

Guardian of the Constitution – Constitutional Review and the South African Constitutional Court

(“Hüter der Verfassung” – zur Verfassungsgerichtsbarkeit in Südafrika)

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Summary. Before South Africa’s accession to a full democratic rule in 1994, the country had an extensive but weak constitutional system because it was dominated by the political majority in the white parliament. Since 1994, with the adoption of first, an Interim and in 1996, a Final Constitution, the country acquired a *Grundgesetz* and achieved the status of a true *Rechtsstaat*. The Constitutional Court, a totally novel state institution, played a decisive role in assuring the Constitution’s compliance with fundamental democratic principles. Until now, the Court has delivered impressive judgments to give effect to the Constitution’s provisions. However, there are at the present moment, some warning signals of factors which could affect the Court’s role as protector and guardian of the Constitution. These factors relate to the Court’s place in the hierarchy of the South African judiciary, the racial and gender composition of the Court, the nature and depth of the Court’s jurisprudence, the legal force of its decisions and the overall independence and dignity of the Court.

Introduction

A discussion of constitutional review by the South African Constitutional Court has to be preceded by a few observations about the background of the new constitutional order that was founded on the national accord which gave rise to the Interim Constitution (1994) and the Final Constitution (1996).

South Africa became a fully democratic state in 1994 with the adoption of an Interim Constitution and the general elections of the same year.¹ On the whole, it can be stated that the country’s peaceful transition to full democratic rule was an “unadulterated success”²

However, it must not be thought that South Africa, before 1994, had no constitutional history and background. In fact, the country abounded with constitutions and constitutional ramifications. First and foremost, there was the South African Constitution itself which since its adoption by the British Parliament in 1909, underwent various major changes, of which the Republican Constitution of 1960³ was the most important. It later also included the adoption of an amended Constitution in 1983 which instituted separate parliament houses for the white, Indian and coloured population groups. In addition there were the constitutions for the so-called

¹ The drafting and adoption of these constitutions did not simply come about as a result of deliberations at the constitutional conferences of 1992 and 1993, but was the outcome of many years of mostly clandestine negotiations between the government and the ANC as well as peace agreements between the main parties. The Constitution of South Africa can thus be rightly seen as a negotiated agreement which for its final adoption, entailed wide-spread public participation and consultation.

² See **Constitutional Law of South Africa**, Woolman, Roux, Klaaren, Stein, Chaskelson, 2nd ed, 2008, at 1-1.

³ With the adoption of this Constitution, South Africa became a fully independent Republic and shortly afterwards, left the Commonwealth.

independent homelands of Transkei, Bophuthatswana, Ciskei and Venda as well as another all-embracing Constitution Act to regulate the self-governing status of the other self-governing homelands.⁴

But the pre-1994 South African constitutional dispensation, despite its extensive networks of intricate constitutional arrangements, suffered from three major and insurmountable defects. First, the central South African Constitution itself that was based upon and emerged from the British tradition of parliamentary sovereignty according to which the Constitution could be amended by a simple majority in parliament⁵ and contained no entrenchment of fundamental rights and freedoms. Second is the precarious nature of the constitutions of the so-called independent homelands, because these “states” existed as ethnic enclaves within the Republic with no international recognition whatsoever. Third, and most important, the lack of legitimacy of the total constitutional order since it patently served only one purpose, namely to preserve white supremacy.

It is essential to emphasize the pre-1994 South African constitutional order. Although it is true that the new Constitution introduced a completely new dispensation, it emerged from the old in a totally evolutionary manner. In other words, the South African Constitution had no revolutionary origin or characteristics. That is the reason why the 1993 Interim Constitution as well as the new Electoral Act based on a universal franchise together with all the other extensive transitional arrangements⁶ could be passed by the existing (dominantly white) parliament. All the existing laws, government and administrative structures (except the homeland governments) kept their legal force in so far as they were compatible with the new Constitution.⁷ Also, the very large body of judicial precedent and previous judgements remained valid in so far as they were in line with the new Constitution.

