

High Court of Australia
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By
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Constitutional Court of South Africa

* I am indebted to my law clerks, Michel Djandji and Martin Willner, for collecting many references, and to Sebastian Bates, law clerk to my colleague Justice Froneman, for collecting even more, and for incisively challenging my reading of those references; and to Leo Boonzaier, my law clerk 2013-2014, now a DPhil student at Oxford, for – as always – inestimably improving the whole. Both Michel and Sebastian have partly Australian roots, which may explain their generous ardour.

1. Chief Justice Kiefel, colleagues, ladies and gentleman: it is a great honour to be with you this evening and to give this lecture.
2. When I was a twelve year old schoolboy, a dramatic event occurred – one that thrilled me as a youngster nurtured in white South Africa’s racial trepidations.
3. At 11h00 on 11 November 1965, Mr Ian Douglas Smith, the Prime Minister of the white minority government of Southern Rhodesia,¹ unilaterally declared Rhodesia independent of the United Kingdom. The trigger was the British government’s insistence that Smith accept majority rule. Mr Smith, who refused to compromise the supremacy of Rhodesia’s white minority, decided to go it alone.
4. Since the source of his government’s power was the Crown and the authority Parliament in Westminster conferred on it, the unilateral declaration (UDI) was unlawful² and an act of rebellion against the Crown.
5. The United Nations Security Council swiftly imposed an oil and arms embargo. In London, Parliament passed legislation declaring the regime illegal and its actions without lawful warrant. Apart from South Africa and Portugal,³ no country recognised Rhodesia as “independent”.
6. A critical question arose. What would the Rhodesian courts do? The judges, all English-speaking and white, derived their power from royal

¹ With the protectorate of Northern Rhodesia ceasing to exist when Zambia became independent on 24 October 1964, the white government of Southern Rhodesia took to calling the country Rhodesia, but since the statutory instruments emanating from Crown rule had not been changed, the new name was unofficial.

² The terms of the Declaration were, rather grandiosely, modelled on those the American colonists employed nearly two centuries before, in establishing the United States of America (though the Rhodesians failed to mention that “all men are created equal”, or that government existed by the “consent of the governed”).

³ Then still a colonial power with a colony Mozambique, bordering on Rhodesia, and another, Angola, closely adjacent.

authority and the mandate that Parliament in Westminster exercised under it. The 1961 Constitution, under which they held office, was itself an enactment of the British Parliament.⁴

7. The Rhodesian judges' response was crucial also to my country, for UDI came at the very time that South African judges were grappling with a crisis of their own: how to interpret harsh laws designed to entrench racial supremacy and exclusion.
8. In the 1950s, the South African Appellate Division gained global recognition for its willingness to confront apartheid legislation that violated elementary common law precepts of fairness, equality and due process. But this changed. As judges less averse to apartheid were appointed,⁵ quiescence began to predominate – and with it a profound shift in interpretive method.
9. In the months immediately before UDI, the Appellate Division handed down three momentous decisions. All three concerned the rights of persons imprisoned under harsh laws authorising detention for anti-apartheid activities. Each rejected available options for interpreting ambiguous statutes that would have offered protection to the vulnerable.⁶ As repression intensified, the trilogy occluded hope that long-vested principles of judicial interpretation could mitigate apartheid's law.⁷
10. It was in this bleak atmosphere – white fright and an intense contest about judges' interpretive responsibilities in countering racial injustice – that the Rhodesian judges were called upon to pronounce on UDI.
11. The Smith government had, pre-UDI, locked up one of its opponents, Mr Daniel Nyamayaro Madzimbamuto, without trial.

⁴Southern Rhodesia (Constitution) Act, 1961. The Constitution reserved full powers to the Crown (on the instance of the British government) to issue Orders in Council to amend, add to or revoke nine provisions (section 111) (see *Madzimbamuto v Lardner-Burke* [1968] All ER 561, 1969 AC 1645 (PC) at xxx).

⁵ See Christopher Forsyth, "Motes and Beams" (1989) 106 SALJ 374 at 378 noting that the apartheid government appointed a disproportionate number of conservative judges to the Appellate Division.

⁶ *Loza v Police Station Commander, Durbanville* 1964 (2) 545 (A) (authorising indefinitely renewable periods of 90-day detention under a statutory provision that licensed detention without trial for 90 days); *Rossouw v Sachs* 1964 (2) SA 551 (A) (holding that a neutrally worded statute by implication precluded a political detainee from exercising the rights unconvicted (pre-trial) detainees enjoyed to reading and writing materials); *Schermbucker v Klindt* 1965 (4) SA 60 (A) (holding, by a majority of 3 to 2, that a court has no power under the rules of court to order a person detained under security legislation to appear before it to investigate allegations of torture). *Schermbucker* was handed down on 28 September 1965, just 44 days before UDI.

⁷ The trilogy of dismal decisions was scathingly and courageously assessed in AS Mathews and RC Albino "The Permanence of the Temporary: An examination of the 90- and 180-day Detention Laws" (1966) 83 *South African Law Journal* 16.

12. The authority for his initial detention was a pre-UDI statute⁸ of the Southern Rhodesian Parliament.⁹
13. The Smith regime sought to prolong Mr Madzimbamuto's detention. It did so under an instrument Mr Smith and his Cabinet themselves purported to issue by Proclamation – the “new” “Constitution of Rhodesia, 1965”.¹⁰
14. Mr Madzimbamuto's spouse, Stella, turned to the Rhodesian courts. In a writ of habeas corpus seeking to secure his release, she invoked the regime's lack of lawful authority.¹¹
15. A dramatic series of legal challenges followed. Their upshot was radically contradictory.
16. In the rebel regime's capital, Salisbury, the courts upheld the Smith government's powers.
17. In London, the Privy Council did the opposite. It held that the Smith government's enactments and promulgations had “no legal validity, force or effect”¹² – and that the Rhodesian courts were wrong to have held otherwise.
18. The leading proponent of judicial sanction for the regime's powers was the Chief Justice of Rhodesia, the Right Honourable Sir Hugh Beadle, a knight of the realm and a member of the Privy Council in London.¹³
19. In determining Mrs Madzimbamuto's challenge,¹⁴ he purported to apply the positivist theory of Hans Kelsen.¹⁵ He ruled that there had been a de facto change of government and that the Smith regime had “effectively usurped” governmental powers granted under the 1961 Constitution. This clothed it

⁸ Emergency (Maintenance of Law and Order) Regulations of 1965, issued under the Law and Order (Maintenance) Act, 1960.

⁹ The statute authorised detention of anyone likely to commit acts “likely to endanger the public safety, disturb or interfere with public order or interfere with the maintenance of any essential service”.

¹⁰ *Madzimbamuto v Lardner-Burke* 1968 2 SA 284 (RAD). The details regarding Mr Madzimbamuto's detention are set out at 291G-293A.

¹¹ The case was brought as “a test case, the object of which is to test the status of the present Government, its capacity to declare states of emergency, to make regulations thereunder, and to detain people” – *Madzimbamuto* (RAD), per Beadle CJ at 290H.

¹² *Madzimbamuto v Lardner-Burke* [1968] All ER 561, 1969 AC 1645 (PC) at xxx (give AER / AC page).

¹³ Sir Sydney Kentridge notes that in his capacity as a Privy Counsellor, Sir Hugh Beadle had undertaken “to be a truth and faithful servant of the Crown, not to countenance any word or deed against the Sovereign but to withstand the same to the utmost of his power to bear faith and allegiance to the Crown and to defend its jurisdiction and powers”: “A Judge's Duty in a Revolution – the case of *Madzimbamuto v Lardner-Burke*”, chapter 7 in *Free Country: Selected Lectures and Talks* (2012), endnote.

¹⁴ 1968 (2) SA 284 (RAD).

¹⁵ The way in which Beadle CJ invoked and applied Kelsen seems almost certainly to have been wrong, raising the question of expediency. See FM Brookfield, “The Courts, Kelsen and the Rhodesian Revolution” (1969) 19 *University of Toronto Law Journal* 326 at 342-343.

with effective authority. In consequence it could “do anything” its predecessors “could lawfully have done” under the 1961 Constitution.¹⁶

20. It followed, Beadle CJ held, that the courts should recognise the Smith government’s powers.¹⁷

21. He denied that in doing so he and the other judges were joining the revolution.¹⁸ Even a judge sympathetic to those seizing power, Chief Justice Beadle said emphatically, “*should*” “declare the law objectively”:¹⁹

“He must declare the law as it ‘is’, and not as it ‘was’, or as what he thinks it ‘ought’ to be.”²⁰

22. In doing so, he explicitly disavowed any suggestion that his own and other judges’ political views played any role in determining the issue.²¹ “...in a revolutionary situation”, he said, “the political views of the Judge do not play any more significant a part in determining what the law is than they do in normal times.” The judge’s disapproval of a statute, no matter how strong, “cannot affect the validity of the law.” Short of resigning, the judge “must apply the law as it ‘is’.”

23. In this, Beadle CJ was echoing – and perhaps invoking – a much-quoted allegiance expressed in this very Court. This was by Sir Owen Dixon, one of Australia’s great lawyers. His expressed commitment was to judging that ignored the “merits and demerits” of a measure, but was justified solely by reasoning that was “excessively legalistic”.²²

24. “There is no other safe guide to judicial decisions in great conflicts”, Sir Owen famously said at his inauguration as Chief Justice of this Court, “than a strict and complete legalism”.

¹⁶ *Madzimbamuto* (RAD) 359-360.

¹⁷ “The status of the present Government today is that of a fully *de facto* Government in the sense that it is in fact in effective control of the territory and this control seems likely to continue. At this stage, however, it cannot be said that it is yet so firmly established as to justify a finding that its status is that of a *de jure* Government” (359H)

¹⁸ 1968 (2) 284 (RAD) 327G-H.

¹⁹ 328A.

²⁰ 327C. The law cannot, he said “be measured by the yardstick of the old constitution if in fact there are no longer any remains of the old constitution in existence” (328C).

²¹ Beadle CJ said:

“... in a revolutionary situation the political views of the Judge do not play any more significant a part in determining what the law is than they do in normal times. In normal times the government may pass a statutory measure of which an individual judge strongly disapproves. He may disapprove so strongly that he may not be prepared to apply the statute, and he may as a consequence decide to resign his commission and refuse to sit any longer as a Judge; but his disapproval cannot affect the validity of the law. If he decides not to resign, but to continue in office, he must apply the law as it ‘is’, and not as he thinks it ‘ought to be’, and this no matter how much he may disapprove of it.” (328D-E).

²² “Swearing in of Sir Owen Dixon as Chief Justice” (1952) 85 CLR xiii-xiv.

