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Introduction

Since the demise of apartheid, South African constitutionalism has been celebrated around the globe. The 1996 Constitution has been described as 'the most admirable constitution in the history of the world', and the process of drafting it and its 1993 interim predecessor has been held up as the fullest realization of the ideas and methods of post–Cold War constitution-making.[1] The Constitutional Court has quickly assumed a place among the world's highest profile judicial bodies; a South African amongst global constitution-watchers can often bask in reflected glory.[2] This constitutional success is an extraordinary result in a country where many in the 1980s did not think ordinary constitutionalism would even be possible.

But many scholars, particularly within South Africa, paint a picture in bleaker shades. The Constitutional Court's judgments often come in for sharp criticism, particularly because alongside its globally celebrated judgments the Court has, apparently inconsistently, handed down some deferent and seemingly stilted ones. The justices are attacked for not doing enough to develop South African law and respond to the manifest injustices of South African society. The concern extends beyond the Court. Threats to the Constitution from the dominant African National Congress (ANC) are regularly identified. Sujit Choudhry has argued that, given the ANC's continued electoral power, South Africa should now be treated as a dominant party democracy that will suffer 'the colonization of independent institutions meant to check the exercise of political power by a dominant party'. For Choudhry, the question is not whether this will

[1] C. R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001), p. 261; A. Arato, 'Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?' (2010) 26 *South African Journal of Human Rights* 19, 21; A. Arato, *Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq* (Columbia University Press, 2009), ch. 2.

[2] T. Roux, *Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, 2013), ch. 1.

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spread to the judiciary; 'the only question is when'.[3] Veteran commentators have reached the point of lumping South Africa with Russia as a 'disenchanted democracy'.[4] Zapiro, South Africa's legendary and increasingly cynical political cartoonist, has drawn the Constitution with letters cut away from the title so that it reads simply 'The Con of the Republic of South Africa'.[5]

No serious observer can deny the concerns (although she also cannot deny that collapse has apparently been imminent in South Africa for some decades now). But this book is not an exercise in fortune-telling. Whatever might happen in the future, it is an attempt to look back and understand what has happened to date, to explain which forces and mechanisms have mattered, and to try and understand why some see so much going wrong while others see so much to celebrate and to envy. The discrepancy in views can be particularly sharp and puzzling when applied to this book's focus, the South African Constitutional Court. Somehow, the Court is seen as being on both sides of this dichotomy, with the very same judges apparently contextual, progressive guardians of social justice at one moment and closed-minded, heartless formalists the next. It is fair enough to charge a court with inconsistency, but the combined effect of the compliments and charges directed at the same group of judges can sometimes approach the point of implying judicial schizophrenia.

I believe that these uncertainties reflect more than just the truisms that no Court gets every decision right and that some level of reasonable professional disagreement about judgments is inevitable. I believe they speak of deep and basic disagreements about how we should understand the legal project in which the Court has been engaged. In the 2008 words of South Africa's constitutional law treatise, 'in the past nearly decade and a half of constitutional democracy in South Africa, no discernible theories of constitutional interpretation have emerged'.[6] The phrasing is suggestive of the problem: it is not merely a lack of acceptable accounts, but the lack of any plausible candidate at all. We are struggling even to take conceptual hold of the interpretative activity

[3] S. Choudhry, '"He had a mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1, 3.
[4] B. Keller, 'How to Lose a Country Gracefully', *New York Times Magazine*, 6 March 2011.
[5] *Mail & Guardian*, 6 August 2010.
[6] L. du Plessis, 'Interpretation' in S. Woolman and M. Bishop (eds.), *Constitutional Law of South Africa* (2 edn., Cape Town: Juta & Co., OS 06–08, 2008), pp. 32–2.

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that has been happening. My claim in this book is that the existing ways of understanding interpretation under the South African Constitution are inadequate to its actual operation. The reason why 'no discernible theories of constitutional interpretation have emerged', I argue, is because many scholarly accounts of constitutionalism in South Africa, focused on how it *should* work, have paid too little attention to how it *does* work.

