

Preventing ANC Capture of South African Democracy: A Missed Opportunity for Other ‘Constitutional Courts’?

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Abstract

When we think of constitutional courts and South Africa, we inevitably (and understandably) think of one institution: the Constitutional Court in Johannesburg. As regards dominant party democracy, the constitutional framework reposes considerable faith in the Constitutional Court to act as a key bulwark against capture of the democratic process by the African National Congress (ANC), and the Court has a mixed record in this regard. Entirely missing from the narrative is the potential role of other ‘constitutional’ courts as a further firewall against capture; chiefly the African Court on Human and Peoples’ Rights. This paper will discuss why, and how, South Africa’s post-apartheid constitutional system has made little space for the role of international courts as a ‘back-up’ constraint, and why this matters as we enter a new political context of declining ANC hegemony and the potential for heightened ‘capture tactics’ this may bring.

INTRODUCTION

The initial abstract I produced for this panel, which was originally titled ‘Constitutional Courts & Dominant Party Democracies’, spoke to two major preoccupations of mine.

The first is a preoccupation with how both constitutional courts and international human rights courts act as ‘democracy-builders’ in post-authoritarian states, part of which entails their countering the incremental re-emergence of authoritarian or undemocratic governance in states that have transitioned to democratic rule. This is an issue on which all my co-panellists have written in one form or another. The second preoccupation to which this paper speaks is a new project on ‘democratic decay’, in which I analyse how public law is utilised, or forwarded as a solution to, the incremental degradation of the structures and substance of liberal constitutional democracy.¹ This project includes analysis of courts, both national and international, but also encompasses other public law mechanisms (e.g. special prosecutors, political party bans, or intervention mechanisms within regional organisations).

The idea for the paper arose while I was writing a working paper on the first decade of the African Court on Human and Peoples’ Rights, in which I compare the development of that Court’s authority in comparison with the experiences of the European and Inter-American human rights courts at the ten-year mark.² For various reasons, that working paper, although at an advanced stage, has not yet been completed, but it has provided a lot of useful background material for this paper.

I contemplate two issues in this paper. First, have those in South Africa concerned with ANC dominance of, and possible subversion of, the post-apartheid democratic order missed an opportunity in failing to make more use of the African Court on Human and Peoples’ Rights as some form of additional ‘back-up’ bulwark against such dominance and subversion? Second, more broadly, how does this make us reflect on the capacities of international human rights courts to act as sentinels in the pushback against democratic decay?

1. SOUTH AFRICA’S DEMOCRATIC TRANSITION: JUDICIAL POWER, INTERNATIONAL LAW, AND REGIONALISM

From the very beginnings of South Africa’s transition to democratic rule after minority governance under *apartheid* in the early 1990s, concerns focused on the potential for the ANC to capture the democratic system through building on its overwhelming electoral success to accrete excessive power. Essentially, the fear has been that the advent of full, free and fair elections would simply constitute a short interregnum before the ANC would overwhelm the new democratic system and replace the authoritarian minority-power system of the *apartheid* era with an authoritarian system dominated by one party.³

Such concerns mean that constraint of the majority, embodied in the political machine of the ANC, was a significant focus of South Africa’s new democratic constitutions from the outset of the transition. The ANC won a landslide victory in the first full, free and fair elections, held in April 1994, with Nelson Mandela elected to the presidency. However, as mandated by the interim Constitution, the party was required to govern as part of a national unity government comprised of the ANC, the National Party (NP), and the Inkatha Freedom Party (IFP), a Zulu nationalist

¹ “The incremental degradation of the structures and substance of liberal constitutional democracy” is the thumbnail definition of democratic decay that I have been using for some time. I flesh out this definition in a forthcoming publication: TG Daly, ‘Democratic Decay in 2016’ Annual Review of Constitution-Building (International IDEA, 2017, forthcoming).

² The working title is ‘The Authority of the African Court on Human and Peoples’ Rights at Ten: Progress, Power and Prospects’.