25. Distinguished Australian minds have carefully parsed the meaning and implications of Sir Owen's doctrine of legalism, which, as Justice Gageler has pointed out, his successor, Sir Garfield Barwick, "repeatedly endorsed".²³ Justice Hayne has rightly noted that Dixon asserted "no mechanistic view of the law" – he did not deny, for instance, that "judges make the common law".²⁴ Justice Kirby has noted that Dixon "would not have denied" that the function of constitutional interpretation is "inescapably political" in the sense that political consequences were inevitable.²⁵ Indeed, it was this very character of constitutional interpretation, Justice Kirby says, that induced Dixon to insist on strict legalism.²⁶
26. On the other hand, Justice Heydon has helpfully confirmed that Sir Owen "thought that non-constitutional cases should be decided by recourse to legalism as well".²⁷
27. What, then, did legalism mean in judging?
28. Justice Gageler proffered an explanation in 1987, long before his appointment to this Court.²⁸ He said that legalism, while not literalism, was the belief that "adherence to the strict analytical and conceptual techniques of formal legal argument provides the only sure method of approaching what is necessarily a sensitive political function" in constitutional adjudication. (He later acknowledged the very great breadth of this definition, which he attributed to his "youthful enthusiasm".)²⁹
29. But Justice Gageler also proffered a precise identification of the essence of legalism. This, he explained, is the conviction that it is possible, and

²³ See Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" [1987] *Federal Law Review* 162 at 175. See too Sir Garfield Barwick's review of Professor Leslie Zines' *The High Court and the Constitution* (1981) in (1981) 4 *UNSW Law Journal* 131 where it is denied (at 133) that unexpressed reasons play a part in judges' decision. Sir Garfield states that "the economic or social consequences for the constituent States of a proposed interpretation of a Commonwealth power can scarcely . . . bear upon the adoption or rejection" of it – and that the "only relevant judicial question is the meaning and operation of the language by which the grant of Commonwealth power is made." (134)

²⁴ See his lecture on the 50th anniversary of Sir Owen Dixon's Yale address, "Concerning Judicial Method – fifty years on", 14th Lucinda lecture, Monash University Law School Tuesday, 17 October 2006, available at http://www.hcourt.gov.au/assets/publications/speeches/current-justices/hayne/hayne_17oct06.pdf (accessed 22 August 2017).

²⁵ Hamlyn Lectures page 35.

²⁶ Hamlyn Lectures pages 35-36.

²⁷ JD Heydon, "Judicial activism and the death of the rule of law" (2003) *Australian Bar Review* page 3 of 18.

²⁸ Stephen Gageler, "Foundations of Australian Federalism and the Role of Judicial Review" [1987] *Federal Law Review* 162. Two decades later, just before his appointment to the High Court of Australia, Justice Gageler recorded that he continued "to adhere broadly" to his explanation of legalism: See "Beyond the Text: A Vision of the Structure and Function of the Constitution" (2007) page 9. Justice Gageler, then Solicitor General, notes that he published the 1987 article "with the enthusiasm of youth", attempting "to refute the broadest notion of what I then understood to be legalism".

²⁹ [1987] *Federal Law Review* 162 at 176.

desirable, for judges **“to negate personal choice or value judgment”** in judging.³⁰

30. And this was precisely the defence Beadle CJ advanced for his reasoning in upholding the Smith regime’s power.
31. It was not remotely plausible to suggest that any “objective” analysis of the law inexorably determined the result the Rhodesian judges reached. At least equally well supported by the legal materials was the conclusion of the House of Lords, namely that the “new Constitution” was quite obviously not promulgated in terms of the Smith regime’s previous lawful authority.
32. Even so, Beadle CJ insisted that his judgment involved no personal choice or value judgment.
33. For negating personal choice or value judgment in adjudication has a further power. It absolves the judge from moral responsibility for the social consequences of the law he or she is enforcing.
34. During apartheid, “social consequences” meant sanctioning evil.
35. “It must be remembered”, Beadle CJ said, “that Judges do not ‘enforce’ the law; they merely ‘declare’ it”.³¹ The Courts, he declared, “should not involve themselves in the political struggle for power”.³²
36. It was, Beadle CJ said, “a wrong conception” to imagine that judges, “by ‘enforcing’ or not ‘enforcing’ a particular constitution can play a part in the resolution of the struggle for political power which occurs at the time of a revolution”.
37. The claim was at best dubious, and possibly disingenuous. It was absurd to deny that the judges could play a part in the revolution. They had no choice but to play a part, indeed a pivotal one.
38. The Privy Council concluded, when Mrs Madzimbamuto appealed to it, that though the Rhodesian judges had been “put in a very difficult position”,³³ nothing could “justify disregard” of the legislation the United Kingdom Parliament had adopted. Hence the “usurping Government now in control of Southern Rhodesia” could not be regarded “as a lawful Government”.³⁴

³⁰ Page 178.

³¹ 1968 (2) 284 (RAD) 326H.

³² 372A. It was, Beadle CJ said, “a wrong conception” to imagine that judges, “by ‘enforcing’ or not ‘enforcing’ a particular constitution can play a part in the resolution of the struggle for political power which occurs at the time of a revolution”.

³³ Sir Sydney Kentridge, “A Judge’s Duty in a Revolution – the case of *Madzimbamuto v Lardner-Burke*”, chapter 7 in *Free Country: Selected Lectures and Talks* (2012) said: “One can well understand and even sympathise with the unusual position in which the judges found themselves”, before going on to consider the “troubling questions” their judgments raised.

³⁴ [1969] 1 AC 645 (PC) at 725.

39. The Privy Council thus considered that the Rhodesian judges ought to have refused to enforce the Smith regime's legal instruments:³⁵ they should have resisted the rebellion, instead of aiding it.³⁶
40. Lord Reid, who delivered the majority judgment, quoted tellingly from an 1872 decision of the United States Supreme Court, *Hanauer v Woodruff*,³⁷ which invoked "the difference between submitting to a force which could not be controlled" and "voluntarily aiding to create that force".
41. What the Rhodesian judges did, in giving de facto recognition to the Smith regime, was not to submit to a force they could not control. They were, despite their disclaimers, in truth "voluntarily aiding to create" the rebellious force.³⁸
42. This exposed as a moral sleight of hand the notion of Beadle CJ that the Rhodesian judges were politically neutral agents whose decisions could not contribute to, still less determine, the success or failure of a revolution.
43. For the Rhodesian judges did not sit outside the revolutionary change of power that Ian Smith's declaration of independence brought about. They

³⁵ Kentridge notes of the Rhodesian judges that "recognition by the sovereign's own court was not only unprecedented but contradictory": "A Judge's Duty in a Revolution – the case of *Madzimbamuto v Lardner-Burke*", chapter 7 in *Free Country: Selected Lectures and Talks* (2012).

³⁶ Lord Pearce, who later played a mediating role in trying to end UDI, dissented. He, too, took the view that "de facto status of sovereignty cannot be conceded to a rebel Government as against the true Sovereign in the latter's Courts of Law", but he accepted the approach of Fieldsend JA, in the Rhodesian appellate court, that the principle of necessity applied. This meant that acts by those actually in control, even without lawful validity, may be recognised as valid and acted upon by the courts, if certain requirements were met. In his view, the lawful government in the United Kingdom had in fact, "for reasons of humanity and common sense", acquiesced in the Rhodesian judges continuing to perform their judicial functions under the unlawful government (give AER or AC page citations). The weakness in Lord Pearce's judgment is that he infers the United Kingdom government's acquiescence in the Rhodesian judges' continuance in office principally from a directive of the UK-appointed Governor, immediately after UDI, which stated that it was the duty of all citizens, "including the judiciary", to maintain law and order and to carry on with their normal tasks. Every official and legal act of the UK government that followed was utterly at odds with any inference of acquiescence that might have been derived from that directive, which was thus a poor source of authority.

³⁷ 82 US 439, available at <https://www.law.cornell.edu/supremecourt/text/82/439> (accessed 11 July 2017). The Court's statement concerned war-bonds issued by the secession ordinance of Arkansas, which were used as a circulating medium in Arkansas and around Memphis. The Court held these "did not constitute any forced currency which the people in that State and city were obliged to use". Instead, they were "only a circulating medium in the sense that any negotiable money instruments, in the payment of which the community has confidence, constitute a circulating medium".

³⁸ Sir Sydney Kentridge, who argued *Madzimbamuto* in the Rhodesian courts and the Privy Council, put it thus: "Surely there was no act more likely to further the objectives of the illegal authorities and to impair the supremacy of the lawful government than the act of the court itself in recognising the rebel regime as a *de facto* government."

See, too, FM Brookfield, "The Courts, Kelsen and the Rhodesian Revolution":

"But how could [the rebel government] have usurped the judicial powers unless the judges chose to regard themselves as revolutionary judges?"

"A Judge's Duty in a Revolution – the case of *Madzimbamuto v Lardner-Burke*", chapter 7 in *Free Country: Selected Lectures and Talks* (2012).

were not its objective witnesses nor its neutral arbiters, determining from some external Archimedean point whether a change of power had occurred.³⁹

44. On the contrary, as the Privy Council's judgment implied, they were themselves deeply implicated in the seizure of power. Their assessment of the efficacy of the revolution was itself an integral factor determining whether the Smith regime's overthrow of British power in Rhodesia would succeed.⁴⁰

45. If the Rhodesian judges had refused to recognise Smith's seizure of power, it would have been crucially and perhaps critically incomplete, and UDI might have failed.

46. Instead, the judgment of Beadle CJ cast over Smith's racist, white-supremacist regime a judicial mantle of legitimating authority. This enabled it to exercise its menacing power for nearly sixteen years – as increasing warfare, bloodshed, civilian loss of life, and inflammatory racial animosity engulfed the region.⁴¹

47. This has had dire consequences, not only for Zimbabwe, the independent state that emerged from the rebellion, but for my own country.

48. Chief Justice Kiefel, why is all this relevant tonight?

49. It is because *Madzimbamuto* offers only the most vivid instance from the dark years of racial supremacism of how white Southern African judges tried to resolve the moral dilemmas of judging by resorting to what may rather roughly, but fairly, be called "legalist" approaches.⁴²

³⁹ FM Brookfield, "The Courts, Kelsen and the Rhodesian Revolution" (1969) 19 *University of Toronto Law Journal* 326 at 342-344.

⁴⁰ The clash of courts and judicial philosophies did not assist Mr Madzimbamuto. He was detained until 24 December 1974. He died on 2 May 1999. See https://www.thepatriot.co.zw/old_posts/remembering-daniel-and-stella-madzimbamuto/ (accessed 16 August 2017).

⁴¹ Sir Sydney Kentridge suggested that "One cannot attribute the present lawlessness [of post-independence events in Zimbabwe] to Mr Smith's revolution, still less to the acquiescence in it of the Rhodesian judges": "A Judge's Duty in a Revolution – the case of *Madzimbamuto v Lardner-Burke*", chapter 7 in *Free Country: Selected Lectures and Talks* (2012).

⁴² There is no doubt that both substantive and formal techniques of legal reasoning (technical, formalist, literalist) can allow judges to support evil while disclaiming responsibility; and both can be used also to the opposite effect. As my concluding section shows, judges and lawyers can apply legal rules strictly precisely because the consequences may be morally preferable. The South African courts' circumvention of ouster clauses may be seen as very literalist (see the judgment of Innes CJ in *Benning v Union Government (Minister of Finance)* 1914 AD 180 at 185 and the cases that followed, including *Welkom Village Management Board v Leteno* 1958 (1) SA 491 (A)). That technique was embraced because it would often neutralise ouster clauses whereas a "purposive" reading would have done quite the opposite.

On the other hand, as HLA Hart showed in his debate with Lon L Fuller, purposive or substantive approaches to judging may be used to entrench evil. In fact, the most chilling vice of Nazi judges was not pliant formalism but the use of 'purposive' or 'value-laden' readings (often circumventions) of legislation to ensure they had more oppressive effects than their literal meaning allowed. The problem was the purposes and values they read in.

