, and this will be the topic of the next two sections, there are serious concerns about the government's commitment to the rule of law, on any conception of that rule, which will be addressed appropriately only on condition that the judiciary remain both fiercely independent and anxiously vigilant. These sections will show that there are threats to the authenticity of the assumption that all the institutions of government are involved in a cooperative project of maintaining the rule of law. Judges might at some point have to engage more in the politics of the klap instead of the politics of deference when it looks like government or even parts of the judiciary no longer subscribe to that assumption.

Gleichschaltung or Transformation

Gleichschaltung was the word used in Germany after 1933 to describe the process of bringing into gear all organs of state so as to ensure an efficient machine for the unchecked

implementation of the regime's policy. While any such analogy is deeply provocative, it seems clear that transformation risks becoming like *Gleichschaltung* in the face of both deep resentments about persisting white privilege and the government's tendency 'to play the race card' by equating any opposition to its power and policies as yet another attempt to reassert such privilege. Indeed, the government seems prepared to use its control over legislation, indeed sometimes over the Constitution since it commands the numbers to amend the Constitution, to ride roughshod over institutional checks.

A troubling example in the context of this paper arose out of the 2005 annual conference of the ANC, shortly after the SCA gave its judgment in *New Clicks*. 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.⁶⁵

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.⁶⁶ 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; rather, it amounted to an 'honest assessment of the state of transformation within the judiciary'.⁶⁷

The Minister of Justice subsequently put forward 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 proposed amending the Constitution to remove potential obstacles to a constitutional challenge to such a system of control of the judiciary and to deprive judges of the authority to suspend legislation found to be in violation of the Constitution. Finally, she proposed legislation to take away from the Judicial Service Commission the authority to appoint judges president and their deputies and to give that authority to the President, to make the CC the final court of appeal on all matters, to improve judicial education and to make judges accountable through and improved disciplinary system.

Among this rather mixed bag of measures, several are no doubt badly needed. For example, Hlophe has been in the news again because it transpired that he was accepting payments from an asset management group at the same time as he was involved in deciding an application to sue one of his fellow judges for defamation.⁶⁸ In addition, the SCA has made it clear in a number of judgments that some of the decisions of the lower courts which it is reversing are not only wrong but incompetent; a fact which led fifteen black judges to complain to the Judicial Service Commission about the fact that it had discussed these judgments—their fear being that such discussion could hamper further promotion.⁶⁹

Moreover, there is a sense among senior South African judges that it is now time to move towards establishing one apex court for South Africa on all matters,⁷⁰ a move which might do much to remove the jurisdictional politics that still attends the relationship between the SCA and the CC, but which would also require that the Judicial Service Commission and the President transform their understanding of transformation. An apex court which is the final court of appeal on all matters is a generalist court that has to be staffed by judges who

have a deeper experience of the practice of law than many of the appointees to the CC.

However, the bills were put forward without any process of prior consultation with lawyers or the judiciary. While initially the government seemed determined to rush these proposals through Parliament, a storm of protest from the judiciary (which included threats of judicial resignations), from lawyers, from opposition parties as well as from the International Bar Association led to a government decision to allow time for more debate, despite the fact that Thabo Mbeki expressed his puzzlement that there could be such opposition.⁷¹

The Minister of Justice indicated in April 2005 that she was willing to engage in discussions with the judiciary and in October 2005 it was reported that the government had decided to shelve the package of bills, apart from the bill dealing with the administration of the courts.⁷² However, on 14 December 2005, the bill amending the Final Constitution and the bill dealing with court administration were gazetted with much of the content which had previously come under fire, with a deadline of 15 January 2006 for public comment. When it was suggested that the timing during the Christmas holiday break was intentional, the Department of Justice responded that it was ‘really just a coincidence’.⁷³

A public outcry about the short period given for consultation led to a three month extension, during which time the General Council of the Bar of South Africa held a conference, attended by several senior judges, including the now retired Chaskalson, and the present Chief Justice Langa, at which both the substance of the proposed legislation and the government’s attempts to shield it from expert comment were severely criticized.⁷⁴

