



POLICY, ISSUES & ACTORS: Vol 18, No 6

**The constitutional framework and deepening
democracy in South Africa**

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Policy: issues & actors

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Centre for Policy Studies

Johannesburg

October 2005

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Centre for Policy Studies
1st Floor
9 Wellington Road
Parktown
Johannesburg, South Africa

P O Box 16488
Doornfontein 2028
Johannesburg, South Africa

Tel (011) 642-9820
Fax (011) 643-4654
e-mail: portia@cps.org.za

www.cps.org.za

Paper funded by the Open Society For South Africa (OSFA) AFRIMAP Project

ISBN – 1-920030-31-X

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1. INTRODUCTION

This paper examines how the constitutional framework supports and encourages the deepening of democracy in South Africa. This is a broad topic and it is, therefore, necessary to make some preliminary remarks about the appropriate scope of this paper.

The inquiry suggested by the topic involves tracing a causal link between the constitutional framework and the quality of South Africa's democracy, measured against an ideal standard implied by the phrase 'deepening of democracy'. Stated thus, the question set for this paper is too broad to be capable of meaningful examination. A comprehensive description of South Africa's constitutional framework would need to cover issues such as the basic form of the state, the supremacy of the constitution, the separation of powers, the form of the electoral system, the structure of the civil service, and so on. Once that were done, the tracing of a causal link between the essential features of this framework and the quality of South Africa's democracy would require a book-length study. Even then, it would be very difficult to isolate, from among the many other influences on the quality of South Africa's democracy, the influence exerted by the constitutional framework.

Given the impossibility of this task, this paper pursues a much more modest objective. The first limitation on the scope of the study is to restrict the description of the constitutional framework to a single element only. For reasons given below, this paper focuses on the separation of powers between the three branches of government and in particular, on the role given to the judiciary. Secondly, in place of the quality of South Africa's democracy, the paper substitutes an assessment of various judicial decisions that have had a bearing on the way in which democratic politics is pursued. The assumption behind this second limitation is that the quality of democracy in a country depends to some degree on judge-made rules and therefore that it is possible to examine changes in the quality of democracy by assessing changes to these rules.

The next section describes the two key concepts used in this paper ('the deepening of democracy' and 'the constitutional framework') in more detail. Sections 3 and 4 move on to discuss four decisions of the Constitutional Court, the first two dealing with social rights, the third with the electoral system and the fourth with the extra-territorial application of the Bill of Rights. As indicated above, the purpose of these case studies is to describe how the Court has translated the general constitutional scheme relating to the separation of powers into detailed legal rules, and then to assess the impact of these rules on democratic politics. The final section brings the threads of the argument together and draws a general conclusion about the role of the constitutional framework in the deepening of democracy in South Africa.

2. BASIC CONCEPTS

2.1 Deepening of democracy

For the methodology used in this paper to succeed, it must be possible to assess judge-made rules affecting the way democratic politics is pursued against some or other normative standard. This standard, in turn, must be capable of distinguishing between rules that have a ‘democracy-deepening’ effect and rules that do not have such an effect.

For obvious reasons, the various documents adopted by the African Union do not set out a substantive conception of democracy beyond the minimum requirement that regular, free and fair elections be held. This situation is a function of the need, on the one hand, to secure the broadest possible support for democratic reform on the continent and, on the other, to allow countries a wide margin of appreciation in choosing the form of democracy best suited to them. Nevertheless, it is possible to discern in these documents a general preference for participatory democracy. Commitments, such as the one in the 1990 African Charter for Popular Development to “broad-based participation, on a decentralised basis, in the development process”, must be understood, not just as commitments to a particular development model, but also as commitments to the particular form of democracy required to achieve African development.¹

If this is correct, the term ‘democracy’ may be best defined for purposes of this paper as a system of government that maximises the capacity of people to participate in the making of collective decisions that affect them.² On this definition, the deepening of democracy occurs whenever the political system expands opportunities for participation in collective decision-making,³ and a judicial decision will tend to enhance and support the deepening of democracy when the rule that it lays down has this effect.

2.2 The constitutional provision for separation of powers

The founding values in section 1 of the 1996 South African Constitution⁴ do not refer expressly to separation of powers, but this doctrine clearly permeates the structure of the

¹ See also the Declaration on Democracy, Political, Economic and Corporate Governance adopted at the Durban Summit in July 2002 in which states participating in NEPAD recommitted themselves to ‘just, honest, transparent, accountable and *participatory* government’ (emphasis added).

² On the form of democracy that this definition tries to capture:

Pateman Carole. *Participation and Democratic Theory* Cambridge: Cambridge UP, 1970.

³ On the connection between the term ‘deepening democracy’ and participation in collective decision-making:

Roberts Kenneth M *Deepening Democracy: The Modern Left and Social Movements in Chile and Peru* Stanford: Stanford UP, 1998: 3-9.

⁴ Constitution of the Republic of South Africa Act 108 of 1996.