50. And that attempt is, in turn, essential to illuminating the ambitious constitutional project that is my theme this evening.
51. I must leave to Australians the task of assessing the impact of “strict legalism”, in its various forms, upon your jurisprudence and politics. That is a task best conducted by those intimate as I am not with your country’s circumstances and your courts’ jurisprudence.
52. Justice Gageler argued in his 1987 paper that, even on its own terms, legalism was a failure; that, “in the absence of an underlying normative judgment”, it provides only indeterminacy;⁴³ and that “the model of neutral judicial decision-making” to which it aspired has always been “impossible to achieve”.⁴⁴
53. Despite these supposed flaws, Sir Ross Cranston has claimed that legalism “cast a long shadow over Australian legal method”.⁴⁵
54. And Justice Kirby has said that, long after Dixon, the power of his exposition and example “continue to influence the notion of what it is to be a judge in Australia”.⁴⁶
55. This I note, as a visitor does, for my theme is native to my own country and region. And in developing it, I take legalism in its essence to be the

This was usually said to be necessary in order to give effect to the 'will of the people' -- which in that particular legal culture proved the most readily available way for those judges to shift moral responsibility from themselves.

Most examples may be doubled over – formalist techniques may be “progressively” employed. If Mr Madzimbamuto had sought to enforce a protective provision in the post-UDI legislation (perhaps an unmet procedural precondition for interning him) then Beadle CJ's approach may have appeared different. The critical question, then, is, as Justice Gageler says, what is the “underlying normative judgment” that is being made? The same may be applied to the *Harris* decisions of the South African appeal court, where, if a procedural misstep had occurred in the packing of the Senate, a highly technical approach, would have been desirable because of the underlying normative judgment that racial inhibitions on the franchise were noxious. It is the inescapability of normative choice that is the point of this lecture.

It is true that in our legal culture, for reasons related to its dominant legal techniques and legitimating assumptions, the readiest means by which pliant judges can disclaim or shift moral responsibility is to say that they are merely applying the law as it objectively “is”. This invites particular vigilance about formalist or legalist methods of eluding moral choice in adjudication.

Christopher Forsyth, “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review” (1996) 55 *CLJ* 122 at 129-34, suggests that the rejection by Rabie ACJ and Hefer JA of ‘formalism’ in *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A) had ‘disastrous’ consequences. And Raymond Wacks, “Judges and Injustice (1984) 101 *SALJ* 266 at 274 observes that under apartheid South African judges often reasoned in what he considers to have been a Dworkinian way.

⁴³ Page 180.

⁴⁴ Page 195.

⁴⁵ Ross Cranston “Lawyers, MPs and Judges” chapter 2 in David Feldman *Law in Politics, Politics in Law* (2013) 17 at 32.

⁴⁶ Hamlyn Lectures page 10. “His words”, Justice Kirby says, “provide a powerful rallying cry for those within the law of a conservative disposition” (ibid). This, Justice Kirby says, even though, in truth, no one in Australia “really believes that it is possible to interpret the federal Constitution by reference only to its words” (Hamlyn Lectures page 77).

attempt, as Justice Gageler explained, to eschew moral value in judging – and, with it, the absolutism that choiceless, valueless judging seems to bring.

56. On that premise, I must state that, in Southern Africa, the impact of legalism was nearly catastrophic.
57. Sir Owen Dixon was sworn in on 21 April 1952 – a momentous time for judges and justice and the law in South Africa. For the date fell directly between the two historic decisions I mentioned earlier in which the South African appeal court struck down, on procedural and constitutional grounds, enactments of the apartheid Parliament.⁴⁷
58. Sir Owen may well have admired those brave judgments. Had fate been that he sat in the South African court, rather than in this Court, he may even have joined them.⁴⁸
59. But it is doubtful whether he could not have done so while adhering to “strict and complete legalism” in any of the forms in which his interpretive philosophy has been explained.⁴⁹

⁴⁷ The Appellate Division nullified the Separate Registration of Voters Act, 46 of 1951 in *Harris v Minister of the Interior* 1952 (2) SA 428 (A) [judgment handed down 20 March 1952] and the High Court of Parliament Act, 35 of 1952 in *Minister of the Interior v Harris* 1952 (4) SA 769 (A) [13 November 1952].

⁴⁸ Dixon’s own approach seemed to conflate the *Harris* decisions with that of the majority in *Attorney-General of New South Wales v Trethowan* (1931) 44 CLR 394. In “The Common Law as an Ultimate Constitutional Foundation” (1957) *Jesting Pilate* 203 at 206 ([also at (1957) 31 *ALJ* 240]) he stated that criticism of *Harris*, as of *Trethowan*, failed “to understand that the principle of parliamentary sovereignty was a doctrine of the common law as to the Parliament at Westminster and not otherwise a necessary part of the conception of a unitary [that is, non-federal] system of government”. Justice Michael Kirby in “The Struggle for Simplicity: Lord Cooke and Fundamental Rights” (1998) *Commonwealth Law Bulletin* 496 at 503 suggests that this statement may be “judicial support for the view that obedience to Parliament, as expressed in a statute, [is] itself a doctrine of the common law made by the judges”, which he regards as heretical (page 512). It may be that Justice Kirby’s reading of this particular statement by Dixon is undue, since Dixon seems merely to have been explaining that Parliament at Westminster was free to impose legislative inhibitions on colonially created legislatures that did not necessarily match its own, common law derived, sovereign supremacy. That was certainly the ratio of his judgment in *Trethowan*, as well as of the opinion of the Privy Council, but not by any means the basis of *Harris*, which was a far more radical decision than *Trethowan*.

⁴⁹ Does *Attorney-General for New South Wales v Trethowan* [1932] AC 526 indicate that Dixon would have approved the *Harris* decision? On its logic, no. Centlivres CJ in *Harris 1* 1952 (2) SA 428 (A) 461 relied on *Trethowan*, though only for the proposition that, before the Statute of Westminster, which came into effect on 11 December 1931, section 5 of the Colonial Laws Validity Act empowered Parliament in the Union of South Africa “to bind a subsequent Union Parliament to follow a prescribed procedure in amending specified provisions in the Union Constitution”. But *Trethowan* neither applied directly to nor governed the issues in *Harris*. In *Trethowan*, the Privy Council unanimously dismissed an appeal from the majority decision (3-2) of the High Court of Australia, which held valid the restrictions section 7A of the Constitution Act 1902 to 1929 (NSW) imposed on the existence or composition of the state’s Upper House. Section 7A, which the New South Wales legislature itself adopted, provided that—

“(1) The Legislative Council shall not be abolished nor, subject to the provisions of sub-section six of this section, shall its constitution or powers be altered except in the manner provided in this section.

60. For the decisions in the two great *Harris* cases – as with every great judicial advance – relied on high constitutional principle whose invocation entailed great vision and innovation, as well as profound moral choice.⁵⁰

(2) A Bill for any purpose within sub-section one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.

[. . .]

(6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section.”

Section 5 of the Colonial Laws Validity Act provided that every representative colonial legislature had “full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law, for the time being in force in the said colony.” The Privy Council concluded that section 5, read as a whole, “gives to the Legislature of New South Wales certain powers, subject to this, that in respect of certain laws they can only become effectual provided they have been passed in such manner and form as may from time to time be required by any Act still on the Statute Book. Beyond that, the words ‘manner and form’ are amply wide enough to cover an enactment providing that a Bill is to be submitted to the electors and that unless and until a majority of the electors voting approve the Bill it shall not be presented to the Governor for His Majesty's assent”.

Dixon J was one of the three judges in the High Court majority. His judgment, like that of the Privy Council's later, held that the electoral requirement validly imposed a “manner” in which a law had to be passed. His reasoning turned on the conclusion that the electoral requirement of section 7A was not repugnant to section 5 of the Colonial Laws Validity Act, “which”, Dixon J said, “concedes the efficacy of enactments requiring a manner or form in which law shall be passed” (pages 431-432).

Dixon CJ later in *Hughes and Vale Pty Ltd v Gair* (1955) 93 CLR 127 expressed misgivings about the procedure by which *Trethowan* came before the Court. But as Edward McWhinney observed (“*Trethowan's Case Reconsidered*” (1956) 2 *McGill LJ* 32 at 41), these did not “affect the substantive issues” in *Trethowan*. Two observations may be made about *Trethowan*. The first is that the provision at issue was enacted by the legislature itself, and was upheld on the basis that the colonial statute that empowered the legislature, itself permitted “manner and form” restrictions to be enacted that would bind its own successors. The restrictions at issue in *Harris* derived from an enactment of the British Parliament, the South Africa Act, 1909. *Harris* held that these, when read with the Statute of Westminster, conferred sovereign legislative power on the South African Parliament in a bifurcated form: sitting bicamerally for all legislation bar legislation impinging on the entrenched provisions, for which sovereignty had to be exercised sitting unicamerally and with a two-thirds majority. By no stretch was this dramatically imaginative construction of sovereignty a matter of “manner and form”. The *Harris* decision was thus radical in a way in which *Trethowan*, for all the indignation expressed about it, was not, particularly since the issues in *Trethowan* (handed down in the High Court on 16 March 1931, and in the Privy Council on 31 May 1932) antedated the coming into force of the Statute of Westminster on 11 December 1931. The apartheid government's principal argument in *Harris* was that, after the Statute of Westminster, the South African Parliament exercised sovereignty in unabridged form, superseding the restrictions imposed on its legislative powers by the 1909 South Africa Act (see the report of the argument at 1952 (2) 439B-445). This was the very argument the South African appeal court had upheld a decade and half earlier in *Ndlwana v Hofmeyr NO 1937 AD 229*.

Second, Dixon was plainly sensitive to criticism of *Trethowan*. McWhinney in 1956 excoriated the decision as “extremely hasty”, and “a piece of ad hoc decision-making by the judges”, showing questionable wisdom in involving judges in “narrow partisan struggles”, in which the effect of the ruling was to preserve merely “one cheap political stratagem” over another (pages 36 and 40-41). McWhinney was relaying criticism of *Trethowan* that antedated Dixon's accession to the Chief Justiceship and his remarks on his inauguration about “strict legalism”, which could very well be taken to have influenced those remarks.

⁵⁰ *Harris v Minister of the Interior* 1952 (2) SA 428 (A) held, overruling *Ndlwana v Hofmeyr NO 1937 AD 229*, that “Parliament” meant Parliament as defined in and functioning under the South Africa Act, 1909, a statute of the United Kingdom Parliament that constituted the South African Parliament, so that even though Parliament became fully “sovereign” after the passage of the Statute of Westminster in 1931, it could legislate in sovereign capacity to remove “coloured” voters from the common voters' roll only in accordance with the

61. And the appeal court in handing down those decisions had to overrule its own previous decision of just fifteen years before, which had, with scrupulous and rigorous legalism, decided the contested issues in precisely the opposite way.⁵¹

62. In fact, it was only by a retreat to “complete legalism” on the part of two of the members of the *Harris* courts,⁵² joined by eight new appointees, in a deliberately stacked bench, that led, over a single brave dissent, to a decision four years later that approved a blatant legislative manoeuvre designed to overcome the procedural protections that the 1952 court had constitutionalised.⁵³

63. And the majority invoked the jurisprudence of Dixon J in making that retreat.

64. At issue was whether Parliament could by ordinary procedure monstrously enlarge the Senate for the sole purpose of creating the two-thirds majority

safeguards enacted in the 1909 statute, which required it to sit unicamerally, securing a two-thirds majority, when doing so.