Before 1994, again in the British tradition of parliamentary sovereignty, there was practically no judicial review of parliamentary legislation and courts had to apply such legislation without contesting their validity.⁸ However, notwithstanding their lack of legitimacy, the Bophuthatswana, Ciskei and pre-independence Namibian⁹

⁴ KwaZulu, kaNgwane, Lebowa, Gazankulu and Qwaqwa.

⁵ This is why the old Constitution was constantly amended at the whims of the reigning Nationalist Party.

⁶ These transitional arrangements were wide and extensive; they had to provide for the re-incorporation of the homelands, for the integration of the military and police, abolition of the existing provinces to create a new provincial dispensation and a host of existing government structures and institutions as well as existing security legislation.

⁷ It is interesting to note that the Constitution for an independent Namibia (1990) came about in the same evolutionary manner. However, in that Constitution, it was expressly stated that nothing contained in that Constitution “shall be construed as recognizing in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa”(art 145(2). This could be considered as a clear example of the *normative Kraft des Faktischen*.

⁸ The last vestiges of constitutional review were abolished when the entrenchment of the coloured vote in the Cape Province was scrapped in 1955. (Except the entrenchment of the official languages which did not give rise to constitutional review.)

⁹ Namibia, the erstwhile Mandated Territory was administered by South Africa as part of the Republic even after the revocation the Mandate by the United Nations up to Namibian independence in 1990.

constitutions had justiciable Bills of Rights and in that way, some landmark decisions were introduced in the overall South African public law.¹⁰

The new Constitution (1996)

The new South African Constitution introduced a totally novel constitutional dispensation. Whereas previously South Africa had a vast network of constitutional institutions, they were weak and subjected to the policies of the white parliamentary majority. With the new Constitution, South Africa became a constitutional state, a *Rechtsstaat*, in the true sense of the word and the Constitution our *Grundgesetz*. In sec 1(c) it is clearly stated that one of the founding values of the Republic is the supremacy of the Constitution and the rule of law.¹¹

The new Constitution with its pledge to the founding values of a multi-party system of democratic government, human dignity, the achievement of equality and advancement of human rights and freedoms, non-racialism and non-sexism, universal adult suffrage, regular elections and an accountable, responsive and open system of government is certainly worthy of the utmost protection.

This is exactly the reason why the Constitutional Court's role as protector and guardian of the Constitution takes such very high eminence.

The Constitutional Court, Guardian and Protector of the Constitution¹²

Under the Constitution, the independence of the Constitutional Court with its eleven judges, is expressly guaranteed.¹³ Judges are appointed for twelve years and may only be removed by a two-thirds vote in the National Assembly if the Judicial Service Commission finds gross incompetence, incapacity or gross misconduct.¹⁴

Undoubtedly, the so-called **Certification Cases** of the Constitutional Court after the acceptance of the Constitutional Assembly¹⁵ of the final Constitution in 1996, will for ever remain the highest mark of the Court's role as guardian of the Constitution.

¹⁰ Since these "independent" homelands still remain within the realm of the overall South African legal system, decisions of their courts still retain strong persuasive force. It must be admitted that although these decisions contained the first sounds of a coming liberation, they provide "an extremely incoherent account of the standards to be applied in constitutional interpretation" (See **Constitutional Law of SA**, op cit at 2-35.

¹¹ Sec 1 may only be amended with a 75% of the vote in the National Assembly and by a concurring vote of six of the nine provinces in the National Council of Provinces. Although this article is not a full *Ewigkeitsklausel*, it patently has such a characteristic.

¹² The Constitutional Court was conceived as a completely novel state institution of the highest order. Under the former Bophuthatswana and Ciskei Constitutions, their Appeal Courts undertook the functions of judicial review and under the Namibian Constitution it is their High Court which is assigned the function of judicial review of parliamentary legislation. In 1955, the government of the day in an abortive attempt to create a high instance of constitutional review, tried to pull the Parliament up by its own boot strings and institute a so-called High Court of Parliament in order to overturn an adverse decision of the Appellate Court. The latter Court, however, declared to High Court of Parliament to be unconstitutional.