Constitution and has been repeatedly recognised by the courts. Section 43 provides that “the legislative authority - of the national sphere of government is vested in Parliament”, and section 85(1) that “the executive authority of the Republic is vested in the President.” Section 165(1) in turn provides that “the judicial authority of the Republic is vested in the courts.”

In political and legal theory there are at least two contrasting versions of the separation of powers doctrine: a strict version, based on a clear division of authority between the legislative, executive and judicial branches, and a flexible, more instrumental version, which requires each branch to control the others in an elaborate system of checks and balances. The strict version of the doctrine is primarily concerned with the consequences for political stability when one branch of government intrudes into a domain of power reserved for another branch. As such, it is based on the assumption that it is possible to draw clear boundaries between the different domains of power, or at least that it is possible to know with some degree of certainty when one branch intrudes too far into the domain of another branch.⁵

The instrumental version of the separation of powers doctrine, by contrast, does not see the separation of powers as an end in itself. Rather the separation of powers is a means towards another end - the prevention of factionalism.⁶ For this version of the doctrine, the greatest danger to political stability is not intrusion by one branch into the domain of another, but domination of the political community by a single group in society.⁷ Since it is easier for a faction to gain control of one branch of government than it is for a faction to gain control of all three, the argument runs, separation of powers tends to work against factionalism.

The significant difference between these two versions of the doctrine is that for the instrumental purpose of the second version to be achieved, the different branches of government are in fact required to intrude into the domains of power reserved for the other branches. Writing in ‘The Federalist’, James Madison argued:

On the slightest view of the British Constitution we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority... One branch of the legislative department forms also a great constitutional council to the executive chief, as

⁵ Dicey AV. *Introduction to the Study of the Law of the Constitution* 8th edition. London: MacMillan, 1915: 86-87. (Distinguishing the English system of separation of powers, in which Parliament presides over and polices a strict division of authority, from the USA’s federal system).

⁶ Madison James. ‘The Federalist No 51.’ Hamilton Alexander, Madison James, Jay John (eds). *The Federalist, Or, The New Constitution* London: JM Dent Ltd, 1992: 265.

⁷ The particular type of faction that the USA’s Constitution was designed to control - through the twin strategies of separation of powers and federalism - was that of the ‘popular majority’.

Tushnet Mark. ‘The Politics of Constitutional Law.’ Kairys David (ed). *The Politics of Law: A Progressive Critique* Revised Edition. New York: Pantheon Books, 1990: 219 & 222.

*on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.*⁸

Only by becoming involved in each other's affairs in this way, proponents of the instrumentalist version hold, is it possible for the different branches of government to perform appropriate checks and balances on each other.

In seeking to give effect to the separation of powers doctrine, constitutional assemblies may choose between three basic models: a model that gives effect to the strict version of the doctrine and two other models that instantiate both a weak and strong form of the instrumental version. As to the first, it is possible to design a constitutional framework in which state power is distributed between the legislative, executive and judicial branches of government without giving the different branches the power to control the others. This would be true, for example, of a system in which parliament was sovereign to the exclusion of the other branches. It would also be true of a system that did not make provision for parliamentary oversight of the executive, or which did not provide for a justiciable Bill of Rights. The second model, the standard form of the instrumental doctrine, is best exemplified by constitutions that contain justiciable bills of civil and political rights, and which provide for parliamentary oversight of the executive. Such constitutions permit the judiciary to intrude quite far into the legislative and executive domain, but still preserve a great deal of autonomy for the political branches with regard to social and economic policy. Finally, the strong version of the instrumental doctrine, in addition to justiciable civil and political rights and parliamentary oversight, gives judges the power to enforce social and economic rights. Since these rights go to the heart of the legislative and executive function, they leave very few areas of operation entirely immune to judicial scrutiny.

The tendency internationally, over the last thirty years, has been for the judicial branch to be given (or to claim for itself) greater oversight powers over the legislative and executive branches.⁹ Generally speaking, this tendency can be understood as a movement towards the American constitutional model, which, in its current form, is partly a function of institutional design and partly a function of institutional development.¹⁰ Countries where parliamentary sovereignty is the dominant constitutional principle, like the United Kingdom and New

⁸ Madison James. 'The Federalist No 47.' Hamilton, Madison and Jay 247-248.

⁹ Tate See C Neal, Vallinder Torbjörn (eds). *The Global Expansion of Judicial Power* New York: New York University Press, 1995.

¹⁰ Constitutional review of federal legislation in the United States was not part of the original constitutional design but a judge-made institution, beginning with the case of *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803). Even then, the institution of constitutional review did not really take off until the second half of the nineteenth century.

Epp Charles R. *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* Chicago, IL: University of Chicago Press, 1998.

Zealand, have long resisted this tendency, but even they have recently enacted weak bills of rights that give the judicial branch greater powers of control over legislative and executive action.¹¹

For reasons that are not yet completely understood, the “global expansion of judicial power”¹² has included many new or fragile democracies, such as those in Latin America, Eastern Europe, Asia and Africa. At first blush, this phenomenon seems paradoxical. With the strict version of the separation of powers doctrine, an expansion of judicial power could only occur at the expense of the legislative and executive branches. Since new and fragile democracies are by definition still establishing the legitimacy of their political institutions, one would expect these democracies to preserve hard boundaries between the different branches’ areas of operation. The fact that this has not happened suggests that there may be a connection between the expansion of judicial power and democratisation.