Minister of the Interior v Harris 1952 (4) SA 769 (A) held that the High Court of Parliament Act 35 of 1952, which after the decision in *Harris 1* constituted Parliament, consisting of all its Senators and Members, as a court of appeal over decisions of the Appellate Division, was itself invalid because it had not been adopted in accordance with the procedure prescribed by the 1909 South Africa Act. The Court held that the parliamentary processes entrenched in the 1909 statute conferred rights on individuals that could not be restricted or abolished by any process other than that prescribed. In form, the High Court of Parliament was a court, but, in substance, it was Parliament acting in contravention of the procedures stipulated in the 1909 statute (see pages 779-783; 785-786; 787-789; 791-792; 794-796).

⁵¹ *Ndlwana v Hofmeyr NO* 1937 AD 229 (holding that, since the enactment of the Statute of Westminster, 1931, by which the United Kingdom Parliament conferred legislative independence on the Dominions, including South Africa and Australia, and abolished the power of Parliament to legislate for the Dominions, the South African Parliament in Cape Town had supreme legislative authority which could not be questioned by the courts). The *Ndlwana* Court said that, absent “fanciful” objections to the authenticity of statute produced in printed form, published by the proper authority, “Parliament’s will” as expressed in an Act of Parliament “cannot now in this country, as it cannot in England, be questioned by a Court of Law whose function is to enforce that will not to question it” (page 237). The Court clearly regarded the argument as entirely implausible (see top of page 237) and even somewhat ridiculous (“It is obviously senseless to speak of an Act of a Sovereign law making body as *ultra vires*. There can be no exceeding of power when that power is limitless”). The ratio of the judgment, which appears at page 238, is that a court of law has no power to declare that a Sovereign Parliament cannot validly pronounce its will unless it adopts a certain procedure.

⁵² Greenberg JA retired in 1955 and van den Heever JA died on 29 January 1956, before *Collins* was argued.

⁵³ The appeal court ruled 10-1 that gerrymandering the Senate to enable passage of the apartheid legislation in accordance with the South Africa Act, 1909, passed muster: see *Collins v Minister of the Interior* 1957 (1) SA 552 (A). Steyn JA: the meaning of “Houses of Parliament” depends on “the ordinary plain meaning of the phrase, based on the language of the Act and arrived at by construction, without the assistance of any implied provision” (at 584E). Schreiner JA, in solitary dissent (pages 571-581), held that ordinarily Parliament could create any form or type of Senate it wanted using ordinary procedures. However, when it came to the protection guarding the coloured vote, which required the Senate to sit with the House of Assembly, the court had to look not at form, but at substance. The Senate-packing legislation was ‘a legislative plan’ designed to get round the protection afforded to coloured voters. This was because government enlarged the Senate for the sole purpose of getting past the two-thirds majority requirement. The court should therefore strike the plan down as invalid (see especially pages 572G and 580A).

- the South Africa Act 1909 required, with both Houses of Parliament sitting together, to remove “coloured” voters from the common voters’ roll.
65. Centlivres CJ, for the majority, expressly invoked Dixon J.⁵⁴ He proclaimed that Dixon’s approach supported the view that the purpose for which the gerrymander was enacted was irrelevant. This was because, once a power exists, “it becomes irrelevant how, upon what grounds, or for what purpose it is exercised”.⁵⁵
66. The dissenting judgment by Schreiner JA asserted the contrary. While Parliament could in general create any form or type of Senate it wanted using ordinary procedures, when it came to protecting the specially entrenched “coloured” franchise, the court had to look beyond form alone. It had to scrutinise the substance of the legislative device.⁵⁶ Schreiner would have struck down the artificial enlargement of the Senate.
67. The majority decision in *Collins* was an incalculable set-back. It heralded 35 bleak years in which pliant executive-mindedness, dressed up in doctrines closely akin to “legalism”, cast a lengthening shadow over South Africa’s courts.
68. The three decisions on detention handed down at the time of Rhodesian UDI abdicated the courts’ long-standing role as defenders of the weak and the vulnerable. The appeal court gave its blessing to the coercive power of solitary confinement and detention without trial. The judgments gave the security police wide leeway in dealing with anti-apartheid activists.
69. Even though ample common law and interpretive grounds existed for a more protective approach,⁵⁷ the highest court indicated that judges would

⁵⁴ In *Huddart, Parker Ltd v Commonwealth of Australia* (1931) 44 CLR 494 (HCA) at 515. Dixon J also stated, of the employment preference the Governor General’s regulation there conferred on members of the Waterside Workers Federation:

“Once it appears that the power extends to conferring upon some a right to be preferred to others, it is open to those exercising the power to select any criterion which they may think fit.”

The South African appeal court invoked also two other Australian cases: *The King v Barger* 6 CLR 41 (HCA) at 67 (Griffith CJ) and *Commissioner of Taxation v Moran* 61 CLR 735 (HCA) at 760 (Latham CJ).

⁵⁵ 1957 (1) SA 552 (A) at 565C-E. The power in issue was Parliament’s power to reconstitute the Senate.

⁵⁶ Where Dixon CJ would have stood, had he sat on the *Collins* court, can only remain conjectural.

⁵⁷ *Schermbucker v Klindt* 1965 (4) SA 606 (A) was decided against the detainee by a bare majority of 3-2 and over a strong dissent. In the most notorious of the three cases, *Rossouw v Sachs* 1964 (2) SA 551 (A), the appeal court, in interpreting a statute authorising detention without trial, reversing a first-instance ruling in favour of a detainee, rejected the common law presumption in favour of liberty. It held instead that the court should determine the meaning of the provision by “meticulous scrutiny of the language” in the light of the circumstances under which it was enacted and of its general policy and object so as to ascertain the intention of the legislature (563-564 and 565A). In doing this the court expressly followed (at 563-563) the majority approach, by then already notorious (see the almost immediate critique by CK Allen, “Regulation 18b and Reasonable Cause” (1942) 58 *LQR* 232), in *Liversidge v Anderson* 1942 AC 206 (HL).

instead stand back once the security police had apartheid opponents in their grasp.

70. It is not far-fetched to see the results of these rulings in the dismal litany of more than seventy brutal deaths in detention in the quarter-century from 1965 to 1990.
71. Had all judges under apartheid embraced “legalism” or doctrines akin to it – had they disclaimed not only personal power in their rulings, but moral responsibility for them, on the basis that they entailed no “personal choice or value judgment” – and had lawyers and academic commentators joined them – it may be doubtful whether any visionary project of law would have been viable in my country.
72. For apartheid was a specifically *legal* system, whose injustices and indignities were enforced, in minute measure, by legal regulation.
73. Under apartheid, black people had no right to vote, were not allowed to move freely, to occupy skilled posts in employment or to exercise any of the elementary dignities of citizenship. They had no legal entitlement to be on or to own property anywhere in the great majority of South Africa’s land area.
74. The laws providing for this were enforced with a sometimes savage efficiency, of which the courts and the judges presiding over them were an integral part.
75. But, fortunately, those who saw the purpose of law and its rule as being to embody some semblance of justice and fairness did not accept defeat. They continued to fight for the conception of law as a shield to protect the weak and an instrument to advance justice for all.
76. And outspoken academic commentators tore to shreds the garb of legalism behind which the apartheid judges sought to shield.⁵⁸

⁵⁸ John Dugard blamed the theory of legal positivism and its conception of adjudication for this. And white Southern African judges’ embrace of legal positivism to fend off the moral obloquy they deserved has led in part to the discrediting of its more rigid expositions. Yet blaming legal positivism was wrong. Certainly, in the formulation of HLA Hart, the doctrine’s most distinguished proponent in the 1950s and 1960s, positivism does not exempt lawyers or judges from responsibility for the immoral content of laws or from accountability for their enforcement. Ronald Dworkin’s attack on positivism was different. He systematically showed that no coherent theory about the truth conditions of legal propositions in a system that involves adjudication can exclude the deep terrain of moral reasoning that decisions in cases of any complexity require judges to enter. And he contended that legal discourse proceeds from the implicit premise that there is a “right answer” to every contested issue. Support for Dworkin’s view may, perhaps ironically, be found in Sir Owen Dixon’s words, in accepting the Howland Memorial Prize at Yale University in 1955. He stated that final courts “proceed upon the assumption” of what he called “an external standard of legal correctness” – namely “that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision of the court will be ‘correct’ or ‘incorrect’, ‘right’ or ‘wrong’ as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges

77. Even in the darkest years of apartheid, a minority of conscientious judges insisted that the Roman-Dutch and English common law presumptions in favour of equality and liberty retained their force, and that these required liberal construction of statutes infringing freedom.⁵⁹
78. These judges afforded arrested militants scrupulous fairness and courtesy in their courtrooms.⁶⁰ They struck down, where they could, subordinate legislation that infringed the common law presumption of equality.⁶¹ They scrupulously enforced procedural safeguards.
79. Some judges went beyond process. Famously, in 1954 two judges refused an application by the law society to disbar Nelson Mandela as an attorney because he had been convicted of inciting mass disobedience of apartheid laws.⁶² They held that he was not acting dishonourably, disgracefully or

themselves” – and hence that adjudication entails the judge’s “best endeavour to apply an external standard”. (“Concerning Legal Method”, [1956] 29 ALJ 468.) In his lecture on the 50th anniversary of Sir Owen’s Yale address, “Concerning Judicial Method – fifty years on”, 14th Lucinda lecture, Monash University Law School Tuesday, 17 October 2006, available at http://www.hcourt.gov.au/assets/publications/speeches/current-justices/haynej/haynej_17oct06.pdf (accessed 22 August 2017), Justice KM Hayne rightly affirmed “the observable fact that judges, especially judges in a final court of appeal, feel constrained to record their processes of reasoning, and to do so in ways which take as their tacit assumption that the reasoning must accord to a standard external to the judge” – one beyond “an intuitive sense of what is ‘fair’ or ‘just’”: in short, “the fact is that judges do not consider their decision-making is unconstrained”. Though Dworkin’s theory of adjudication has incontestably compelled recognition that ascertaining any legal “rule” unavoidably involves weighing normative or moral considerations. Perhaps the most powerful practical implication of Dworkin’s attack on legal positivism is that it accords judges moral responsibility for what they decide. His account of adjudication illuminates how, in every borderline or contested case, principles and values (and not pre-cast rules) must be brought to bear in determining the outcome – and it is the judge, in grappling to find the correct answer to the case before her, who must weigh the importance of every principle and value, and thereby come up with the “right answer”. This is that answer that gives the best “fit” between institutional history and morality.

⁵⁹ Raymond Suttner (a long-serving detainee and prisoner under apartheid) in “The question of ‘judicial overreach’”, *Polity* 22 May 2017, available at <http://polity.org.za/article/the-question-of-judicial-overreach-2017-05-22> (accessed 13 September 2017) observes that during apartheid –

“there was room in the application of laws, no matter how harsh the intention may have been, for more than one interpretation on certain matters and some judges took decisions that construed the impact of repressive laws in a manner that was as limited in its invasion of personal freedom as possible. When faced with ambiguity they saw their professional obligation, as members of the legal profession to align themselves with a particular set of traditions and ethics that limited state repression. This led to some people being freed from detention or restraining orders being issued against the police”.