As a result, I claim, some key mistakes are made. Scholarship is too court-centric, and gives far too little credit to the role that has been played by the ANC in government. There is a pervasive tendency to praise the ANC up to the point where the 1996 Constitution came into force, and thereafter to consign it to the role of threat. There is no point in being starry-eyed about the party. This book will not add much to the plentiful existing criticism of the ANC, but it by no means denies that many legitimate concerns that can be raised about the ANC, from specific policy areas like education to infamous scandals like the arms deal to general problems like corruption and mismanagement, nor that these concerns have been growing of late. But these points are already notorious, and this book is concerned with correcting an imbalance by focusing on the parts of the picture that are neglected. The ANC's contribution to the success of South African constitutionalism has been immense, and that contribution did not end when the drafting of the constitutional text did. It is inaccurate and unfair not to acknowledge this, whether we are thinking of giving due credit to the past or deciding more instrumentally how to think about the ANC going forward: we have more than one reason to want people living in South Africa, ANC members and not, to be aware of the prouder strains of the organization's recent history. And if we are trying to understand constitutional law or the Constitutional Court, the failure to acknowledge this contribution is also misleading. If we depart from the premise that the Court has mostly operated in a politically hostile environment, we will cast the Court as a somewhat precarious guardian at the gates, helped only by some resilient civil society actors – a story that we are primed for in any case by familiar understandings of impact litigation campaigns and the position of courts in emerging democracies. We will miss the way in which the Court's great cases have really been broader, public, political stories, and we will miss the extent to which the Court has had the luxury of being part of a significantly common exercise in building a new state and society. We will see the Court's great decisions as more unilaterally bold than

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they are, and so will find its decisions *not* to be unilaterally bold in other situations more puzzling than is actually the case. We will find it harder to take seriously the possibility that a decision by the Court to defer to another branch might not always be dictated by political fear or institutional caution or old-fashioned restrained legal habit, and that a decision to defer might really be a decision that the Court does not *need* to intervene because the other branches are also doing important constitutional work, and might be doing it better than the Court could. We will see how existing understandings of South African constitutional activity have problems with each of these ideas, and how each sheds important light on the Constitutional Court's approach to its cases. The Court has indeed played its hand well, and this book will argue that the Court is often better than its critics recognize. But the Court has also often held good cards, and we should not forget that in this metaphor the ANC has often been the dealer.

The result of this move to take more seriously the facts surrounding the Court and its cases is what I will call the *constitution-building account*, an account of the work that the Constitutional Court has been performing since its creation in 1995. This focus on the highest court has its ironies coming from someone ostensibly opposing court centrism. I adopt it partly because it is also the focus of most of the standard constitutional understandings with which a useful engagement has to start, but it also serves a broader goal. In the context of a broader enquiry into the surrounding facts, the focus on the Court forces us to engage with all the other institutions and actors its interpretative activity involves. Constitution-building compels us to stop seeing the Court as the place where all constitutional meaning begins and where all constitutional bucks stop, and to start seeing it as one institution among others. Constitution-building works best when it is a joint activity, and the successes of the South African system reflect that the Court's work has often been supported, in various ways, by the efforts of other actors and institutions.

The constitution-building account, however, aims to be an interpretative account – that is, a legal, constitutional account of the Court's work that can be used to explain and defend its activity in legal, constitutional terms, rather than merely the analyzed factual description one might get from a political scientist. It adopts a conscious strategy of trying to take the reality seriously as legal activity by seeking to articulate and test the constitutional arguments on which it rests. As such, it needs to explain how this social and political activity can fit into a book about legal

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activity, and how arguments that draw on these data can properly be treated as legal, constitutional arguments. This book is not a work of legal theory, but I will aim to say enough here to render plausible the claim that the constitution-building account is defensible as a legal account as well as a descriptively adequate one, and that it can therefore reply to other legal accounts on their own terms. Since the problem of how to relate legal activity to social and political activity arises in any legal system, my arguments in this regard borrow from abroad, and in particular on work from the United States. This may merit brief comment. Some perceive US constitutionalism as too old-fashioned, idiosyncratic, conservative and/or focused on negative rights to be useful to South Africans or other newer members of the global constitutional club. It is true that US doctrine is more often distinguished than followed by South African courts. But in drawing on US theory, I follow in the footsteps of leading scholars of South African constitutional law,[7] and I would add that there is much the long rich history of the US experience can teach us about how constitutionalism actually works.[8] It is mere chauvinism to rule all this out by stipulation.

But my focus in this book is on the South African case, and my analysis will be comparative only in the sense of looking outside in order to better understand within.[9] With five election cycles and two decades of post-apartheid government behind us, it is time to start taking stock. It is time to ask whether South African constitutionalism, poster child of the

[7] See e.g. J. Dugard, *Human Rights and the South African Legal Order* (Princeton University Press, 1978), p. 49: ('[s]pecial attention will be paid to the experience of the United States because South Africa and the United States share a common legal heritage as well as common social problems stemming from the diverse racial composition of their societies'), as well as the work of scholars such as Dennis Davis, Karl Klare, Heinz Klug, Theunis Roux and Stu Woolman discussed in this book.