The experience in South Africa, which came somewhat late in the race to expand judicial power, but has been a frontrunner since 1994, tends to support this hypothesis. On one level, the connection between the expansion of judicial power and democratisation may simply be attributable to the fact that countries that have democratised in the last thirty years have tended to follow a standard constitutional model that includes an expanded role for courts. In this sense, therefore, the line of causation runs from democratisation to courts. But there is also increasing evidence to suggest that the line of causation goes the other way as well. Those countries that give an expanded role to courts in the course of democratising tend to fare better than those countries that do not.¹³

Against this background, the single most important feature of the South African constitutional framework is the role it gives to courts in the separation of powers. Not only did the Constitutional Assembly adopt a constitution with a supreme-law Bill of Rights. It also adopted a Constitution that contains one of the most comprehensive lists of social rights in the world. Considering the reputation of social rights as potentially anti-democratic, and the fact that democracy had so long been denied to the majority of South Africa’s people, this choice was truly remarkable. Two years after the transition to democracy, a ‘final’ constitutional model was chosen that in effect divested the political branches of their exclusive power to determine social and economic policy. Either this decision was very rash, or those who made it took a calculated risk that the expansion of judicial power, far from undermining the South African people’s newly won freedom to govern themselves, would

¹¹ The New Zealand Bill of Rights Act, 1992.
The United Kingdom Human Rights Act, 1998.

¹² Tate and Vallinder.

¹³ O’Donnell Guillermo. ‘Horizontal Accountability in New Democracies.’ *Journal of Democracy* 1998; (9): 112-26.

Ginsburg Tom. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*
Cambridge: Cambridge UP, 2003.

contribute to the deepening of democracy. A sufficient number of social rights cases have since been decided to allow a tentative assessment of the impact of this decision on democratic politics.

3. SOCIAL RIGHTS

3.1 Background

Social rights may be defined as rights that guarantee access to basic goods such as education, healthcare, social security and housing. As noted above, the 1996 Constitution contains a long list of such rights.¹⁴ The inclusion of social rights in a constitution is often accompanied, as indeed it was in South Africa,¹⁵ by dire predictions about the likely impact of these rights on democracy. For social rights sceptics, the problem with these rights is that they confer on judges the power to second-guess the wisdom of policy choices made by the peoples' representatives. This is said to undermine democracy in two ways: first, by giving a body of people who tend not to be representative of the population as a whole a privileged influence over policy-making and, secondly, by allowing the factual circumstances of a particular case, refracted through the prism of individual rights, to distort the overall assessment of the public interest.¹⁶

Fifteen years ago this critique had some force, largely because, in the absence of real-world examples, the debate about the impact of judicially enforced social rights on democracy took place at a high level of abstraction. Today, with social rights entrenched and apparently working in constitutions from Latin America to Eastern Europe, the social rights critique has begun to wane. The jurisprudence of the South African Constitutional Court has played a central role in this change in attitude and its decisions are often cited amongst the leading examples of the role that social rights may play in democratic consolidation.

This result was by no means foreordained. Social rights are indeed difficult to reconcile with democratic theory,¹⁷ and their enforcement still raises concerns about the proper role of courts in political systems based on the separation of powers. But the experience over the last ten years in South Africa and elsewhere has revealed three things about social rights that were not previously known. First, in certain political settings, the enforcement of social rights may in fact enhance democracy by allowing the courts to give effect to the people's

¹⁴ See sections 24 (right to a non-harmful environment); 25(5) (right to gain access to land); 26 (right to have access to adequate housing); 28 (right to have access to health care services, sufficient food and water, and social security); and 29 (right to a basic education).

¹⁵ Davis DM 'The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles.' *South African Journal on Human Rights* 1992; (8): 475-490.

¹⁶ Fuller Lon L. 'The Forms and Limits of Adjudication.' *Harvard Law Review* 1978; (92): 394-404.

¹⁷ For a recent attempt:

Sunstein Cass R. *Designing Democracy: What Constitutions Do* New York: Oxford UP, 2001.

will in situations in which the political branches are unable or unwilling to act. Secondly, judges have proven themselves to be very adept at developing mechanisms that allow them to enforce social rights in a meaningful way without overstepping the limits of their designated role. Thirdly, the differences between social rights and civil and political rights are not in fact as great as originally supposed: both sets of rights may impose positive as well as negative obligations on the state, and both sets of rights may be costly to enforce.¹⁸ The problems posed by judicially enforced social rights for democratic theory are therefore no greater than the problems posed by civil and political rights. The next section summarises the contribution made by the South African Constitutional Court to these insights.