⁶⁰ As an instance see the series of rulings and decisions in *S v Leepile* 1986 (2) SA 346 (W) (Ackermann J).

⁶¹ See *Machika v Staatspresident* 1989 (4) SA 19 (T) (striking down a Presidential proclamation as impermissibly discriminatory in permitting men only to vote in an apartheid “Bantustan” during a referendum on “independence”).

⁶² *Incorporated Law Society v Mandela* 1954 (3) SA 102 (T), (Ramsbottom J; Roper J concurring) (28 April 1954). The judges found “Nothing” that “suggests in the slightest degree that [Mr Mandela] has been guilty of conduct [during the Defiance Campaign] of a dishonest, disgraceful or dishonourable kind; nothing that he has done reflects upon his character or shows him to be unworthy to remain in the ranks of an honourable profession. In advocating the plan of action, [he] was obviously motivated by a desire to serve his fellow non-Europeans. The intention was to bring about the repeal of certain laws which [he] regarded as unjust. The

dishonestly in opposing those laws because he was “obviously motivated by a desire to serve” his people.

80. It was a remarkable decision. Mandela entered prison a decade later as an enrolled attorney, and left it, 27 years after, still an enrolled attorney. He never forgot that, though for its greatest part apartheid law was unrelentingly cruel and oppressive, it remained possible under it to find ways of vindicating justice and dignity.
81. But he knew this depended on the willingness of judges to confront the substantive values and the moral options that inform all law.
82. And this was the paradox that lay at the heart of public interest law under apartheid:⁶³ that a vicious system could, *because it was law*, be employed against itself.
83. This entailed a further paradox, for “legalist” approaches were an integral part of the legal fight against apartheid,⁶⁴ since anti-apartheid lawyers employed the very doctrines and logical methods and processes of the law to combat injustice.
84. But this was legalism with voom; legalism employed as one component in a larger moral strategy; legalism not to limit the possibilities of the law, but to insist on its minimal safeguards and to build its processes into something beyond legalism; legalism that subordinated itself to the expressly moral ends of law.
85. In this way, anti-apartheid lawyers kept alive the belief that the use to which law was put under apartheid was an abuse, and that its true purpose, also under apartheid, was to resist indignity and injustice and to protect those vulnerable to abuse.
86. And, even in the endgame of apartheid, as hit squads proliferated and the embattled white government imposed emergency rule,⁶⁵ trade unionists, draft resisters and militants alike continued to invoke the law.⁶⁶ They did so

method of producing that result which [he] advocated is an unlawful one, and by advocating that method [he] contravened the statute; for that offence he has been punished. But his offence was not of a “personally disgraceful character” and there is nothing in his conduct which ... renders him unfit to be an attorney” (108D-F). The decision was distinguished when Bram Fischer was struck from the roll of practitioners: *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 (1) SA 133 (T).

⁶³ Richard L Abel *Politics By Other Means: Law in the Struggle Against Apartheid, 1980-1994* (1995).

⁶⁴ *Mathebe v Regering van die Republiek van Suid-Afrika* 1988 (3) SA 667 (A) is an instance where an apartheid statute was held to its own logic, by circumscribing the powers it afforded to apartheid objects only (and not to including an ethnically “mixed” community in a proposed “independent Bantustan” scheme).

⁶⁵ There are books by Max du Preez, Charl Pauw and other writers about the endgame.

⁶⁶ See Abel above note 63.

on the premise that its proper use entitled them to protection against injustice.

87. These paradoxes of law, and the central role that lawyers played in resisting apartheid, meant that, when, because of internal dissent and for geopolitical reasons, the transition came, at its forefront was a distinguished cadre of lawyers who had used the law to fight against apartheid and for its larger embodiment. They included Nelson Mandela, Oliver Tambo, Arthur Chaskalson, George Bizos, Sydney Kentridge and other legal giants.
88. Beyond the individuals and personalities, a powerful group of civil society bodies, non-governmental organisations and legal rights institutions had become skilled in employing the processes of the law for public interest purposes.⁶⁷ They have survived, and thrived, in our democracy.
89. And, most importantly yet, beyond the individuals and the organisations, amongst the South African public itself, there existed a widely disseminated understanding that, though the law was the chill instrument of apartheid's enforcement, its employment had abused its nature and ends, and that reform and repurposing to nobler ends remained possible.
90. It was thus the virtues of law – its hopeful possibilities in a society wracked by division and injustice – the virtues of law *lying beyond legalism* – that made it possible for the law to play the pivotal role it assumed in South Africa's transition.
91. When negotiations started, there was broad agreement that there had to be a constitution and a bill of rights. Parliament should never again exercise supremacy – and legal gerrymanders should not be capable of execution.
92. There was later agreement that a new court, the Constitutional Court, had to be created at the top of the existing court hierarchy to safeguard the new system.
93. The main features of the Constitution are –
 - its carefully and fully detailed provisions;
 - its express commitment in its Preamble to diversity, and to transforming South African society;
 - its enumeration of founding values (including human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; the supremacy of the

⁶⁷ It may be said that, even though resistance movements were suppressed, criminal trials of their supporters and legal challenges brought by their supporters galvanized public resistance and consciousness through a form of legal spectacle. But, behind the spectacle, there were real exercises of and challenges to power.

Constitution and the rule of law; and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness”);⁶⁸ and –

- what may well be the world’s most expansive Bill of Rights, which includes very wide standing provisions,⁶⁹ as well as environmental rights⁷⁰ and children’s rights,⁷¹ with an equality clause that includes seventeen conditions specially protected against unfair discrimination,⁷² plus express license for “measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination”.⁷³

94. The Constitution replaced the old, Westminster, system of parliamentary sovereignty with constitutional supremacy. Any law or conduct inconsistent with the Constitution is invalid.⁷⁴ The obligations it imposes must be fulfilled,⁷⁵ and the state must respect, protect, promote and fulfil the rights in the Bill of Rights.⁷⁶

95. Constitution vests the judicial authority of the Republic in the courts,⁷⁷ proclaiming them “independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”.⁷⁸

96. This includes the power to strike down unconstitutional conduct or law – a momentous competence, because the Bill of Rights includes a set of fully justiciable socio-economic rights.

97. The courts are also tasked to develop the common law and customary law, when necessary, to give effect to the rights in the Bill of Rights, and to interpret legislation in manner that promotes their spirit, purport and objects.⁷⁹ This makes the judiciary pivotal within South Africa’s scheme of separation of powers.

⁶⁸ Constitution section 1.

⁶⁹ Constitution section 38.

⁷⁰ Constitution section 24.

⁷¹ Constitution section 28.

⁷² Constitution section 9(3).

⁷³ Constitution section 9(2).

⁷⁴ Constitution section 2.

⁷⁵ Constitution section 2.

⁷⁶ Constitution section 7(2).

⁷⁷ Constitution section 165(1)

⁷⁸ Constitution section 165(2).

⁷⁹ Constitution section 39(2).

98. Needless to say, given the history of the 1956 parliamentary gerrymander, special provisions entrench the Constitution against amendment.⁸⁰ A two-thirds majority is required for most provisions – but the Founding Provisions are even harder to amend,⁸¹ since a three-fourths majority is required. The specially protected provisions include the one that stipulates⁸² the supremacy of the Constitution itself.
99. Certain rights are entirely non-derogable, even when a state of emergency is lawfully and properly declared.⁸³
100. While separation of powers between the branches of government is nowhere expressly specified, it is a “vital tenet of our constitutional democracy”.⁸⁴ Government power is distributed at three levels between national, provincial and local government.
101. The Constitution provides for eleven official languages,⁸⁵ though English is overwhelmingly the predominant official means of communication.
102. South Africa’s final Constitution is a remarkable document.⁸⁶ It is a detailed, generous-spirited and forward-looking social contract, meant to serve as a blueprint to transform South Africa’s society and institutions to make them more inclusive – more just – after centuries of exclusion and injustice.
103. Central to the commitment to social justice are the social and economic rights the Constitution entrenches.⁸⁷ As justiciable rights, they form one of the mainstays of the work of the Constitutional Court.
104. And rightly so. For if the Constitution only protects privilege, and fails to secure governance that delivers palpable justice, it will rightly be held to have failed.

⁸⁰ Section 74 requires a two-thirds majority in the National Assembly plus the support of six of the nine provinces for most provisions.

⁸¹ Chapter 1 of the Constitution.

⁸² Constitution section 1(c) and section 2.

⁸³ Section 37, which provides for states of emergency, makes certain equality conditions; human dignity; life; certain freedom and security of person aspects; slavery and servitude; certain children’s rights; and certain rights of arrested and accused persons non-derogable.

⁸⁴ *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 44.

⁸⁵ Constitution section 6(1).

⁸⁶ Justice Ruth Bader Ginsburg of the US Supreme Court has described the South African Constitution in 2012 as “a deliberate attempt to have a fundamental instrument of government that embraced basic human rights [and] had an independent judiciary. . . . It really is, I think, a great piece of work that was done.” Justice Ginsburg said that for instruction of those drafting a constitution, she would not commend the US Constitution, but rather “the Constitution of South Africa”. The full text of the interview in which Justice Ginsburg made these comments is available at <http://foreignpolicy.com/2012/02/06/why-does-ruth-bader-ginsburg-like-the-south-african-constitution-so-much/> (accessed 8 September 2017).

⁸⁷ Constitution section 26 (housing), section 27 (health care, food, water and social security), section 28 (children’s special entitlements) and education (section 29).

105. The inclusion of enforceable social and economic rights reflects the insight that people’s physical circumstances and their situation in relation to that of others – their material conditions of life – determine the extent to which they are able exercise other, less tangible, rights, like those of speech, association, movement and conscience. In short, one’s capacity to exercise these rights depends on whether you are hungry or well-fed.
106. In this, the South African Constitution differs brightly from that of the United States, whose Due Process Clause, Rehnquist CJ famously said, is not “a guarantee of certain minimum levels of safety and security” but “a limitation on the State’s power to act”.⁸⁸
107. This sharply constricted conception of constitutionalism – which Justice Gageler, in his 1987 lecture, aptly summarises as “the negation of despotism by the limitation of government”⁸⁹ – is alien to my country’s history.
108. For in it, government power and the law were used with great efficacy to divide, oppress, humiliate and exclude the majority, so creating deep vestiges of racial privilege, which it is now necessary, coordinately, for government power to rectify.
109. Plainly this puts the courts at the centre of the exercise of power.
110. It is true that this comes with perilous consequences.
111. As crime has risen,⁹⁰ some have blamed not police ineptitude or prosecutorial neglect, but the fact that the Constitution affords guarantees to criminal accused.⁹¹

⁸⁸ *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1989) 195 (opinion of the Court) .

⁸⁹ Gageler “Foundations of Australian Federalism and the Role of Judicial Review” (1987) *Federal Law Review* 162 at 170 (citing McIlwain *Constitutionalism Ancient and Modern* (revised ed 1947) at 21).