[8] Thus although much US work of this sort will find little place in the footnotes of a book on South Africa, my approach has been informed in various ways by scholars including Akhil Reed Amar, Phillip Bobbitt, William Eskridge, John Ferejohn, Barry Friedman, Michael Klarman, John Langbein, Thomas McCraw, Jerry Mashaw, Nicholas Parrillo, Robert Post, Jed Rubenfeld, Reva Siegel, Keith Whittington and Gordon Wood, in addition to the US scholarship (and scholarship on South Africa by US scholars) that will find more specific acknowledgement in later pages.

[9] On this sort of comparative approach, see e.g. M. Tushnet, 'The Possibilities of Comparative Constitutional Law' (1998–1999) 108 *Yale Law Journal* 1225, 1269–84; P. W. Kahn, 'Comparative Constitutionalism in a New Key' (2002–2003) 101 *Michigan Law Review* 2677; R. Hirschl, 'On the Blurred Methodological Matrix of Comparative Constitutional Law' in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, 2007), pp. 41–43.

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progressive and the transformative, whose birth was heralded around the world, has the resources to understand itself.[10]

A Beginning: *Makwanyane* Stories

S v. *Makwanyane*, the Constitutional Court's first significant decision which invalidated the death penalty, is the crown jewel of South African constitutionalism.[11] But if *Makwanyane* is an emblem, of what exactly is it emblematic? After more than twenty years, several hundred more Constitutional Court decisions, and a great deal of scholarship, local and international, we still do not have a good answer, and in this we will be able to start seeing the limitations of the ways in which South African constitutionalism is currently understood.

For many, *Makwanyane* is the model of a bold, value-driven approach to judging, and of a South African human rights jurisprudence that protects the interests of even unpopular minorities (murderers) against the position of the majority, without fear or favour. But if *Makwanyane* is to be understood in this way, as a decision that set the pattern for subsequent rights cases, it is striking that examples of its heirs are so hard to find. Although the many friends of this understanding of adjudication have kept a vigilant look-out, the truth of the matter is that the best example of this model today is still *Makwanyane*. Even the LGBTI equality decisions, the most likely candidates to be its successors, lack *Makwanyane*'s expansiveness.[12] So it is no surprise that those who saw *Makwanyane* as a promise of how the new court would be, or a symbol of how it should be, are often inclined to view this subsequent dearth as a betrayal, an abdication, a weakening of nerve, a failure to follow through.

Also interesting about this first view of *Makwanyane* is that it treats as *emblematic* of South African constitutionalism a decision that may be the Court's single most *un*popular finding among South Africans. It is not always attacked in name, or even as a court decision, but consistent majorities before and since have supported the death penalty. The 2005 decision in *Mohamed*, relying on *Makwanyane* to hold that South Africa should not have deported a criminal accused to the United States

[10] For this way of phrasing the enquiry, see B. Ackerman *We the People: Foundations* (Harvard University Press, 1991), ch. 1; J. Rubenfeld, 'Reading the Constitution as Spoken' (1995) 104 *Yale Law Journal* 1119.

[11] *S* v. *Makwanyane* 1995 (3) SA 391 (CC).

[12] I discuss these cases in Chapter 6.

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without obtaining a guarantee that the death penalty would not be imposed, attracted undiminished public criticism.[13] A ban on the death penalty in the face of popular support for it is of course not unique to South Africa, but this first story does not spend enough time asking whether such an unpopular example represents a good model for a new constitution and court, nor why its unpopularity with a majority has not produced decisive backlash against *Makwanyane* and the stand the Court took in it. The role of the political party elected by that majority is conspicuous by its absence.