3.2 The impact of the Court's social rights decisions on public policy

The most celebrated of the Constitutional Court's social rights decisions is the Grootboom case,¹⁹ in which the Court declared certain elements of the national housing programme to be unconstitutional against section 26(1) and (2) of the 1996 Constitution. Closely following this decision in the extent of its international reputation is the Treatment Action Campaign (TAC) case,²⁰ in which the Court ordered the national Department of Health to expand its pilot programme for the provision of anti-retroviral drugs to pregnant mothers living with HIV. The two less well-known decisions are the Soobramoney case,²¹ in which the Court upheld a hospital superintendent's decision to refuse a terminally ill man free access to life-prolonging medical treatment, and the Khosa case,²² in which elements of the South African social security system were extended to permanent residents.

The characteristic feature of all of these decisions is an evident sensitivity on the part of the Court about the limits of its role in the South African political system. Both the Grootboom judgment and the TAC judgment begin with long perorations on the strides that have been made by the political branches in redressing the legacy of apartheid. Both judgments also contain several passages in which the Court's lack of political legitimacy and institutional competence is cited as a reason for not intruding too far into domains of power reserved for the political branches. And yet, in both these cases, the Court's decision ultimately resulted in changes to public policy that would not have occurred but for the intervention of the Court.

¹⁸ Holmes Stephen, Sunstein Cass R. *The Cost of Rights* New York: WW Norton, 1999.

¹⁹ Government of the Republic of South Africa and Others v. Grootboom and Others 2001 (1) SA 46 (CC).

²⁰ Minister of Health and Others v. Treatment Action Campaign and Others (No. 2) 2002 (5) SA 721 (CC).

²¹ Soobramoney v. Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC).

²² Khosa and Others v. Minister of Social Development and Others 2004 (6) BCLR 569 (CC).

In the case of *Grootboom*, although the order handed down was merely declaratory, the five years since this decision have seen a slow but inexorable shift in housing policy towards the position preferred by the Court. Beginning with the adoption of an Emergency Housing Programme,²³ and more recently with the wholesale re-orientation of housing policy to cater to the needs of informal settlers,²⁴ the state's approach to housing today resembles the kind of policy that the Court in *Grootboom* said was constitutionally required. That result could, of course, be entirely coincidental, ie it may be the case that South Africa's housing policy would have changed in this way without the intervention of the Court. But there are several reasons to think that the *Grootboom* case did make a difference. For one, the discussion paper accompanying the Emergency Housing Programme referred expressly to *Grootboom*, along with the then recent experience of severe flooding in the north of the country, as the reason behind the new strategy.²⁵ Although not that prominent in the policy documents underpinning the Informal Settlement Support Programme, the spectre of *Grootboom* loomed large in internal departmental discussions about how to deal with mass urbanisation.²⁶ Arguably, *Grootboom* helped to tip the balance in these discussions in favour of a policy more accommodating of informal settlers.

In the health sector, the re-orientation of the state's anti-retroviral programme in the direction mandated by the Court in the TAC case has been much more hotly contested, with the successful litigant having to institute contempt of court proceedings against the Minister of Health in order to ensure implementation of the Court's decision. This situation is somewhat ironic since the order in the TAC case was very explicit about what the government had to do in order to satisfy the requirements of the Constitution. Nevertheless, public policy on the prevention and treatment of HIV-AIDS has since shifted in the direction preferred by the Court. More importantly for purposes of this paper, it is clear that that policy now more closely reflects the preferences of the majority of South Africans, and that this change occurred because the TAC case created the space for broader public participation in the making of the policy. Such participation took the form not only of direct participation in the case itself (i.e. through membership of the Treatment Action Campaign), but also public debate in the media and internal discussions within the ruling party itself.

Both the *Grootboom* and the TAC case illustrate that, given the requisite amount of judicial restraint, and favourable political conditions, justiciable social rights may deepen democracy by enhancing public participation in the policymaking process. The constitutional framework obviously provided the basis for the Court to play this role, but the Constitution on its own would not have been enough without the skilful manipulation by the Court of the legal materials available to it. In *Grootboom*, the Court was faced for the first time with a

²³ National Department of Housing (2003).

²⁴ The Informal Settlement Support Programme adopted by the national Department of Housing in 2004.

²⁵ *Khosa and Others v. Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

²⁶ The author participated in a University of the Witwatersrand Study into Supporting Informal Settlements commissioned by the national Department of Housing in 2004.

constitutional challenge that required it to review a major social policy. Given that this case came quite early on in the Court's life, it might easily have drawn the Court into conflict with the political branches. Fortunately for the Court, however, the very newness of the constitutional provisions it was called to interpret worked in its favour. In the absence of a binding precedent on how it should deal with social rights, the Court was able to develop an adjudicative model that had little to do with the text of the Constitution and everything to do with its need to establish a *modus vivendi* with the political branches. Thus, instead of attributing "minimum core content" to the right to housing, as it was asked to do, the Court elevated a single element of the right - the right to "reasonable legislative and other measures" - to a position of pre-eminence. Through this device, the Court skilfully avoided becoming a forum in which individuals could demand immediate satisfaction of their needs. What the court did instead, by reviewing public policy for 'reasonableness', was to position itself as a necessary 'conversationalist' in the democratic process.