¹³ Also the judiciary as such, see sec 165 of the Constitution.

¹⁴ Sec 176 and sec 177 of the Constitution.

¹⁵ The newly elected Parliament, after the 1994 general elections, constituted itself as a Constitutional Assembly to debate and accept the draft Final Constitution.

These Certification Cases¹⁶ need special explanation. Conjunctly with the drafting of the Interim Constitution, the Multi-party Conference of 1993 also drafted a complete list of Constitutional Principles which was agreed to by all the political parties as being a “solemn pact” between them. These Principles, spelling out the premises on which the future democratic state and constitutional order would be founded, would serve as a set of absolutely binding norms against which all the sections of the Final Constitution would be evaluated and tested. Only once the Constitutional Court has certified the Final Constitution as being in conformity of these Principles,¹⁷ would the Final Constitution be adopted.

In the Certification Cases, the newly established Constitutional Court undertook the arduous task of carefully testing each and every clause of the Final Constitution against the Constitutional Principles. Although the Court in its First Certification Case found that the draft Constitution in essence adhered to the Principles, it detected quite a number of provisions which contravened the Principles and therefore referred the draft back. Once the Constitutional Assembly had rectified these provisions, the Court in its second certification judgment endorsed the text and the New Constitution was promulgated.

The judgments of the Constitutional Court in the Certification Cases no doubt will remain the most authoritative source for future interpretation of the Constitution. As such, these judgements can be considered the most significant contribution of the Court. About the First Certification Judgment it was rightly said: “(This judgment) reflects to a large degree how the Constitutional Court was able to assert its own views about the signal features of a constitutional democracy. That assertion demonstrates, in turn, the institutional confidence the Constitutional Court secured in its first eighteen months of operation and the degree to which constitutionalism and the rule of law had been accepted by most South African political actors by the end of 1996. The fact that none of the political parties questioned the legitimacy either of the certification process itself or the particular decisions taken by the Constitutional Court during the certification process offers quite a positive, if implicit, commentary on the new democracy’s commitment to its constitutional principles.”¹⁸

In its almost two decades of existence, the Constitutional Court has established an impressive record of constitutional judgements. Perhaps its most audacious¹⁹ judgement was to rule that the death penalty is unconstitutional.²⁰ Other landmark

¹⁶ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997(2)SA 97(CC), 1997 (1) BCLR 1(CC).*

¹⁷ In **Constitutional Law of SA**, op cit at 2-28, the authors quite correctly point to these Principles as the “most critical concession” made by all the negotiating parties at the Multi-party conference. In the drafting of the Namibian Constitution a set of constitutional principles which were negotiated by the Western Contact Group and endorsed by all the political parties as well as the United Nations, served the same purpose. In the Namibian negotiation process their Principles were constantly referred to as the “holy cow” that may not be violated.

¹⁸ See **Constitutional Law of SA**, op cit at 2-45. An important question remains whether, after the adoption and certification of the Final Constitution, these Principles are still operative. My own opinion is that they still have their full legal force when interpreting and applying the constitutional provisions.

¹⁹ Had the Court followed public opinion, it would have certainly ruled for the retention of the death penalty.

²⁰ In *S v Makwanyane 1995(3) SA 391(CC)* the Court ruled that the death penalty is a cruel, inhuman and degrading punishment that violates human dignity and the right to life.

judgments concerned the access to health care and emergency treatment, freedom of religion, the right to adequate housing, the right to freedom and physical security of the person, the right to bodily integrity, unfair discrimination on the ground of sexual orientation, the constitutionality of ‘floor crossing’ legislation, the right to receive social grants, prisoners’ rights to vote, traditional marriages and the right of succession, right to dignity, publication of names of persons with HIV status, extension of common law definition of rape, religion and culture, etc.