⁹⁰ *The State of Urban Safety Report in South Africa*, by the Urban Safety Reference Group, available at http://www.sacities.net/wp-content/uploads/2016/06/201606_SACN_Urban_Safety_in_SouthAfrica_Report_2016_web.pdf (accessed 12 September 2017), provides detailed information on crimes of violence in South Africa’s cities. The report found that drivers of violence and crime in South African cities include rapid population growth, population density, family disruption, poverty, income inequality, youth unemployment, poor service delivery and deprivation (page 62). Substance abuse has also emerged “as a common challenge”. Justice Minister Masutha stated in May 2017 that “the country was becoming increasingly violent”, but he attributed this to the number of longer prison terms being imposed, which may be a doubtful measure. See “More Jail Terms Point to Rise in Violence”, *Business Day* 18 May 2017, available at <http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=d76341c4-1f92-414a-a570-408622ef81bb&key=1IVotdh1orMTD8IOOSLq0g%3d%3d&issue=1106201705180000000001001> (accessed 12 September 2017).

⁹¹ See my *Justice: A Personal Account* (2014) pages 274-284 for allusion to this debate. Roughly speaking, violent crime decreased from 1994 to about 2012, but has been on the rise since then. The 2017 *South Africa Survey* of the Institute of Race Relations (IRR) totals 445 835 recorded murders between April 1994 and March 2016. In the statistical year 1994/1995 25 965 murders were recorded; in 2015/2016 the total number of murders recorded was 18 673.

112. As corruption and government malfeasance have gravely escalated, and racial divisions, still manifest in disparities in wealth and income, have persisted, some have blamed not the eight-year tenure of President Zuma, nor the nine-year tenure of President Mbeki before him, but President Mandela, and the Constitution whose enactment was the jewel of his tenure as President – a Constitution that is criticised as insufficient to deal with past and present injustice.⁹²
113. And as government finds itself increasingly accused of failures of probity and oversight and delivery, and responsibility for the disintegration and malfunctioning of independent institutions, and as parliamentary scrutiny of the executive⁹³ is itself criticised as insufficient, and parties turn increasingly to the courts to assert their constitutional rights, some within government have complained of “judicial overreach”.⁹⁴
114. And yet the charge entails a puzzle. For recourse to litigation and the assertion of constitutional rights are not limited to lawyers or political insiders or the urban elite.
115. In the minds and in the discourse of “ordinary” South Africans, including South Africans outside the urban centres, the judiciary and the Constitution occupy a palpably important role in asserting claims against government – particularly when there is a sense of betrayal by their own leaders.⁹⁵
116. This is not a figment of a constitutional lawyer’s wishful dream: it is evident in the claims the poor and the dispossessed themselves persistently make on the courts.
117. And in this they are not judicialising political demands: they are merely insisting on what the Constitution itself says is due to them.
118. Nor is it only opposition parties and non-governmental organisations, or only the poor and the dispossessed, who turn to the courts to vindicate constitutional rights.

⁹² Some of these critiques are considered in Edwin Cameron and Max Taylor “The Untapped Potential of the Mandela Constitution”, [2017] *Public Law* 382-407.

⁹³ The Constitution obliges Parliament to scrutinise the executive and to hold it to account: section 42(3) and section 55(x).xxxx

⁹⁴ For an overview of the debate, see Raymond Suttner, “The question of ‘judicial overreach’”, *Polity* 22 May 2017, available at <http://polity.org.za/article/the-question-of-judicial-overreach-2017-05-22> (accessed 12 September 2017).

⁹⁵ The three bitter provincial-boundary disputes that the Court decided all instanced citizens seeking legal recourse after, they claimed, they had been let down by political promises: *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC); *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC); *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 (11) BCLR 1158 (CC).

119. Government itself does so, as do government officials, who rely on the courts and the Constitution to protect their terrain and to clarify the extent of their powers.⁹⁶
120. And members of the governing party themselves invoke the Constitution to protect their organisational rights under it.⁹⁷
121. The proposition I draw from all this is that South Africa’s history of struggle under law, the constitutional negotiations in which it culminated, and the achievements of constitutionalism, however glaringly insufficient, provide a basis for tentative hope that constitutional resilience may endure beyond the present grave threats to the rule of law.
122. And its corollary, Chief Justice Kiefel, is that if the Constitution and the rule of law are to survive, it will not be by judges and lawyers taking recourse to minimalist or “legalist” notions of lawyering and judging that disclaim the moral choices they are required to make.
123. If that struggle is to be won, moral engagement and moral choice in expounding constitutional values and protecting constitutional mechanisms will have to be openly embraced.
124. For I offer no pretty picture of life and the law in South Africa.
125. We face a very considerable crisis of governance and law.
126. Two recent reports, one presented by church leaders,⁹⁸ and the other by academic analysts,⁹⁹ present evidence suggesting that criminal syndicates at high levels have deeply infiltrated and already seized the apparatus of state power in South Africa for corrupt gain.
127. If this is proved true – if even only part of it proves true – then dishonest leadership, corruption, mass looting of state entities and the destruction of independent institutions could see the demise of law’s most ambitious and yet fragile venture.
128. In the face of this, what is the power of law?

⁹⁶ Some vivid instances are *Kirland, Merafong, Tasima; SITA v Gijima; Minister of Police v Premier, Western Cape*.

⁹⁷ *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) (at the instance of some of its own members, governing party’s Free State provincial elective congress and its decisions and resolutions declared unlawful and invalid); and, see, most recently, *Dube v Zikalala* (7904/2016P) [2017] ZAKZPHC 36 (12 September 2017), available at <http://www.saflii.org/za/cases/ZAKZPHC/2017/36.html> (accessed 3 October 2017) (Koen J; Balton and Chetty JJ concurring).

⁹⁸ See “The South Africa we pray for: State of Capture – Much more than corruption”, 22 May 2017, available in presentation form at https://www.scribd.com/presentation/348738950/SACC-Presentation-on-state-capture#from_embed (accessed 12 September 2017).

⁹⁹ See “Betrayal of the Promise: How South Africa is being Stolen”, May 2017, available at <http://pari.org.za/wp-content/uploads/2017/05/Betrayal-of-the-Promise-25052017.pdf> (accessed 12 September 2017).

129. My answer is: on its own, not very much.
130. Yet, as I've suggested, there are signs and significations in South Africa that the project of democracy and social justice through law may be more durable than those seeking to undermine it may conceive.
131. I have already explained the widely disseminated invocation of the law and legal processes.
132. That phenomenon springs from **three** interrelated reasons, all deriving closely from my country's history of struggle under law.
133. **First**, the Constitution has required the courts to pronounce momentous decisions. These have served to define and strengthen our democracy at moments when it has trembled.
134. Some have dramatically curtailed governmental power. Others have extended benefits that government unwarrantably refused to confer.
135. These decisions continue a tradition of law-based vindication of rights that started under apartheid – where judicial decisions embracing moral choice were instrumental in ending the degradation the pass laws inflicted¹⁰⁰ and in dramatically extending trade union and worker rights.¹⁰¹
136. This tradition the Constitution has merely embedded more deeply, and with dramatic imaginative force, into the consciousness and armoury of ordinary South Africans.
137. For instances I take only two extraordinary decisions:
- one because it affected many millions of lives;
 - another because it luminously presented the lessons of civic duty and constitutionalism;
 - and both because they played a decisive part in halting episodes that threatened to wreck our democracy.
138. The Court in which I am now honoured to sit gave the first of the two decisions before I joined it – a momentous ruling requiring government to start supplying antiretroviral (ARV) treatment for those living with HIV and AIDS.¹⁰²

¹⁰⁰ *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 449 (A) and *Oos-Randse Administrasieraad v Rikhoto* 1983 (3) SA 595 (A). Regarding the first as “non-legalist” may be debatable since the lawyers for Mrs Komani employed strictly legalist arguments in kiboshing the “lodger’s permit” under the pass laws. But the finding in the second that Mr Rikhoto had acquired secure tenure in urban areas by having “worked continuously” there for at least ten years, even though he had an annually defeasible contract of employment, and returned to his “homeland” when his contract expired at the end of every year, could not have been attained on strictly legalist reasoning.

¹⁰¹ *Administrator of the Transvaal v Zenzile* 1991 (1) SA 21 (AD); [1991] 1 All SA 240 (A) (27 September 1990)

¹⁰² *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC)

139. President Thabo Mbeki’s deeply sceptical approach to the aetiology and treatment of AIDS, from November 1999 until well into 2004,¹⁰³ was a deadly national calamity that rightly became an international scandal.¹⁰⁴
140. While AIDS ravaged nearly every household and community in the country, and millions of South Africans were dying or faced death, his government refused to make antiretroviral treatment available – even though it was medically established as a near-miraculous life-saving intervention.
141. President Mbeki did so for sometimes bizarrely expressed reasons that at times appeared to resonate with goof websites and far-out conspiracy theorists.
142. In a coruscating demonstration of civic activism, after they had exhausted all negotiations, nongovernmental organisations led by the Treatment Action Campaign eventually challenged government’s policy on ARVs in court.
143. This was not as easy as it now sounds, for government dressed up its denialist resistance to ARVs in specious and plausible-sounding operational and programmatic considerations.
144. The courts did not tolerate this. The treatment activists won a stirring victory. The eleven judges of the Constitutional Court unanimously ordered President Mbeki to start making ARVs available.¹⁰⁵ Though government tried to foot-drag implementation of the judgment, the Court’s order had immediate practical effects.
145. More important, perhaps, the rational lucidity of the judgment dispelled the paralysing pall of dubious science and stigmatising obfuscation that for years had disabled the national response to the catastrophe of AIDS.
146. Today my country has the world’s biggest publicly provided ARV treatment program. Over 3.6 million people¹⁰⁶ owe their lives and health,

¹⁰³ See Nathan Geffen and Edwin Cameron “The deadly hand of denial: Governance and politically-instigated AIDS denialism in South Africa”, working paper of the Centre for Social Science Research, University of Cape Town, 2009, available at <http://www.cssr.uct.ac.za/publications/working-paper/2009/deadly-hand-denial-governance-and-politically> (accessed 10 September 2017).

¹⁰⁴ AIDS denialism manifested also in Australia. See the judgment dated 27 April 2007 of Sulan J of the South Australia Criminal Court of Appeal, refusing permission to appeal, in *R v Parenzee* [2007] SACS 143, available at <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2007/143.html> (accessed 15 September 2017), finding that AIDS denialist views propounded by the defence in a criminal trial ‘lack any credibility’.

¹⁰⁵ The judgment concerned the availability to pregnant women with HIV of Nevirapine to help prevent transmission of HIV to their new-born infants, and the order was crafted to reflect this; but it was widely seen, and rightly so, as presaging a broader eventual order requiring wider availability of ARVs.

¹⁰⁶ See <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/south-africa> (accessed 10 September 2017).

as do I, to the simple daily ingestion of safe, effective tablets. These contain a combination of medications that prevent the replication in the human body of the virus that causes AIDS.