In the TAC case, as we have seen, the Court built on this beginning by taking advantage of the political context in which its decision was handed down. Even though it dealt with a much more explosive political issue, the difference in TAC was that the case was driven by a well-organised social movement that was able to mobilise overwhelming public support for its arguments by the time the Court came to deliver its judgment. For this reason, the Court was able to hand down a much more interventionist order than it had done in the Grootboom case and began a democratic discussion in the public sphere that eventually resulted in the re-orientation of government's HIV/AIDS policy.

In this way, the Court has been able to transform what the social rights sceptics had argued was one of its weakest features - the fact that it considers individual rights claims rather than aggregate welfare - into one of its greatest assets. The useful role that the Court has to play when enforcing social rights, it is now clear, is to subject the policy process to evidence of systemic failure, such as the irrational exclusion of certain groups or the non-implementation of policies at the local level. In so doing, the Court has been able to assist the political branches to fulfil their constitutional mandate without violating the separation of powers doctrine.

4. OTHER CASES ILLUSTRATING THE COURT'S APPROACH TO THE SEPARATION OF POWERS DOCTRINE

4.1 Background

The questions raised by social rights about the role of judges in deepening democracy are specific instances of the generic question about the role of judges in political systems based on the separation of powers. The central question in all of these discussions is the extent to which courts may intrude into areas traditionally reserved for the political branches when

enforcing the Constitution. In some jurisdictions, such as the United States, the standard instrumental separation of powers model is tempered by the so-called ‘political question’ doctrine, in terms of which the judiciary excludes itself from certain areas of governance that are thought to lie outside its province.²⁷ This doctrine is best understood as a judge-made, pragmatic concession to the strict separation of powers model, which recognises that the institutional costs of judicial involvement in certain areas of politics are not worth the possible advantages to be had from subjecting legislative and executive conduct in these areas to judicial scrutiny.

The South African Constitutional Court has yet to develop a fully-fledged political question doctrine, largely because the Bill of Rights and its own prior decisions make it clear that every exercise of public power is subject to the control of the Constitution.²⁸ Instead, what the Court has done is to use the fact that a question is political to adjust the level of scrutiny (or standard of review) applicable to the law or conduct in question.²⁹ Since the level of scrutiny is often the decisive factor in a case, the Court is able through this device to avoid intruding too far into the executive domain. Far from being awkward, therefore, the absence of a political question doctrine in fact permits the Court to micro-manage its relationship to the political branches on a case-by-case basis.

Two cases have been chosen to illustrate this point. The first involved a challenge to legislation that purported to alter the constitutionally supported rules governing the electoral system, the second, an attempt to persuade the Court that the conduct of the executive branch in its dealings with other countries was subject to the Bill of Rights.

4.2 The United Democratic Movement (UDM) case

The UDM case³⁰ presented the Constitutional Court with one of its most politically sensitive cases to date. It concerned a constitutional challenge by a minority party, the United Democratic Movement (UDM), to four pieces of legislation, all of which had apparently been

²⁷ Finkelstein Maurice. ‘Judicial Self-Limitation.’ *Harvard Law Review* 1924; (37): 338-364.

Henkin Louis. ‘Is There a “Political Question” Doctrine?’ *Yale Law Journal* 1976; (85): 597-625.

²⁸ Section 2 of the Constitution provides that: “The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” The Court has correctly interpreted this provision to mean that all law and all conduct is in theory subject to constitutional review, including conduct of the President.

President of the Republic of South Africa v. Hugo 1997 (4) SA 1 (CC) para 13.

President of the Republic of South Africa v. South African Rugby Football Union 2000 (1) SA 1 (CC) para 38.

²⁹ *United Democratic Movement v. President of the Republic of South Africa and others (African Christian Democratic Party and others Intervening; Institute for Democracy in South Africa and another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC) para 11: “This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional.” As explained in 4.2 below, the Court then goes on to subject the conduct in question to a weak standard of review.

³⁰ Note 29.

drafted to take advantage of the departure of the New National Party (NNP) from the Democratic Alliance (DA) in November 2001.³¹ At local government level, the DA was a pre-election alliance in the sense that candidates who stood for the DA in the October 2000 local government elections did so as representatives of the DA.³² According to the electoral system then applicable to local government elections in South Africa, candidates elected to represent a particular political party could not change to another party without losing their seats.³³ When the NNP broke away from the DA to join the ANC in November 2001, therefore, the NNP councillors who had won seats in the October 2000 elections faced the prospect of having to give up their seats to the DA. In what appeared to be a completely expedient exercise, the African National Congress (ANC) tabled four bills in the National Assembly aimed at allowing the NNP councillors, and members of the national and provincial legislatures, to 'cross the floor' without losing their seats.³⁴ Though different in detail, all four bills had the same basic purpose, namely, to provide a 15-day window period on two occasions every four years during which floor-crossing could occur, subject to the proviso that at least 10 per cent of the members of a party had to cross the floor before any one member could cross. The bills also provided for a further window period immediately after their enactment during which members of the national and provincial legislatures and municipal councils could cross the floor without being bound by the minimum threshold requirement.