Constitutional Court Quo Vadis?

It cannot be contested that the South African Constitutional Court has acquired a high and eminent place in the whole of the South African constitutional constellation. Whereas previously, the concept of a constitutional court was completely foreign to constitutional theory and practice, the Constitutional Court occupies a central place in most of South African hearts and minds. As a result of open access to the Court by the media and television and the ready availability of the Court’s judgments on the internet, the Constitutional Court has become almost a household reality.²¹ It is generally agreed that the Constitutional Court is not only the guardian of the Constitution but also the ultimate protector of human rights and liberties. What is more, the jurisprudence of the Court has in a relatively short time inspired a deep and remarkably learned and perceptive body of academic writing and discourse amongst lawyers, legal philosophers, students and also enriched the reasoning of judges in the other courts.

At the same time, however, it would be short-sighted and naïve not to see that various factors and recent events contribute to the gathering of dark and ominous clouds around the role, the status and future of the Constitutional Court. Of note, are the following:

- **The Constitutional Court’s place in the overall hierarchy of the South African judiciary.** In this respect, there are two opposite views. The Court, under the Constitution,²² is the highest Court in “all constitutional matters.” The one view is that by giving a wide meaning to the concept of constitutional matters, so as to include all litigation regarding the Bill of Right’s human rights and freedoms, just administration, access to the courts and all the other matters included in the Constitution, the Constitutional Court in effect becomes the highest Court of Appeal. The Constitutional Court by its readily giving judgement on such matters as health, security, just administration and hearing cases between individual litigants has itself contributed to the conviction that it is the highest court of appeal in the country. This apparently, is also the government’s line of thinking. That is the reason why in 2001, by Constitutional amendment, the President of the Court was renamed Chief Justice and the erstwhile Chief Justice of the Appeal Court was named President. In 2005 the government published a 14th Constitution Amendment

²¹ In this respect, the public attraction of the Court on Constitution Hill, Johannesburg, amidst the apartheid museums, must also be mentioned.

²² Art 167(2)(a).

Bill which makes express provision for the Constitutional Court becoming the highest court of the Republic in all matters.²³

On the other hand, there is the view that the Constitutional Court should be a Court apart from the existing judicial hierarchy and only have exclusive jurisdiction in matters such as the constitutionality of parliamentary and provincial legislation, constitutional amendment, conduct and validity of elections, international agreements, impeachment of the President and judges as well as other reserved matters of eminent constitutional interest. According to this view, the Constitutional Court should rather have the elevated status of a High Court of Parliament, appointed by special majorities in Parliament in order to ensure the respect and uncontested obedience of the Legislature and Executive.

Much could be said in favour of the latter point of view. Because, should the Constitutional Court become the apex court in the judicial hierarchy, it would necessarily follow that the existing High Court of Appeal with its long and outstanding history and tradition as the highest court, will become relegated to a lower status. Since 1994, under the new Constitution, the Appeal Court has also delivered remarkably outstanding judgments on constitutional matters with equal and sometimes even more persuasive reasoning than those of the Constitutional Court.²⁴ With the Constitutional Court as highest appeal instance the Court of Appeal more and more would be emasculated and even become redundant.²⁵ Should the Constitutional Court become the highest court of appeal in all matters, it would necessarily become embroiled in many non-constitutional cases and become extremely occupied with the result that its role as austere, vigilant protector and guardian of the Constitution will become blurred. An opinion such as the following carries much weight: "In order to be linked to the Final Constitution's transformative project and its underlying value system, the (Constitutional Court) needs to do so as a court of limited, specialized jurisdiction."²⁶

An even more serious argument against the Constitutional Court becoming the highest court in all matters, is the possibility of government and political interference and influence. Under the Constitution,²⁷ the Chief Justice and deputy Chief Justice of the Constitutional Court are appointed by the President after having consulted the Judicial Service Commission and the leaders of the political parties represented in the National Assembly. The other nine judges are also appointed by the President after consulting the Chief Justice and leaders of political parties represented in the National Assembly. He does the appointment of these judges from a list of names prepared by the Judicial Service Commission. The President in appointing the Constitutional Court

²³ This Bill has not as yet been passed by Parliament but it is still on the agenda of the ruling party.