Chaskalson, for example, said that the ‘Evolving process of judicial independence essential to a constitutional state, has been stopped and reversed, and a great deal of control has now been placed in the hands of the Minister.’⁷⁵ He went on:

‘[I]t is the early incursions into checks and balances which historically been shown to open the way for later incursions to be made. Nobody knows what the future holds for us, but once you accept you can east into protections which are there, and that you can erode fundamental principles of the Constitution, sometime, somebody else can take it further. So any attempt to do so, no matter how small, is open to objection.⁷⁶

Both he and Langa emphasized that the bills had nothing to do with transformation.⁷⁷

Subsequently, the government has put forward bills on judicial education and training that appear to be far more acceptable to the judiciary and the profession and seems to have shelved the bills discussed at the conference.⁷⁸ But the fact that the government did appear to be so determined to chip away at the independence of the judiciary and to weaken the constitutional safeguards of all South Africans, moreover, to do so in a fashion calculated to avoid public deliberation, does not bode well for the future of the rule of law in South Africa. I will now turn to discuss an even more dismal situation.

Failure to Implement the Law

Prior to 1994 the South Africa Act of 1909 in effect created a bifurcated State whereby the white minority was governed by a system of parliamentary democracy whilst the majority of black South Africans were subject to administrative rule... The fact that our Constitution now explicitly provides the foundation and means for the Courts to act as instruments of democracy is no reason for complacency. Some social theorists argue that the bifurcated State bequeathed to post-independent Africa by colonialism and apartheid is alive and well in post-colonial form, thereby presenting a real threat to the future democracy in Africa ... This case is an

illustration of the dangers associated with unaccountable administrative rule.

Froneman J⁷⁹

The case which led to this comment arose out of some examples of the comprehensive failure of the Eastern Cape Provincial Administration to deal with its mandate to provide social assistance to indigent people within its jurisdiction. In *Vumazonke v MEC For Social Development, Eastern Cape*,⁸⁰ a matter decided four years later, Plasket J had to decide similar instances in which individuals had not received responses to their applications for social assistance. He noted that in one week in 2004 he had had to deal with 102 matters in which applicants made more or less the same claim in social assistance cases against the Eastern Cape Provincial Government, that is, asked the court to order the government to make decisions about their claims. In many of these cases, the government not only failed to make decisions within its own prescribed period of three months but refused to respond to the applicants' own enquiries and, when they resorted to legal assistance, to their lawyers.

Plasket pointed out that this was not an unusual week for his court. This practice had persisted for several years and judges had been commenting adversely on the performance of the government without any response. Indeed, the government seemed far more ready to expend vast resources fighting the judicial orders against it to the level of the SCA than to devote any energy to internal reform.⁸¹ Plasket summed up as follows:

notwithstanding that literally thousands of orders have been made against the respondent's department over the past number of years, it appears to be willing to pay the costs of those applications rather than remedy the problem of maladministration and inefficiency that has been identified as the root cause of the problem. [T]he courts are left with a problem that they cannot resolve: while they grant relief to the individuals who approach them for relief, they are forced to watch

impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people ... What escalates what I have termed a problem into a crisis is that the cases that are brought to court represent only the tip of the iceberg.⁸²

He went on: “The administration does not have a free hand to behave as it wishes. It is constrained by the Constitution and the law, and a network of constitutional institutions are created to ensure that it operates within the limits of the Constitution and the law”.⁸³ Thus he not only granted the relief he thought appropriate; he also ordered that copies of his judgment be served on the Premier of the Eastern Cape Province, the chairperson of the Social Development Standing Committee of the Eastern Cape Provincial Legislature; the Minister of Social Development in the national government, the chairperson of the Human Rights Commission, the chairperson of the Public Service Commission.