All four bills were passed in June 2002. Two of the four took the form of constitutional amendments passed in terms of section 74(3) of the Constitution, which prescribes the procedure for amendments to any part of the Constitution except section 1, the so-called founding provisions, and chapter 2, the Bill of Rights. In its challenge before the Constitutional Court, the UDM did not dispute that the two bills had been duly passed in terms of section 74(3). Rather, it raised the question whether the amendments were permissible at all, and if so, whether the special requirement in section 74(1) for a 75 % majority, and the requirements in section 74(2) with regard to amendments to the Bill of Rights, should have been fulfilled. There were two main legs to the UDM's case: an argument that the bills interfered with the 'basic structure' of the Constitution and were therefore not permissible at all and an argument that the bills violated the founding values in section 1,

³¹ The Democratic Alliance was formed in July 1999 through an agreement between three of the main minority parties in South Africa: the Democratic Party, the New National Party, and the Federal Alliance. The New National Party broke away from the Democratic Alliance in November 2001 to ally itself to the ANC and has since been dissolved.

³² *UDM* case para 1.

³³ See sections 27(c) and (f) of the Local Government: Municipal Structures Act 117 of 1998 (prior to the 2002 amendments).

³⁴ The Constitution of the Republic of South Africa Amendment Act 18 of 2002.

The Constitution of the Republic of South Africa Second Amendment Act 21 of 2002.

The Local Government: Municipal Structures Amendment Act 20 of 2002.

The Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

and therefore that they should not have been passed without an amendment to that section.³⁵

The UDM's argument in respect of the first point drew on various decisions of the Indian Supreme Court that had held that there were certain provisions of a constitution that were so fundamental as to constitute its basic structure, and that provisions such as these could not be amended at all. In an earlier judgment, the Constitutional Court had seemingly approved of this jurisprudence without, however, incorporating it into South African law.³⁶ In the UDM case, the applicant relied on this prior decision to argue that the system of proportional representation in South Africa, including the ban on floor crossing, was so fundamental as to be incapable of amendment. The Constitutional Court dismissed this argument in two sentences:

*The electoral system adopted in our Constitution is one of many that are consistent with democracy, some containing anti-defection clauses, others not; some proportional, others not. It cannot be said that proportional representation, and the anti-defection provisions which support it, are so fundamental to our constitutional order as to preclude any amendment of their provisions.*³⁷

The UDM's second argument relied on section 1(c) of the Constitution, which provides that the supremacy of the constitution and the rule of law are part of the values on which the South African state is founded and section 1(d), which provides that South Africa is founded on the value of "universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." The two ordinary statutes passed as part of the package of electoral system reforms in June 2002 were said to be inconsistent with these provisions, in particular the guarantees of multi-party democracy and the rule of law.

In the course of deciding this question, the Court defined the term 'multi-party democracy' as meaning "a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections."³⁸ The problem with the UDM's argument was that section 1(d) of the Constitution, which was based on Constitutional Principle VIII in Schedule 4 to the Interim Constitution, had expressly omitted 'proportional representation' from the list of requirements relating to the electoral system. Given this textual fact, the UDM could only

³⁵ The UDM's third argument, that the bills violated the right to vote in section 19(3) of the Constitution, and therefore that they should not have been passed without an amendment to that provision in terms of section 74(2), was assimilated by the Court in the course of its judgment into the argument that the bills violated the founding values.

³⁶ *Premier of KwaZulu-Natal v. President of the Republic of South Africa and others* 1996 (1) SA 769 (CC) para 47 (cited in *UDM* at para 15).

³⁷ *UDM* para 17.

³⁸ *UDM* para 26.

succeed if it could be said that proportional representation, together with a ban on floor crossing, was an essential requirement of multi-party democracy. The Court had little difficulty in deciding that this was not the case.³⁹ Recognising that, given prevailing conditions in South Africa, the absence of such a provision may tend to favour the ANC, the Court nevertheless held that “[t]he fact that a particular [electoral] system operates to the disadvantage of particular parties does not mean that it is unconstitutional.”⁴⁰

Turning to the rule-of-law component of the challenge, the Court confirmed its previous decision that this requirement subjects all legislation and all executive conduct to a basic standard of rationality, ie all state action must be rationally related to a legitimate government purpose. The rational basis test is the weakest of the various standards of review that constitutional courts may apply. Unsurprisingly, therefore, the Court dismissed the UDM’s argument on this ground as well, holding that whatever the ANC’s motives were in enacting the four bills in question, the amendment of the rules governing the electoral system was nevertheless a legitimate government purpose, and the particular rules developed to permit floor crossing were rationally related to this purpose.⁴¹

Did the UDM decision support the deepening of democracy? At the outset of the judgment, the Court was at pains to say that its decision did not concern the merits of the legislation being challenged - a ‘political question’ - but merely the question whether the legislation complied with the Constitution.⁴² As noted above, this is an often-used rhetorical device through which the Court both obscures the inevitable politicality of its function and creates space in which to manage its relationship to the political branches. The UDM case nevertheless presented the Court with a difficult conundrum. Before the June 2002 amendments, it was thought that the constitutional framework provided for a particular form of electoral system - namely proportional representation with a ban on floor crossing - and therefore that the Constitution could be used to prevent any expedient changes to this system. From this perspective, the UDM’s argument must be understood as an argument about the role of the Constitution in preserving the quality of South Africa’s democracy. Surely, the UDM argued, if it guarantees anything at all, the Constitution must ensure that the results of a particular election cannot be distorted by ex post facto changes to the rules according to which the election was decided? In essence, this argument amounted to an allegation that the quality of South Africa’s democracy had been cheapened (rendered shallow) by the passing of the floor-crossing legislation, and that it was the function of the Constitutional Court to reverse this slide into one-party domination.