²⁴ Judges of the Appeal Court are appointed from the ranks of judges of the High Courts or in rare cases from the ranks of eminent lawyers from the professions. The Appeal Court, under the Constitution, has concurrent jurisdiction with the Constitutional Court on all constitutional matters, except matters on the constitutionality of legislation.

²⁵ Appeals, first to the Appeal Court and then to the Constitutional Court would become extremely time-consuming and expensive.

²⁶ **Constitutional Law of SA**, op cit, at 4-131.

²⁷ Art 174 of the Constitution.

judges is not bound by the advice given by the leaders of the political parties or the Judicial Service Commission. The Constitution stipulates²⁸ that at least four judges must be persons who were judges at the time they were appointed to the Court. All the other judges, including the Chief Justice and Deputy Chief Justice do not necessarily need to have legal qualifications.²⁹ Although it can be assumed that the Judicial Service Commission in making its recommendations would closely look at the candidates' legal expertise, this is not necessarily so. The President, not being bound by the advice of the Commission or the leaders of the political parties, would be free to appoint his political loyalists to interpret and apply the Constitution according to the dictates of the reigning political party. Should this happen, it will no doubt affect the status and prestige of the Constitutional Court as guardian of the Constitution. It speaks for itself that once the Constitutional Court loses its independence and becomes a party political instrument and mouthpiece, the enshrined constitutional values of the Constitution are in jeopardy.³⁰

- **The Racial and Gender Composition of the Constitutional Court**

The Constitution prescribes³¹ that “(t)he need for the judiciary to **reflect broadly**³² the racial and gender composition of South Africa must be considered when judicial officers are appointed.”

It was certainly necessary to enact such a constitutional provision since it would have been totally incongruous in South Africa's multi-racial society to have members of only one or two racial groups occupying the judicial benches. Unfortunately, the requirement of a judiciary “broadly reflecting” the racial and gender composition has been interpreted and applied to mean “reflecting the racial and gender demography” of South Africa. The result was that appointments to the bench were made on a quota system based on the demographic proportions of the various population groups in the country.³³ This essentially unconstitutional practice which denies the fact that courts are not elected political bodies to represent various sectional interests but should be totally independent only to serve the ends of justice, has in some cases resulted in appointments of a suspect nature. Fortunately, this application of a mechanical quota system in the appointment of judges has so far not affected the quality and independence of the Constitutional Court. But the danger of applying such a bland politically motivated quota system remains.

- **The Constitutional Court's Jurisprudence**

²⁸ Art 174(5) of the Constitution.

²⁹ This was in line with the original thinking that the Constitutional Court may benefit from the knowledge of sociologists, political scientists and even a retired heads of state to enrich its constitutional wisdom.

³⁰ This is not a remote possibility in the light of the threat by Mr Jacob Zuma, president of the ruling ANC party and candidate for the presidency. See the discussion *infra*.

³¹ Art 174(2).

³² My emphasis.

³³ In practical terms this means that because about 60% of the population is black, 60% of the judges on the bench must also be black.

Law analysts and legal philosophers in South Africa, although appreciative of the outcome of most of the Court's judgements, remain largely critical of jurisprudential depth in the Constitutional Court's reasoning. It is averred that "a discernible gap clearly exists between what the Court understands its constitutional mandate to be – to model rational discourse and engage in substantive reasoning – and what it actually does."³⁴