I said at the beginning of this paper that if public officials do not regard it as their duty to implement the law, the very existence of legal order is in doubt. The practice of the public officials of the Eastern Cape Province subverts not only the Constitution but the rule of law, on any conception. It displays a contempt not only for the Constitution and the courts, but, more importantly, for the people most in need of the benefits of a transformed social and political order.

Conclusion

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification—a culture in which every exercise of power is expected to be justified; in which leadership given by

government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.⁸⁴ Etienne Mureinik.

These hopeful words of South Africa's leading public lawyer of the time were meant to elaborate the commitment expressed in the Interim Constitution to a new legal order and their eloquence meant that they were not only cited frequently in South Africa in the early years of constitutional adjudication. Indeed, Mureinik's idea that the ideal of legality is the expression of a 'culture of justification' has become something of a term of art among judges of apex courts in the Commonwealth. It even informs the argument of a recent work on China and the West in the 21st century.⁸⁵ When Plasket ordered that copies of his judgment be served on various institutions of the legal order, as well as public officials, he was placing his faith in that same commitment.

How long such faith can last is an interesting question. In the main part of this paper, I have argued that Klug's optimism in 1990 remains justified—the Constitutional Court continues to assert its right 'to decide central questions of governance, while simultaneously limiting its role to a clearly specified judicial function which pays open respect and deference to the new democratic institutions and politics'.⁸⁶ However, the temptation to turn transformation into *Gleichschaltung* on the part of the ANC central government, as well as of provincial governments,⁸⁷ suggests a yearning for the more traditional post colonial form of African rule. Moreover, that tendency is perversely twinned with the kind of comprehensive failure to obey the law, even contempt for the law and the courts, on the part of the ANC-led Eastern Cape Government. Finally, if one adds to this the prospect of a future Constitutional Court, or whatever apex court replaces it, unwilling

to call senior public officials to account, one might predict a dire future for the rule of law. Froneman's comment about the resurgence of the unaccountable administrative state—the Prerogative State disguised as a rule of law state—has to be taken seriously.

On the other hand, the courts now dominated by new order black judges, together with the Bar and sympathetic journalists have proved resilient in seeing off the government's attempt to bring the judiciary into gear. In addition, the elaborate constitutional furniture put in place by the Final Constitution would be a standing rebuke for anything less. One might say not only that the fundamentals are more than sound but also that the will to maintain them remains, except on the part of the government. That is of course a rather large exception and a pessimist might predict that gradually the government will succeed in chipping away at the institutional checks.

To repeat: All it might take is a more deferential apex court, which is the final court of appeal on all matters, and which is not only unwilling to uphold the Final Constitution when in issue is the constitutionality of a statute or government action, but also unwilling to resist as the government suggests moving the constitutional furniture around or getting rid of a piece here or there. On the other hand, legitimate issues around the transformation of the judiciary are and will remain vexed into the future.⁸⁸

However, it should not be thought that the tensions discussed in this paper are limited to the South African context or to the context of transitional societies. Precisely this point is well made in the work just referred to on China and the West in the 21st century. There Will Hutton argues that the Chinese experiment with capitalism will fail if it is not buttressed by the institutions of what he calls the 'soft infrastructure of capitalism',⁸⁹ including the rule of law. But Hutton is as anxious to argue that these same institutions are under threat in the West.⁹⁰

One might rephrase this point by saying that it is worth keeping in mind that transitions can go in different directions—Western societies can, that is, transition away from institutions like the rule of law and democratic accountability. Especially since 9/11, there has been a marked decline in the West of executive accountability to the legislature, and judges of apex courts who are reacting to what we can think of as 9/11 statutes and executive action, find it difficult to steer a path between giving too much and too little deference to the executive and the legislature, often erring on the side of too much, as governments make the claim that they enjoy something like a prerogative power when it comes to questions of national security. While these problems are not complicated by the politics of the apartheid racial divide, they are by the politics of pluralism, when the terrorist ‘other’ becomes identified with Arabs or with Islam, or both. In these contexts, there should be as much concern about a decline in the culture of justification as is sparked by the rather halting progress towards creating such a culture in societies that are seeking to escape an authoritarian past.⁹¹ It might be ironic, but not all that surprising, that the lens afforded by the ideal of justification that came out of the South African transition sheds critical light not just on developments in that country, but also in the countries which are the guardians of the Enlightenment flame.