A second, more political *Makwanyane* story can be written. Its title might be 'Chronicle of a Death Penalty Invalidation Foretold'. The ANC had long supported the abolition of the death penalty by the time the Court decided the case in 1995. Black defendants had historically been strongly disproportionate recipients of the death penalty.[14] When the ANC and the ruling National Party (NP) moved towards negotiations in the late 1980s, a moratorium on the death penalty was one of the important concessions the government made. As the negotiations proceeded, the ANC wanted to abolish the death penalty, but reached deadlock with the NP, which wished to retain it. To get past the deadlock, they agreed on a right to life provision that was textually neutral on the issue, with the explicit intention that this arrangement would leave the issue to be decided by the Constitutional Court.[15]

Thus when the Court sat to consider the issue in 1995, its members could be as sure as judges in a counter-majoritarian case probably ever get to be that the ruling party intended them to decide the issue and would back up an anti-death penalty decision.[16] And the ANC

[13] *Mohamed* v. *President of the Republic of South Africa* 2001 (3) SA 893 (CC); see e.g. M. du Plessis, 'Between Apology and Utopia – The Constitutional Court and Public Opinion' (2002) 18 *South African Journal on Human Rights* 1, 5–7; R. N. Daniels and J. Brickhill, 'The Counter-Majoritarian Difficulty and the South African Constitutional Court' (2006–2007) 25 *Pennsylvania State International Law Review* 371, 381.

[14] See famously B. van Niekerk, '. . . Hanged by the Neck Until You Are Dead: Some Thoughts on the Application of the Death Penalty in South Africa' (1969) 86 *South African Law Journal* 457.

[15] For the background, see e.g. H. Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press, 2000), pp. 146–48); R. Spitz with M. Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Witwatersrand University Press, 2000), pp. 330–32; Roux, *Politics of Principle*, pp. 238–39.

[16] I use 'counter-majoritarian' here and in the rest of this chapter to refer to the court acting contrary to the view of a majority of members of the public, as opposed to the view of the majority party elected by that public. I owe to Or Bassok the knowledge that Alexander

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has since repeatedly done so. Days after the decision (and just before local government elections) the NP demanded in Parliament that the issue of the death penalty should be put to a referendum, asking Parliament to '[a]llow South Africans to instruct the judiciary to let justice be seen to be done'.[17] Minister of Justice Dullah Omar and future Deputy Minister of Justice and then-ANC MP Johnny de Lange responded by praising *Makwanyane*, from which Omar quoted at length and which De Lange predicted 'shall go down in history as one of the great judgments that has been handed down'.[18] Joined by speakers from the Inkatha Freedom Party (IFP), Democratic Party (DP) and Pan Africanist Congress (PAC), they castigated the opportunism of the NP's populist pre-election appeal in light of the negotiated transition and the importance of respecting the new constitutional nature of the state and the Court's authority, while reminding the NP that other things could be put to referendum too. In Omar's words:

> The proposal that a referendum should take place calls into question the very basis of the constitutional state and the notion of the core values of the Constitution, which should be beyond the reach of temporary majorities and the role of the Constitutional Court ... The key to the whole negotiated settlement in South Africa is the move away from parliamentary sovereignty to constitutional supremacy. The constitutional state depends on the establishment and nurturing of an independent, impartial constitutional court. Every single party which is committed to the notion of a constitutional state needs, therefore, to ensure that nothing is done to undermine the new constitutionalism. This includes building respect for the Constitutional Court and helping to establish its independence ... The complex arrangement contained in the Constitution to place core values beyond the reach of a temporary majority will be at risk if the NP's proposal for a referendum is accepted. Not only does it undermine the Constitutional Court; it opportunistically invokes the principle of majoritarianism at the expense of constitutionalism, in respect of only one issue, the one in which it believes that the majority is baying for blood. However, it ignores others which are also controversial. Why should we not submit other issues of major concern to referendum, such as the future of languages in our country, the national anthem, the flag, the need for radical land redistribution, the unpopular property clause in Chapter 3,

Bickel used the term to refer to the latter situation, in the days before opinion polls became ubiquitous.

[17] *Hansard*, 19 June 1995, Col. 2843 (GC Oosthuizen, NP).

[18] *Ibid.*, Cols. 2850–52 (Minister of Justice [AM Omar]); Col. 2829 (JH de Lange, ANC).