This criticism, to an extent, is justified. The South African judiciary follows a very casuistic approach when deciding cases. In other words, in South African judgments the specific legal dispute that is brought up, is carefully analyzed and solved in accordance with the applicable law. This was mainly the tradition before 1994. In this tradition a rather strict positivist approach would be followed, meaning that the courts would apply the law as it stands without expressing views on the broader and deeper questions such as law and morality or the meaning of a just society.³⁵ Since 1994, with the advent of the new Constitution, the courts do follow a more purposive approach. However, the casuistic tradition still remains, also in the Constitutional Court. The Constitutional Court will give a carefully reasoned judgment on the particular matter before it and apply the relevant provisions of the Constitution but would not express itself on the broader, more theoretical subject of the nature of a value driven democracy. It is for this reason that it is claimed that the Court, unlike the German Federal Constitutional Court did not give content to an "objective normative value system".³⁶

The debate on the depth of the Constitutional Court's jurisprudence will continue. It is hoped that in time the Court will give a clearer content to the fundamental concept of an objective normative value system.

- **The legal force of the judgments of the Constitutional Court.**

In the Constitution's Bill of Rights, a whole number of second and third generation rights is included, for example the right to housing, health care, food, water, social security and education. In a few cases the Constitutional Court invoked a particular right in a given situation, for instance to decide whether a sick person is entitled to the right of access to health care and emergency treatment.³⁷ In this case, the Minister did comply with the Court's judgement. However, in cases where the Court ordered a general compliance on the part of government to give effect to economic and social rights, the government dragged its feet and neglected the Court's order. For instance, in 2001 a group of destitute persons living under severe conditions approached the Court for an order requiring the state to provide adequate housing.³⁸ The

³⁴ See **Constitutional Law**, op cit, at 1-10.

³⁵ This approach, of course, was the outcome of the doctrine of parliamentary sovereignty according to which the validity of laws cannot be questioned. But it must be pointed out that there were some landmark decisions where judges did question the morality of apartheid laws; though, such cases were the exception.

³⁶ See **Constitutional Law of SA**, op cit, at 1-8 where it is alleged that the Constitutional Court, although frequent reference is made to foreign decisions, has done little to "delineate the extension of an objective normative value system.

³⁷ *Soobramoney v Minister of Health (KwaZulu-Natal) 1998(1)SA 765(CC).*

³⁸ *Government of RSA v Grootboom and Others 2001(1)SA 46(CC)*

Court stressed the state's obligation in that regard and issued a declaratory order. However, when Ms Grootboom, the old lady in whose name the application was brought before the Court, died in 2008, she was still living in the same shack.³⁹

It speaks for itself that nothing would discredit the Constitutional Court more if the state refuses or neglects to give effect to the Court's orders. It would certainly create the impression that the Court is not taken seriously. What is more, it would fatally affect the Court's role as guardian of the Constitution.

- **The independence and dignity of the Constitutional Court**

Respecting the independence and the dignity of the courts is a constitutional imperative.⁴⁰

Recently, two events occurred which directly impugned the independence and high dignity of the Constitutional Court and give much cause for concern.

The first event arose when a Judge President of a division of the High Court was allegedly interfering with a pending judgment of the Constitutional Court by making personal representations to two of the Court's judges. The Chief Justice immediately lodged a complaint with the Judicial Service Commission which is the overseeing body for the judiciary, and made it known in the media that such a complaint had been lodged. The Judge President in question, in turn, lodged a counter complaint with the Judicial Service Commission and applied to a provincial High Court for relief against the Chief Justice and all the judges of the Constitutional Court on the ground that his right to dignity and reputation was violated since he was not given the opportunity to be heard before the Chief Justice made his complaint known. In the High Court, the Judge President won his case by a majority decision, but lost it in the Appeal Court which was unanimous in upholding the Constitutional Court's appeal.

This vendetta between the Judge President and the Constitutional Court upset the whole legal fraternity, because it became a bizarre spectacle to see how the judges of presumably the highest court in the land are taken to task in a lower court as well as in the Appeal Court at the instance of another senior judge. This rather tragic course of events did nothing to enhance the dignity and independence as well as the reputation of the Constitutional Court. The entire judiciary has been tarnished by the dispute.