¹ Professor of Law and Philosophy, University of Toronto. I thank Edwin Cameron, Arthur Chaskalson, Alfred Cockrell, Hugh Corder, Jacques De Ville, Cora Hoexter, Jonathan Klaaren, Carole Lewis, Jonathan Lewis, Frank Michelman, Christina Murray, Kate O’Regan, Albie Sachs and Bashier Vally for comments on a draft of this essay. In view of the highly contentious nature of the issues I discuss, I would like readers to take seriously the

disclaimer that all the views in the essay are my own and were often deeply—indeed vehemently--contested from very different perspectives by my commentators. I also thank Linda van de Vijver for research assistance.

² Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000) at 178.

³ Ibid.

⁴ Save for the existence of a prerogative (or legally uncontrolled) power in certain matters that was itself derived from the British tradition.

⁵ 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.

⁶ See Stacia L. Haynie, *Judging in Black & White: Decision Making in the South African Appellate Division, 1950-1990* (New York: Peter Lang, 2003), chapter 3. This is an interesting but highly problematic observation because the bare statistic tells us nothing unless we know something qualitative about each case. A judge whose formal conception of the rule of law leads to a finding that public officials are acting illegally makes the law more effective, not less. Indeed, this point informs the argument of legal positivists that strict observance of the formal requirements of legality will make morally obnoxious laws worse. Haynie has a less than firm grip on such issues as is evidenced in her discussion of the positions taken in the jurisprudential debate about adjudication during apartheid; 15-23. For example, in her

discussion of Raymond Wacks she equates legal positivism and Ronald Dworkin's approach, and in her discussion of my work she attributes to me a view of adjudication which I explicitly reject. However, the most troubling aspect of her study is the half explicit thought that the judges of the Appellate Division were correct to uphold the government's argument in precisely the cases which she criticizes those who took part in the jurisprudential debates for making their focus—that is, the high profile cases where judges declined to uphold the substantive conception of the rule of law. Her idea seems to be that because the judges could anticipate that the government would use statute as a brute instrument to override their judgments, they decided correctly. If anticipation of government reaction is made the criterion of correct judgment, the rule of law, on any conception, is in peril.

⁷ Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Oxford University Press, 1941).

⁸ 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.

⁹ 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'.

¹⁰ For an illuminating discussion of transformation in the South African context, see Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

¹¹ *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

¹² Ibid, paragraph 44.

¹³ 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.

¹⁴ Section 167(5) stipulates that the CC is the apex court on constitutional matters, which leaves the SCA apex court on all other matters (section 161(3)).

¹⁵ It is of course true that one's assessment of *any* of the judges discussed below might change if one looked not just at his or her decision in *New Click's* in the context of that case but at the judge's record over a range of cases. But my inquiry is not into the overall performance of any judge, but into tensions that affect perceptions of the judiciary and the rule of law. I also do try to show that these tensions latch onto reality, in that the way judges reasoned in this case provides a basis for the tensions. That is, the issue is not just perceptions but conduct which fuels the perceptions.

¹⁶ The Medicines and Related Substances Control Act, 101 of 1965.

¹⁷ Case CCT 59/04, hereafter *New Clicks* CC, paragraph 2.

¹⁸ 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.

¹⁹ *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*.

²⁰ *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.

²¹ *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.

²² 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.

²³ *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.

²⁴ *Ibid*, 233-34, where he said that the stakeholders' stance 'borders on contempt for this Court'.

²⁵ *New Clicks SCA*.

²⁶ *Ibid*, paragraphs 12-14.