147. Medical treatment of AIDS is not a miracle, but to those who have faced death from its effects, it can certainly seem so.
148. The significance of the Court's decision cannot be overstated, for it was given in the face of fierce opposition by a democratically elected President who commanded historically the largest majority ever in Parliament, and who enforced his views and his power with sometimes chilling authority.
149. The decision vindicated the constitutionally entrenched right of access to healthcare: but it also decisively vindicated reason and good sense, in an emerging democracy where many under President Mbeki's leadership appeared to have taken leave of them.
150. A similar lucid assertion of constitutional principle was demanded in a judgment the Constitutional Court handed down last year, on 31 March 2016. The case concerned the private residence of President Zuma at Nkandla, which was vastly improved, at the cost to the public purse of hundreds of millions.
151. This gave rise to great controversy. The Public Protector, Ms Thuli Madonsela, was asked to investigate. She held office under the Constitution as an independent state institution supporting constitutional democracy.¹⁰⁷
152. Her office gave her power to investigate conduct in any sphere of government suspected to be improper or to result in impropriety or prejudice.¹⁰⁸
153. More importantly, the Constitution gives the Public Protector power, when she finds impropriety or prejudice, "to take appropriate remedial action".¹⁰⁹
154. After investigating, the Public Protector ordered the President to pay back a portion of the money spent on his home.¹¹⁰
155. The President failed to do so. And Parliament failed to hold him to account for his failure.

¹⁰⁷ Constitution section 182.

¹⁰⁸ Constitution section 182(1)(a).

¹⁰⁹ Constitution section 182(1)(c).

¹¹⁰ https://www.gov.za/sites/www.gov.za/files/Public%20Protector's%20Report%20on%20Nkandla_a.pdf (accessed 11 September 2017).

156. Claiming the President had failed to fulfil a constitutional obligation,¹¹¹ two opposition parties sought direct access to the Court under its exclusive jurisdiction.
157. A judgment by Chief Justice Mogoeng on behalf of a unanimous court held that the Public Protector’s remedial power, until set aside by a court, could not be ignored or second-guessed.¹¹²
158. The President’s failure to comply with the remedy ordered was inconsistent with his duty under the Constitution to uphold, defend, and respect the Constitution.
159. These were the judgment’s decisional elements.
160. But in its exposition of them, in terms of constitutional principle and duty, achieved much more.
161. The Court’s decision had a momentous impact. Broadcast live on all national channels, both public and private, it secured a mass audience.
162. Mogoeng CJ broke with the Court’s usual practice of reading out only a short formal synopsis of its decision.
163. His fearless and sometimes impassioned advocacy of the rule of law and constitutional values has established him as a figure of integrity, power and authority not only in South Africa, but on the African continent.
164. On this occasion, Mogoeng CJ read out an expansive summary, in which he proclaimed the duties of the President as the Head of State and Head of the national Executive – as well as of Parliament, as “the embodiment of the centuries-old dreams and legitimate aspirations of all our people”.
165. The Chief Justice’s exposition constituted a memorable declamation of constitutional philosophy and elementary civic duty. It had the clarity of a sermon, the simplicity of a great judgment, and the urgency and passion of an imperative call to national duty.
166. Viewers and listeners across the country reported being enthralled. The judgment, in the vivid terms Mogoeng CJ articulated, constituted an historic moment in South Africa’s democracy.
167. It embodied the image of the judge as not only determining a particular dispute but as also proclaiming a vision of the law’s role in its resolution.
168. Judgment was handed down on Thursday 31 March 2016. The next night the President appeared on national television to confirm he fully accepted the court’s decision.¹¹³

¹¹¹ Constitution section 167(4)(e).

¹¹² *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

169. He called the judiciary “a trusted final arbiter in disputes in society”, and welcomed the judgment “unreservedly”. It had, he said, “underscored the values that underpin our hard-won freedom and democracy, such as the rule of law”. It had “further strengthened our constitutional democracy and should make South Africans proud of their country’s Constitution and its strong and effective institutions”.
170. President Zuma may have had many motives for saying what he did. And what he said is open to more than one construction.
171. Yet that he felt obliged or found it expedient to say what he did had some significance. It showed that our constitutional order exacts at least expressed obeisance to the law.
172. In this way, when constitutional mishap is cast in its path, the Court has been obliged to assume the duty of exposition and enforcement of constitutional values.¹¹⁴
173. The impact of decisions like these has been very considerable.
174. The **second** reason I proffer for the possible buoyancy of constitutionalism in my country relates not to judicial decision-making, but to the broader impact of constitutional rights.
175. They result in widespread dissemination and internalisation of constitutional values. This, in turn, may provide a measure of unexpected constitutional resilience.
176. Again, the embrace of values is not confined to the urban elite or to suburban South Africans. It not only includes, but often starts with, South Africans from rural areas and townships.
177. My instance here, is again vivid, and again it has an intense personal resonance.

¹¹³ President Zuma’s full statement can be read at <http://www.heraldlive.co.za/news/top-news/2016/04/01/president-zumas-full-statement-nkandla/> (accessed 12 September 2017).

¹¹⁴ I emphasise “mishap” and the fact that these are “cast” in the Court’s path. As James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) notes:

“[T]he 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.” (page 4)

And:

“For the Court to decide to rule in circumstances in which another institution has not yet expressed its position, or to overrule another institution that has asserted it is competent to handle the issue, is for it to make a determination about its relationship to that institution going forward...The act of interpreting, therefore, is often bound up in calculations about how to relate to other institutions and give effect to the Constitution that look a lot like remedial calculations, which are affected in just the same way by considerations of newness and infrastructure.” (pages 137-138)

178. In 1994, South Africa became the first country in the world to afford express constitutional protection against unfair discrimination on the ground of sexual orientation.¹¹⁵
179. In the 23 years since then, the Constitutional Court has given half a dozen decisions that have vindicated the constitutional rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.¹¹⁶
180. These culminated in a decision that required the legislature within one year to enact marriage-equality legislation.¹¹⁷ Amidst stormy public debate, Parliament did so.¹¹⁸
181. These decisions have had obvious practical consequences for LGBTI persons, in protecting their equality and dignity and security.
182. Yet, just as constitutional promises have not secured an end to gender subordination or to racial inequality or racism, they have also not ended discrimination against gays and lesbians or homophobic attacks, to which lesbians living in townships are horrifically vulnerable.¹¹⁹
183. Even so, the Constitution has done more than merely extend legal rights to a vulnerable group. They have had an empowering impact. They have included LGBTI people within the dignified ambit of moral citizenship.¹²⁰ And in doing so they have afforded them a powerful sense of personal agency as the bearers of equal rights.¹²¹

¹¹⁵ Bill of Rights, section 9(3).

¹¹⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *J v Director General: Department of Home Affairs* 2003 (5) SA 621 (CC);

¹¹⁷ *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) (1 December 2005). This was however the first time, ever (and the last time), that the Court deferred to Parliament a non-distributional decision affording individual equality rights. The powerful dissenting judgment of O'Regan J pointed out the defects in the deferent order Sachs J granted on behalf of the majority.

¹¹⁸ Civil Union Act, 17 of 2006, which came into force on 30 November 2006, provides that the legal consequences of a marriage under the Marriage Act apply to a civil union (section 13(1)), whether between two persons of the same or the opposite sex (section 1).

¹¹⁹ See my Eudy Simelane Memorial Lecture (7 April 2016), which recounts the violence against and horror faced by lesbians, available at http://ujamaa.ukzn.ac.za/WhatUJAMAAdoes/LECTURES/lecture_BODY.aspx and [http://www.constitutionalcourt.org.za/site/judges/justicecameron/Eudy%20Simelane%20Memorial%20Lecture%20Thursday%207%20April%202016%20\(updated\).pdf](http://www.constitutionalcourt.org.za/site/judges/justicecameron/Eudy%20Simelane%20Memorial%20Lecture%20Thursday%207%20April%202016%20(updated).pdf) (accessed 11 September 2017).

¹²⁰ See my Scarman Lecture, "What you can do with rights", 25 January 2012, [2012] 2 *European Human Rights Law Review* pages 147-159, available at http://www.lawcom.gov.uk/wp-content/uploads/2015/05/Scarman_2012_Justice_Cameron_What_you_can_do_with_rights.pdf (accessed 15 September 2017).

¹²¹ See Graeme Reid, *How to be a Real Gay – gay identities in small-town South Africa* (2013). Reid concludes that political and legal changes in South Africa have allowed new forms of citizenship to emerge. The promise of constitutional equality and legal changes have materially affected the lives of small-town township gays. The benefits of change are not solely the preserve of the affluent. Without the Constitution and the changes it introduced, different ways of being gay could not have been expressed. This has led to 'a new sense of

184. And this, in turn, has led to a remarkable shift in public attitudes to sexual orientation and gender identity – one that is unique outside Western Europe, North America and (I trust) Australasia.
185. This makes the case of sexual orientation a powerful illustration of the generalised impact of constitutional rights.
186. In 2013 a Pew Foundation study of global attitudes to LGBTI people asked a forbidding question – *Should society accept homosexuality?* Despite the unenticing inquiry,¹²² fully 32% of South Africans answered: Yes.¹²³ This, at the time, unlike many others, I found markedly positive, for in the rest of Africa, Asia and the Middle East and North Africa, those saying Yes were a tiny fraction.
187. A recent South African study, in 2016, revealed even more affirming attitudes. It reported that more than half of South Africans considered that LGBTI people should have the same human rights as others – while two thirds expressed opposition to removing express constitutional protection against discrimination on the basis of sexual orientation.¹²⁴
188. The disparity between support for equal rights and antipathy to their removal from the Constitution itself shows a sophisticated appreciation of constitutionalism. It means a significant proportion of South Africans appreciate that one may consistently resist a moral claim to equality yet at the same time believe that those rights should not be removed from the Constitution.
189. Given that most of South Africa’s immediate neighbours¹²⁵ criminalise consensual, private same-sex activity, and given the horrific abuses that LGBTI people suffer throughout the rest of Africa¹²⁶ – including torture,

belonging, of citizenship, which comes from a new emancipation – the abolition of laws that were oppressive in terms of race, and equally importantly ..., sexual orientation’ (pages 188f).

¹²² Not “should society reject homosexuality” – but “should society accept homosexuality”.

¹²³ Pew Research Centre, “The Global Divide on Homosexuality”, available at <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/> (accessed 10 September 2017).

¹²⁴ Available at http://theotherfoundation.org/wp-content/uploads/2016/09/ProgPrudes_Report_d5.pdf (accessed 10 September 2017). 55% of South Africans said they would accept a gay family member; 51% said gay people should have the same human rights as others; and two thirds supported keeping the constitutional protections against discrimination on the basis of sexual orientation.

¹²⁵ Lesotho, Botswana, Namibia, Swaziland and Zimbabwe.

¹²⁶ While I was preparing for the lecture, twelve women and eight men were arrested at a hotel in Zanzibar, Tanzania, while undergoing training from an NGO that works on HIV/Aids education programmes on charges that they were “implicated in homosexuality”. See “Police in Zanzibar arrest at least 20 for 'homosexuality'”, available at <http://www.news24.com/Africa/News/police-in-zanzibar-arrest-at-least-20-for-homosexuality-20170916> (accessed 18 September 2017).

beatings, imprisonment, increasing legislative repression¹²⁷ and death – these findings are significant in two ways.

190. On the one hand, they point to the power of law and of constitutional rights to promote popular acceptance and inclusiveness of stigmatised, marginalised minorities.

191. But, perhaps more importantly, they evidence how constitutional rights enable those perceived as “other” themselves to claim their rights – and to do so assertively and unapologetically.

192. In this, the rights of LGBTI persons are only one instance of the widespread internalisation and dissemination of constitutionalism and of constitutional rights.

193. This, too, may portend a unexpected resilience of the power of constitutionalism.

194. Despite its many perceived deficiencies, the Constitution has afforded South Africans a widespread sense of personal agency. They conceive of themselves not merely as objects of the law, but as bearers of rights, with entitlements they have the capacity to exert and enforce against government.