The second event to cloud the Constitutional Court's independence and dignity, concerns Mr Jacob Zuma, the newly elected president of the ANC, South Africa's ruling political party. Zuma, who will most probably become the country's next president, was since 2003 charged with a large number of criminal offences of fraud, corruption and money laundering, flowing from the massive arms deal in the Nineties. For years he resisted these charges on technical and procedural grounds in the High Court, the Appeal Court and also the Constitutional Court. In all these cases to thwart his prosecution, he was

³⁹ A similar laxity occurred after the Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359(CC) instructed the respondents to ensure the safety of all rail commuters.

⁴⁰ Art 165 of the Constitution.

mostly unsuccessful. On 6 April 2009, the Independent Prosecuting Authority announced that the charges against Zuma were being withdrawn since his prosecution, in the opinion of the NPA, was from the beginning tainted with political interference and intrigue and that, therefore, the prosecuting process was abused.⁴¹

Of course, when the charges were withdrawn, Zuma and the ANC were tremendously relieved and claimed that a victory was won. On 8 April 2009, Zuma in an interview, voiced his anger against the Constitutional Court and said:⁴² “If I sit here and I look at a Chief Justice of the Constitutional Court, you know, that is ultimate authority, which I think we need to look at because I don’t think we should have people who are almost like God in a democracy. Why are they not human beings? I don’t want to debate that now, but at the right time I’m keen to engage them before the issue becomes public.”⁴³

What exactly Mr Zuma, the candidate for South Africa’s future presidency, meant when he expressed these sentiments, is not quite clear but whatever it might be, they do not augur well for the Constitutional Court’s independence.

- **Conclusion**

The authority, dignity and independence of the Constitutional Court are dependent on the Constitution. If the Constitution is weak or is not respected by the institutions of state and the government, the Constitutional Court will be the immediate victim. South Africa has a strong Constitution that has weathered many political storms, even those of the dominant alliance with a more than 70% majority in parliament, a majority that could have easily allowed that alliance to amend the Constitution in a drastic manner. This did not happen and the following statement can be fully endorsed: “Thus, despite its considerable majorities in the national legislature, the ANC has not, as yet, used its legislative power to enact major changes to the negotiated peace settlement reflected in our Interim Constitution and our Final Constitution. This state of affairs has enabled the political institutions established in 1994 – though still fragile – to consolidate the underlying commitment to the formal and the substantive transformation of South African society.”⁴⁴

On the other hand, it must be conceded that the Constitution’s commitment to dignity, democracy and legitimacy has still remained “largely formal”.⁴⁵ Nearly half of South Africa’s population is still desperately poor in spite of the last decades of economic growth. They are still underfed, living in miserable conditions without sufficient services, suffering illnesses (South Africa has the

⁴¹ The NPA’s decision to withdraw the charges did not address the merits of these charges and rested on some unlawfully obtained extra-curial information. The NPA’s decision created a furore and became a main topic in the pre-election campaigns.

⁴² *The Mercury*, 9 April 2009 at 1.

⁴³ What is equally disconcerting is that Zuma in the same interview attacked Deputy Chief Justice Moseneke by name because the Judge was reported to have said at a private function: “I want to use my energy to create an equal society. It’s not what the ANC or what the delegates want; it is what is good for our people.”

⁴⁴ *Constitutional Law of SA*, op cit, at 2-46/47.

⁴⁵ *Ibid*, at 2-3.

highest percentage of HIV and Aids infections) and are untrained, jobless and by and large without hope of an immediate better future. These deplorable social and economic conditions have inspired authors to brand the South African Constitution a “Potemkin Constitution.”⁴⁶ Potemkin, it will be remembered, did in fact build a large number of real villages and ports throughout the Crimea, but did not succeed to procure a better life for all.

One can only hope that in coming years when looking back at the Constitution of 1996 and taking account of ensuing events as well as the ill-fated lot of democracies in other African countries, that Constitution would not one day be judged as South Africa’s Weimar Constitution.

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⁴⁶ Ibid, at 2-49.