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> as well as the far-reaching amnesty provisions? Why should public opinion in these matters not also be tested by referenda? [Interjections].[19]

The referendum was not called. The ANC's position, of course, suited its preferences on the substance of the issue (although several senior ANC members also thought the issue of the death penalty should be put to a referendum).[20] But the terms in which Omar stated that position are notable nonetheless, and the ANC government has continued to hold this line. Although constitutional scholarship pays no attention, in the years since *Makwanyane* Parliament has heard many submissions from the public and in private member's bills seeking the reinstatement of the death penalty, and the ANC has consistently rejected them and upheld *Makwanyane*. A representative example comes from a 2008 parliamentary committee considering public comments. On a submission from a Mr. NK Govind, the minutes record: 'The first issue raised related to the re-instatement of the death penalty. The legal advisor recommended that the Makwanyane argument applied and therefore the amendment not be applied. Mr Gaum (ANC) agreed.' There the matter ended.[21] The most recent in a long chain of such small episodes, a November 2014 reply to a presidential question, continues to hold the *Makwanyane* line nearly twenty years on.[22]

This political detail offers an explanation for *Makwanyane*'s expansiveness – it will be rare indeed that judges can be as certain of a

[19] *Ibid.*, Cols. 2847–49 (Minister of Justice [AM Omar]); see also *Ibid.*, Cols. 2829–30 (JH De Lange, ANC); Cols. 2832–33 (MB Skosana, IFP); Cols. 2836–38 (AJ Leon, DP); Col. 2841 (RK Sizani, PAC). President Mandela took the same line at the time in a televised address: see A. M. Dodek, 'A Tale to Two Maps: The Limits of Universalism in Comparative Judicial Review' (2009) 47 *Osgoode Hall Law Journal* 287, 310.

[20] H. Klug, 'Participation in the Design' in P. Andrews and S. Ellmann (eds.), *Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Ohio University Press, 2001), p. 149.

[21] National Assembly, Constitutional Review Committee, 15 August 2008, record available at https://pmg.org.za/committee-meeting/9505.

[22] National Assembly, Internal Question Paper No. 2823, Question 940 for written reply from Mr. AM Shaik Emam (NFP), 21 November 2014, available at https://pmg.org.za/question_reply/497/. For other examples, selected from among many, see e.g. Private Members' Legislative Proposals and Special Petitions Portfolio Committee, Minutes, 9 September 1998, available at https://pmg.org.za/committee-meeting/6314/; Constitutional Review Committee, Minutes, 25 March 1999, available at https://pmg.org.za/committee-meeting/6684/; Joint Constitutional Review Committee, Minutes, 29 August 2003, available at https://pmg.org.za/committee-meeting/2779/; Joint Constitutional Review Committee, Minutes, 2 February 2004, available at https://pmg.org.za/committee-meeting/3411/.

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ruling party's counter-majoritarian stance or its willingness to accept a counter-majoritarian outcome – and its durability. This second *Makwanyane* story, accordingly, illustrates the critical importance of taking social and political facts seriously. But the second story's most worrying deficiency is the account it offers us of *Makwanyane* as an interpretative act, or rather, the account it fails to offer. If the fearless rights-defender story seems to spend too much of its time inside the legal materials, the political story seems strangely removed from the judicial reasoning itself. The result matters, but there is a strong whiff of the legal realist idea that the Court's reasons were tacked on to a result preordained. Explaining *Makwanyane* as a product of the political circumstances seems to come at the cost of rendering rather vestigial or peripheral *Makwanyane* as the duly interpreted legal implications of a value-driven constitutional text.

The further effort to take the reality *interpretatively* seriously will respond to this concern, and I will be offering my own *Makwanyane* story based on that approach in a moment. But my prior concern is with the simple fact of these two stories and the divide between them. For my claim is that this pattern of a politically disinterested or naïve interpretative story running along in parallel with an interpretively barren political science story, neither of them completely satisfactory, is a general feature, and defect, of post-1994 understandings of South African constitutionalism. A key reason why a workable account of South African constitutional interpretation has not yet emerged is because accounts are only of one sort or the other, having the strengths and weaknesses of their type. If an account's *Makwanyane* story is court-centric and tends towards applauding bold, proudly value-vindicating counter-majoritarianism, it struggles to explain a post-*Makwanyane* world in which the Constitutional Court has almost always played a more cautious and subtle game, and in which much of what happens cannot be explained without considerable reference to actors outside of the Court. But if an account's *Makwanyane* story embraces the politics and the reality, it struggles to offer an account that can reasonably be considered interpretive, based on and resulting from fidelity to the legal materials.

Why does this divide matter? It is easy to imagine a possible world where it would *not* matter. After all, we are used to the idea that there is a gap between reality and the law: we are supposed to put the facts next to the rules and, to the extent that the facts do not match the rules, judge the facts as illegal, as unconstitutional, or at least as less constitutional. On this view, if post-*Makwanyane* constitutional practice has not lived up to *Makwanyane*'s promise, then that constitutional practice is failing

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