²⁷ *Ibid*, paragraph 39.

²⁸ *Ibid*, paragraph 10.

²⁹ *New Clicks CC*, paragraph 82.

³⁰ Nic Dawes, 'A drug test for the judiciary', *Mail & Guardian Online*, 23 December 2004.

³¹ 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.

³² 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.

³³ The first bench of the Constitutional Court contained five old order judges, including Ismail Mahomed who was first appointed to the bench in 1995.

³⁴ *New Clicks CC*, paragraph 32.

³⁵ *Ibid*, paragraph 33.

³⁶ 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.

³⁷ 'Monster judgment for drug pricing', *Mail & Guardian Online*, 17 October 2005.

³⁸ *New Clicks SCA*, paragraph 94.

³⁹ 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.

⁴⁰ *New Clicks SCA*, paragraph 75.

⁴¹ 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.

⁴² 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, 2006).

⁴³ *New Clicks, SCA*, paragraph 89.

⁴⁴ 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.

⁴⁵ *New Clicks SCA*, paragraph 41.

⁴⁶ For a sophisticated discussion of deference in the South African context, see JR De Ville, *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths: Durban, 2003)

chapter 1. At 13-21, De Ville concludes very tentatively that the CC is more ready to defer in an appropriate fashion than the SCA. He also comments at 21 on a reluctance on the part of the SCA to engage with PAJA which he regards as a refusal “to enter into a debate with Parliament”.

⁴⁷ 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.

⁴⁸ *New Clicks CC*, paragraphs 98-420.

⁴⁹ Paragraph 404.

⁵⁰ 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.

⁵¹ Paragraphs 663-64.

⁵² Paragraph 783.

⁵³ Paragraph 786, my emphasis.

⁵⁴ Paragraph 725, quoting from paragraph 45 of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* (2004) 4 SA 490 (CC).

⁵⁵ *Ibid.*, paragraph 43.

⁵⁶ 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’.

⁵⁷ ‘Bid for healing formula as court rules on drug pricing’, *Business Day Online*, 3 October 2005. See her follow up piece, ‘Cool heads prevail in medicine battle’, *Business Day Online*, 16 May 2006.

⁵⁸ ‘At last, the law inscribed on tablets’, *Mail & Guardian Online*, 10 October 2005.

⁵⁹ However, the issue is far from resolved, as a search for ‘pharmacies’ in the archive of *Business Day Online* reveals. See, for example, Amy Musgrave, ‘Legal Challenge again Stalls Drug-Price Rules’, 22 December 2006.

⁶⁰ ‘Monster judgment for drug pricing’, *Mail & Guardian Online*, 17 October 2005.

⁶¹ See Jonathan Lewis, ‘Executive-Mindedness Reinvented?’, (2005) 21 *South African Journal on Human Rights* 127.

⁶² 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.

⁶³ *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.

⁶⁴ For discussion of PAJA's constitutionality, see Klaaren and Penfold, 'Just Administrative Action', 63-5 - 63-8.

⁶⁵ <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.

⁶⁶ 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.’

⁶⁷ ANC Statement on Comments on Judiciary, 10 January 2005,

<http://www.anc.org.za/ancdocs/pr/2005/pr0110.html>

⁶⁸ ‘DA calls for Hlophe Probe to be Reopened’, *Mail & Guardian Online*, 2 February, 2007. In an earlier episode, the Judicial Service Commission accepted Hlophe’s claim that he had oral permission from the later Minister of Justice, Dullah Omar, to accept a post with this group. *Mail & Guardian Online*, 15 December 2006, ‘Racial Split over Hlophe’ reported that the Commission, in reaching this result, split on racial lines.