Against this background, can it be said that the Court’s refusal to strike down all but one of the four statutes constituted a failure of democracy, and in particular a failure on the part

³⁹ UDM paras 34-35, 53.

⁴⁰ UDM para 47.

⁴¹ UDM paras 56-74.

⁴² UDM para 11.

of the constitutional framework to support democracy? Well, yes, but only of course if you accept the UDM's case that the legislation in question did indeed threaten democracy. The central theme running through the Court's judgment was that there are many different ways in which democracy can be instantiated and many different forms of electoral system that are compatible with this ideal. While the constitutional framework provides some broad parameters, there are many sub-options within these parameters that are compatible with a commitment to democratic governance. Clearly, both a system of proportional representation and a constituency-based electoral system are compatible with this ideal. Nor can it be said that a ban on floor-crossing is such an essential component of a proportional representation system that, without such a ban, the system ceases to be democratic.

From the normative perspective outlined at the beginning of this paper the Court's decision in UDM case may appear at first quite disappointing. After all, its decision amounted to ratifying a rule change that undermined the results of an election, one of the most basic ways in which citizens participate in the democratic process. To the extent that people who voted in the local government elections for DA candidates did so in deliberate preference to the ANC, the UDM decision does appear to have been a short-term blow for democracy in South Africa. Whichever way one looks at it, the constitutional framework failed to prevent an essentially expedient mid-term change to the electoral system. However, the rule change cannot be said to have done any long-term damage to the quality of democracy in South Africa. There is also the important counter-argument, touched on by the Court in its judgment. Floor crossing, to the extent that it allows political realignments between elections to be reflected in the proportion of seats held by each party, may actually be better for democracy.⁴³

The conclusion in respect of the UDM case must therefore be the non-committal one that the court's decision is neither obviously positive nor negative when measured against the normative standard employed in this paper. Certainly, the case represents a failure to protect the particular type of electoral system originally enshrined in the Constitution. But this outcome cannot be read as having clearly undermined democracy. Indeed, it may well have allowed a rule change that will eventually lead to the strengthening of democracy. In addition, the case once again illustrates the remarkable capacity of the Court to enter politically sensitive situations and play a meaningful, dispute-resolving role. That all the parties to the case ultimately accepted the Court's decision is in itself an indication of the useful function performed by the Court as a final arbiter in democratic politics.

⁴³ UDM para 64 of judgment quotes a long extract from the report of a parliamentary committee appointed in 1997 to this effect.

4.3 Kaunda

The 69 applicants in ‘Kaunda and Others v. President of the Republic of South Africa and Others’,⁴⁴ all of whom were South African citizens, had been arrested in Zimbabwe on suspicion of participating in an attempted coup against the President of Equatorial Guinea. Amidst allegations of poor treatment and threatened extradition to Equatorial Guinea, where it was said they would face the death penalty, the applicants’ attorney launched an urgent application in the Pretoria High Court and then, on appeal, in the Constitutional Court, demanding that the South African government seek their release and/or extradition to South Africa, in addition to various other assurances about their treatment whilst still in Zimbabwe. The case raised interesting questions about the extent to which the Constitution can be used to control the executive in its dealings with foreign states. It also threw into sharp relief the contrast between the Constitution as bastion of democracy and the Constitution as possible haven for the enemies of democracy.

The central question facing the Court in the Kaunda case was whether the Constitution could be said to apply extra-territorially, ie do the rights that citizens enjoy under the Constitution cease to be of any effect once they leave the borders of the country? The 1996 Constitution is silent on this issue, except in so far as it provides in section 7(1) that the Bill of Rights “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” The plain meaning of this provision is that the Bill of Rights applies equally to everyone in South Africa; the stress, in other words, falls on the word ‘all’. With the Kaunda case, a majority of the Court signalled its unwillingness to intrude too far into the executive’s conduct of foreign relations by emphasising instead the word ‘in’, as though section 7(1) literally meant that the rights in the Bill of Rights were available only to people living in South Africa at the time of the alleged violation.⁴⁵ Through this trick of intonation, which occupies a few lines only of a lengthy judgment, the Court was able to translate the problem raised by the Kaunda case into a problem of international (rather than constitutional) law. International law, of course, is directed at states rather than individuals. It followed that the applicants’ array of constitutional rights, including their right to freedom and security of the person, were exchanged for their much weaker right to demand diplomatic protection as an incident of citizenship.⁴⁶ With the legal dice loaded against the applicants in this way, the majority of the Court unsurprisingly turned down the appeal.