195. This means the Constitution cannot be dismissed as only a piece of paper, or a magic box to which only the powerful have access, or which only lawyers and judges can operate.

196. The hardest test for the Constitution undoubtedly lies in whether it can secure governance that ensures meaningful social and economic benefits and opportunities for the majority of South Africans.

197. In that quest, I share Justice Gageler’s view, as expressed in his 2007 paper,¹²⁸ that the political process is primary: institutions democratically

¹²⁷ In Nigeria, the Same Sex Marriage (Prohibition) Act, available at <https://www.nigerialii.org/ng/legislation/act/2014-0> (accessed 13 September 2017), which was assented to and commenced on 7 January 2014, provides in section 5(2) provides that “A person who ... directly or indirectly makes public show of same sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment”. Section 5(3) goes even further. It provides that “A person or group of persons who ... supports the registration, operation and sustenance of gay clubs, societies, organizations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years imprisonment”. “Same sex marriage” is defined extremely widely to mean “the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship” (section 7).

¹²⁸ Stephen Gageler “Beyond the Text: A Vision of the Structure and Function of the Constitution” (2007) pages 17-18.

accountable to the people must be the primary mechanisms to fulfil constitutional goals.¹²⁹

198. The courts' role here is to ensure that the processes of democracy, in free and fair elections, freedom of speech and expression and in democratic accountability, are sustained in a vibrant and functioning form.¹³⁰

199. And in doing precisely this our Court has given significant rulings.¹³¹

200. Yet the duty of constitutional guardianship and exposition cannot and does not stop at securing democratic political processes.¹³² More is entailed.¹³³

201. For in applying any form of law judges are called on to do more than only determine the outcome of disputes before them.

202. They are required to explain the normative framework that impels the answers they give, and sometimes to expound its deepest premises.

¹²⁹ See James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016), which seems to me to convey a realistic practical as well as an analytically sound assessment.

¹³⁰ Jesse Choper and John Hart Ely, whom Gageler quotes.

¹³¹ *Kham v Electoral Commission* (30 November 2015); *Mhlope* (Mogoeng CJ, Madlanga J). Fowkes note xxx above discusses *Doctors for Life* (available at <http://www.saflii.org/za/cases/ZACC/2010/10.html>) and *Matatiele (2)* (available at <http://www.saflii.org/za/cases/ZACC/2006/12.html>), which he notes "saw a majority of the Court accept challenges to the constitutional validity of specific statutes on the basis that the (provincial) legislatures concerned had not done enough to involve the public in the legislative process" (page 190).

¹³² Laurence H Tribe "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 *Yale Law Journal* 1063, 1080. Tribe rightly notes that –

"Any constitutional distinction between laws burdening homosexuals and laws burdening exhibitionists, between laws burdening Catholics and laws burdening pickpockets, must depend on a substantive theory of which groups are exercising fundamental rights and which are not. Indeed, even laws putting blacks and women "in their place" – banning racial intermarriage, say, or excluding women from combat are likely to reflect neither simple hostility nor self-serving blindness but a substantive vision of proper conduct – a vision that no amount of attention to flaws in the political process could condemn or correct. Accordingly, the idea of blacks or women as properly segregated beings can be rejected only by finding a constitutional basis for concluding that, in our society, such hierarchical visions are substantively out of bounds, at least as a justification for government action.06 And such a finding would in turn entail a theory of unenumerated substantive rights, rights at best suggested by constitutional text and history, rights whose necessarily controversial elaboration the process theorists seek to eschew." (page 1074)

¹³³ James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) notes that "[m]aking the constitution work entails making the present form of society in which the court operates into the society described by the constitution. This is a question of implementation, of making effective. It extends to all aspects of the court's work: it is not confined to the narrow idea of ensuring that the situation of a particular applicant before the court changes in a way implied by the text, but encompasses the full reach of the duty to make the real world work as the constitution envisions." (page 31) "And this is why the work of such a court—a constitution-building work—can involve social and political awareness and practical judgment and strategy alongside more conventionally legal considerations about the text and its purposes." (pages 31-32)

203. And they are required to do so no less in disputes between corporations or about tax or bills of exchange than in cases concerning constitutional rights.
204. For a constitution is not different *in kind* from other forms of law; it is only a form of law with intensified and perhaps more explicit values in it.
205. And a constitution with a bill of rights is only a yet more explicit form of law; while a constitution richly seeded with values, as the South African Constitution is, only more intense yet.
206. For all forms of law proceed from shared suppositions about reason and behaviour and human dignity and entitlement.
207. Constitutions merely make those suppositions explicit, and entrench them institutionally and procedurally.
208. And, whatever the particular structure of our different legal systems, judges are all exponents of norms that are freighted with value, guardians of a tradition of rationality and fairness that the system presupposes.
209. That is the clearest lesson the grievous failings of the apartheid judges offer us, and it is a lesson that applies no less in my court than in any other apex court in the world.
210. For all of us, whether in Canberra, Nairobi, New Delhi, London or Johannesburg, are confronted daily with guarantees that are not expressed in closed words or concepts. They demand construction and exposition.¹³⁴
211. And this confronts us with inevitable choices. Strict legalism is itself one choice, as is “originalism” in the United States; and each entails unavoidable political implications.
212. Denial of that responsibility and the opportunities it affords is as surely “political” as to acknowledge and embrace them.
213. On its own, “legalism”, as I have termed it tonight, impoverishes our craft and evades our responsibility.
214. As a political choice it cannot strip out value, for, “in the absence of an underlying normative judgment”, it provides only indeterminacy.¹³⁵
215. It is true that in the task of exposition, we all *start off* as exponents of legalism.

¹³⁴ See Justice David Souter’s Harvard Commencement address, May 2009, available at <https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/> (accessed 12 September 2017).

¹³⁵ Gageler, 1987.

216. For legalism – in counselling respect for “the strict analytical and conceptual techniques of formal legal argument”¹³⁶ – is the necessary precondition of our trade, our common starting point.
217. It has to be: for we recognise that words have meaning, that this lays bounds to the quest for understanding, and that language, even when contested, is not indeterminate.
218. A second common starting point is that all judges try in fidelity to their craft, as Sir Owen Dixon stated in his Yale lecture, to discern “an external standard of legal correctness”. We do this by applying ascertained legal principles “according to a standard of reasoning which is not personal [that is, capricious] to the judges themselves”.¹³⁷
219. But legalism is only the start of the judge’s task. It cannot be the end. For lawyering unavoidably entails an embrace of value that formal analytical and conceptual technique cannot strip away, and constitutionalism only more.¹³⁸
220. South African judges under apartheid sought by recourse to strict legalism to deny their exercise of choice and to elude moral responsibility for the choices they made. They failed.
221. In each case the option is to acknowledge that moral engagement with the choices that interpretation of words and exposition of values entails is unavoidable or to deny that the choice exists at all.
222. In Nairobi, where the Supreme Court of Kenya last month invalidated a deeply contested presidential election,¹³⁹ and in New Delhi, where the Supreme Court of India, in striking down a personal identification law,¹⁴⁰ declared that the Constitution of India affords a fundamental right of privacy, the precise norms requiring articulation and enforcement may have differed; but the inevitability of the choice that had to be embraced, and the values that had to be pursued, were the same.
223. And what are those values? They are surprisingly unprescriptive: to protect the vulnerable and to scrutinise the exercise of power with

¹³⁶ Stephen Gageler [1987] *Federal Law Review* 162 at 176.

¹³⁷ Sir Owen Dixon, (“Concerning Legal Method” [1956] 29 ALJ 468.

¹³⁸ Souter (above) (consider adding something about insight into our own flawed condition and our own part in the dysfunction around us).

¹³⁹ GIVE CITATION

¹⁴⁰ GIVE CITATION

appropriate apprehension,¹⁴¹ whatever its source: governmental, corporate, institutional, trade union or populist.

224. This does not mean that judges become partisans for particular political programs.

225. On the contrary, the grossest historic failures of courts have occurred precisely when judges embraced partisanship,¹⁴² when they subjected popular or institutional power to insufficient scrutiny,¹⁴³ or when they failed to use their power to protect the weak and the vulnerable.

226. How we feel called to do so will differ. And we all do so, as Justice Kiefel explained in January this year, at her swearing in as Chief Justice –

“respectfully, conscious of [the judiciary’s] constitutional role and the role which the Constitution gives to the legislature and government”.¹⁴⁴

227. We in South Africa feel if anything more diffidence, caution and humility. We must, for we are a young democracy,¹⁴⁵ and the greatest judicial vice is not a vision of encompassing powers, but vanity in expounding and applying them.

228. Yet we cannot avoid the necessary entailments of our craft, or of our position.

229. Legalism seemed to offer a way to do so, but for my country it only portended disaster.

230. In South Africa now, the rule of law and the Constitution may indeed be precarious; but our history, our circumstances and the constitutional text leave us little choice but to pursue ambitiously the values it embodies.

231. And in our exposition of the Constitution, and enforcement of its values, South Africans’ long years of struggle against governmental abuse and

¹⁴¹ Virgil, Aeneid, Book VI.853, *parcere subiectis, et debellare superbos*, which may be translated as “to protect the poor and the dispossessed, and to approach those exercising power with wariness”.

¹⁴² For how judicial partisanship contributed to the fall of the Weimar Republic, see Richard M Watt *The Kings Depart: The tragedy of Germany: Versailles and the German revolution* (2003).

¹⁴³ See my Bentham Lecture, University College, London, 2003, “When judges fail justice” (2005) 58 *Current Legal Problems* 83-99.

¹⁴⁴ Swearing in ceremony of Chief Justice Kiefel, Monday 30 January 2017, available at <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ31Jan2017.pdf> (accessed 12 September 2017).

¹⁴⁵ As James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) notes:

“The more a court can do [rely on other institutions], the more it can act without facing the invidious choice suggested by the bluntest implications of the infrastructural argument: the choice between trying to do more itself to compensate for the absence, thus stretching judicial capacity and ability, or risking issuing an order that will not be implemented, leaving the underlying problems unresolved and damaging the credibility of the text and the Court. The value of avoiding this predicament is such that the Court has a powerful reason to support other institutions and build trust.” (page 134).

injustice endow them a salutary measure of scepticism toward power and resistance to injustice.

232. This is the **third** and last aspect of constitutionalism that may portend more hope for it than many now feel.

233. It is that South Africans will not be readily bamboozled. They have fought once against tyranny, and prevailed, and the victory has left them salutarily sceptical of power.

234. This is why they demand fulfilment of the promises made to them under the Constitution – and if government should fail them, they know they have recourse to the courts.

235. Their attitude to power, in short, is not cap in hand. It is that of a sophisticated citizenry that knows that courts are legitimately available for securing enforcement of rights.

236. In all this, it is impossible to say whether the rule of law and the Constitution will prevail in South Africa against the forces that seek their destruction.

237. But the law's survival will not be secured by narrow or legalist approaches to rights and values.

238. It has a chance of survival only if judges embrace the daily choices the aspirations of equality, social justice, social security and transformation in the Constitution embody.

239. For in the end we cannot escape the moral call of law and the institutional responsibility it entails; we cannot seek to abide by technical rules and prescripts that eschew value; and we cannot deny the wider possibilities and the deeper promises – as well as the deeper duties – that the law casts upon us all.