⁶⁹ Carmel Rickard, ‘Judges cannot be shielded from scrutiny’, *Business Day Online*, 10 February 2007. Rickard describes the SCA’s rebuke to these lower court judges as a ‘klap’. Note that she points out that among the judges klapped were white judges. The same point is made by ‘Serjeant at the Bar’, ‘Will the judiciary ever catch up?’, *Mail & Guardian Online*, 27 February 2007. ‘Sereant at the Bar’ comments: ‘The 15 black judges complain that the appeal court criticism is targeted against black judges, yet the Supreme Court of Appeal has been equally rude to a number of white judges. This is not to deflect the point made by the 15 judges, nor does it excuse rudeness, but it is to show that the pathology of which they complain may be owing more to a form of judicial arrogance than racism’.

⁷⁰ For discussion, see Carole Lewis of the SCA, ‘Reaching the pinnacle: Principles, policies and people for a single apex’ *South African Law Journal*.

⁷¹ 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.

⁷² ‘Judicial Bills on hold “for now”’ *The Mercury*, 12 October 2005.

⁷³ ‘Publication of judges’ Bill during holiday lull “just a coincidence”’ *Mail and Guardian* 17 January 2006.

⁷⁴ General Council of the Bar of South Africa, Human Rights Committee: Conference on the Justice Bills, Judicial Independence and the Restructuring of the Courts, Johannesburg, 17 February 2006.

⁷⁵ *Ibid*, 33.

⁷⁶ *Ibid*, 33-4.

⁷⁷ *Ibid*, 33 and 65.

⁷⁸ See Wyndham Hartley, ‘DA Welcomes Judicial Bill, Asks for More Time’ , *Business Day Online*, 6 March 2007.

⁷⁹ *Ngxusa v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E).

⁸⁰ 2005 6 SA 229 (SE).

⁸¹ Paragraphs 1 and 2.

⁸² Paragraph 10.

⁸³ Paragraph 11.

⁸⁴ Etienne Mureinik, ‘A Bridge to Where?: Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31, at 32.

⁸⁵ See Will Hutton, *The Writing on the Wall: China and the West in the 21st Century* (London: Little, Brown, 2007), 197, referring in note 8 to my essay in the memorial volume for Mureinik: ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’ (1998) 14 *South African Journal on Human Rights* 11.

⁸⁶ Klug, *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction*, 178.

⁸⁷ One troubling example of this tendency arose recently when the Democratic Alliance, the principal opposition party in the national legislature, managed to form an alliance with other opposition parties sufficient to form a majority in the municipality of Cape Town. The provincial government threatened to use provincial legislation to change the municipal structure of Cape Town in a fashion that would secure an ANC-led coalition. For a time the national government refused to intervene. Had the provincial government gone ahead, the matter would likely have ended up in the CC but eventually the national government did intervene and brokered a compromise. Insert references ...

⁸⁸ See ‘Serjeant at the Bar’, ‘Will the judiciary ever catch up?’, *Mail & Guardian Online*, 27 February 2007: ‘In our haste to use race as a shield against criticism, we stifle any chance of developing the framework that can achieve a non-racial, non sexist judiciary. African values must transform the core of our legal system, but these values surely cannot support allegations of lack of accountability, corruption and arrogance—if these are properly proved. Until the country as a whole and the judiciary in particular can develop an agreed set of standards to evaluate performance, we will only experience a further absence of proper public debate and, more important, an implosion of precious institutions. Make no mistake:

whatever the achievements of the Constitutional Court, the judiciary still has a long way to travel’.

⁸⁹ See Hutton, chapter 8.

⁹⁰ See especially his Conclusion.

⁹¹ These trends give the lie to critics of judicial review who have argued that we should place our faith in parliaments rather than courts. Somewhat curiously, these critics are prepared to make an exception for un- or not fully democratic societies, where they appear to concede that judicial review is appropriate to safeguard the interests of those subject to the law. See Jeremy Waldron, ‘The Core of the Case Against Judicial Review, (2006) 115 *Yale Law Journal*, 1346, at XX, Jeffrey Goldsworthy, ‘Questioning the Migration of Constitutional Ideas, in Sujit Choudhry, ed.,