The interesting aspect of the Kaunda case from the perspective of this paper is that it placed the Court in the contradictory position of having to enforce constitutional rights in defence of people charged with anti-democratic conduct. A similar apparent contradiction is often said to exist when the courts enforce the rights of accused persons to a fair trial. In

⁴⁴ CCT Case 23/04 (judgment of Chaskalson CJ handed down on 4 August 2004).

⁴⁵ Kaunda para 37.

⁴⁶ Kaunda paras 58-81.

this case, the Court itself acknowledged that “the history of coups and counter coups in Africa has undermined democracy on the continent.”⁴⁷ It was therefore imperative that the South African government should not be hindered in assisting the governments of Zimbabwe and Equatorial Guinea in prosecuting the alleged mercenaries. However, the evidence before the Court showed that there was a strong possibility that the accused would be extradited from Zimbabwe to Equatorial Guinea, where the chances of their being sentenced to death without a fair trial were great.⁴⁸ The Court also accepted that “there [was] no evidence to contradict” the allegations that the applicants were being held in “deplorable conditions” in Zimbabwe and that numerous orders already handed down by the Zimbabwe courts in relation to the improvement of these conditions had been ignored.⁴⁹

Did the eventual rule laid down by the Court - that in circumstances such as these, the Court must defer to the executive’s judgment of how best to protect its citizens - deepen or subvert democracy? In this case the policy affecting the applicants was the Department of Foreign Affairs’ policy in relation to citizens charged with serious offences in foreign countries that might expose them to penalties that would not be constitutional in South Africa. As summarised by the Court, that policy was to make “representations concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen.”⁵⁰ Until the matter came to court, the only opportunity the applicants had had to participate in the making of this policy was the opportunity they had had to vote in the election of the party whose officials made the decision. Nor, given the complexity of modern government, could they realistically have expected more than this. What the Constitution, however, offered them was an opportunity to subject that policy to scrutiny in a public forum.

From this perspective, the Court’s decision appears to have closed down rather than opened up the space provided by the Constitution for public participation in policies of this nature. Given the Court’s refusal to grant even one of the applicants’ claims, it is doubtful that anyone else in a similar position will bother to bring such a case again. To be sure, citizens who find themselves imprisoned abroad may make representations to the Department of Foreign Affairs, but this opportunity is not so much about influencing the policies governing the conduct of relations with other states, as it is about attempting to force their implementation.

For this reason, the minority judgment of Justice O’Regan in the Kaunda case is to be preferred. Unlike the majority of the Court, Justice O’Regan did not axiomatically accept that section 7(1) of the Constitution means that the Bill of Rights has no extraterritorial effect. Indeed, she argued that the case did not really concern the extraterritorial

⁴⁷ Kaunda para 125.

⁴⁸ Kaunda para 124.

⁴⁹ Kaunda para 139.

⁵⁰ Kaunda para 99.

application of the Bill of Rights at all, but rather whether the applicant's constitutional rights as citizens entitled them to protection in the circumstances of the case. Had Justice O'Regan views carried the day, the Court would have granted a declaratory order that the government was "under a constitutional obligation to take appropriate steps to provide diplomatic protection to the applicants to seek to prevent the egregious violation of international human rights norms."⁵¹ Although not the remedy that the applicants were seeking, this order would at least have vindicated their use of the Court as a forum for bringing attention to their plight, and would have preserved a role for the Court in future cases of this nature.

5. CONCLUSION

This paper has argued that the most important aspect of the South African constitutional framework is the role it gives to the judiciary, and particularly the Constitutional Court, in the separation of powers. In many ways, the expanded role of the Court in reviewing social rights and in resolving politically sensitive disputes is in keeping with global trends. But it was by no means certain when the 1996 Constitution was drafted that South Africa's peculiar history would lend itself to such a system. Given that democracy had been denied for so long, the decision to create a strong Constitutional Court was vulnerable to the charge of giving too much power to unelected judges.

The record of the Court over the last ten years has revealed these fears to be unfounded. On the contrary, the Court has on several occasions used its power to create spaces for broader participation in policymaking. This is most evident in its social rights decisions, where the Court has on two occasions forced the political branches to reconsider policies that were evidently failing. In the two other cases discussed, the Court was less interventionist, and allowed laws and policies to pass constitutional muster that many felt ought to have been struck down. Nevertheless, neither of these cases ultimately proved damaging to democracy, and the constitutional framework at least allowed the Court to be used as a forum for heightened democratic deliberation. In most other countries, both of these cases would have been dismissed as involving a political question that the courts were not competent to decide. The South African Constitution does not afford the Court this opportunity. Far from being awkward, however, the Court has turned this feature of the constitutional design to its advantage. By entering politically sensitive cases, and judiciously using its power to enforce compliance with the Constitution, the Court has become an authoritative voice in democratic politics, and has undoubtedly contributed to the deepening of democracy.

⁵¹ Kaunda para 271.