³ See e.g. H Buhr Giliomee, ‘South Africa’s Emerging Dominant-Party Regime’ (1998) 9(4) *Journal of Democracy* 128.

party. The permanent Constitution, produced by a Constituent Assembly after the 1994 elections and which entered into force in December 1996, enshrined a number of countermajoritarian mechanisms aimed at placing constitutional fetters on the ANC and providing guardrails for the fledgling democratic order. The constitutional text expressly states the political system to be based on the values of human dignity, equality, human rights, the supremacy of the Constitution and the rule of law, and a “multi-party system of democratic government, to ensure accountability, responsiveness and openness”.⁴

Two hallmarks of the 1996 Constitution (and the 1994 Constitution before it) are of particular importance here. The first vital element to constrain subversion of the new democratic order by the ANC was the placement of a powerful domestic constitutional court as a central actor in the democratic constitutional order, with a wide range of powers aimed at constraining political powers, guarding the separation of powers, and upholding a long raft of fundamental rights. As a constitutional design option, the Court was designed to act as a protector of the white minority’s rights in the new black-majority political system, and, as such, constituted a central guarantee in the political settlement underlying the democratic transition and the new constitutional order.

The second significant hallmark of South Africa’s democratic and constitutional transition was, not just the influence of international law (and international human rights law in particular) on the constitution-drafting process, but the formal place accorded to international law by the text of the 1996 Constitution. The now-famous Section 39 states expressly mandates reference by South African courts to international law in interpreting the Bill of Rights, stating.

1. When interpreting the Bill of Rights, a court, tribunal or forum-
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.⁵

The main approach, then, was to focus on an ‘inside-out’ approach, where the South African judiciary would reach out to international law norms in interpreting the Bill of Rights, with much less focus on an ‘outside-in’ approach that would entail intervention by international judicial actors as bulwarks against ANC hegemony.

The scant attention to the potential of regional mechanisms as additional countermajoritarian constraints on the ANC seems to be attributable to a number of factors. Partly, it appears due to the underdeveloped nature of regional governance at the time. The Organisation of African Unity (OAU) was not replaced by the African Union (AU) until 2002 and judicial or quasi-judicial mechanisms at the regional level had made little impact at the national level. The African Commission on Human and Peoples’ Rights, for instance, created as a stand-alone institution in 1987, and faced with almost universally undemocratic regimes,⁶ had at the time found little room to manoeuvre following its establishment. It had adopted a more deferential posture to states than its counterparts in other regions, through a focus on ‘positive dialogue’, inconsistent use of provisional measures, and reluctance to follow up its decisions, and it had yet to issue its most assertive decisions.⁷

More fundamentally, it may be offered that the ANC, in the grand political settlement underlying South Africa’s transition from minority rule under *apartheid* to majority rule under the new democratic dispensation, had submitted to a very particular form of domestic judicial power—

⁴ Article 1, Constitution of 1996.

⁵ A similar provision was found in the 1993 Interim Constitution. Article 35 stated: “(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.”

⁶ The only electoral democracies in the late 1980s were Botswana, The Gambia, and Mauritius.

⁷ See G Bekker, ‘The African Commission on Human and Peoples’ Rights and Remedies for Human Rights Violations’ (2013) 13 *Human Rights Law Review* 499.

embodied in the Constitutional Court—not to judicial power in any form. In addition, the ANC was eager to place the state within the mainstream of international law, to end South Africa’s status as a pariah state in the international community under apartheid, as evidenced in its ratification of a raft of international human rights treaties throughout the 1990s (e.g. the International Covenant on Civil and Political Rights, the International Convention on the Elimination of Racial Discrimination).⁸ However, post-apartheid South Africa was, as Peter Vale puts it, a “reluctant regionalist” in economic affairs, which may also explain its approach to regional human rights protection, an issue discussed in more depth below:

For all the pageantry, pomp and pronouncements of South Africa's new place in the order of regional things, the country was a reluctant regionalist. Not only were the bureaucrats responsible for making the first links into the region's multilateralism drawn from the country's apartheid past, but economic discourse within South Africa had turned its attention away from the region. As a 1994 report issued by the African Development Bank noted: ‘What is clear is that for South Africa national interests are paramount, while regional issues are secondary and likely to remain so.’ This emphasis on South Africa’s own interests, rather than on developing a common regional purpose, ended any hope that the region could become more than the sum of its separate sovereign pieces.⁹

The almost exclusive focus on domestic countermajoritarian institutions in South Africa’s democratic transition lies in significant contrast to democratic transitions in Central and Eastern Europe and South America throughout the 1980s and 1990s. In the latter transitions, the sweeping region-wide shift from authoritarianism to democratic rule provided a sound basis for action by a regional human rights court. In Europe it required the re-making of the European Court of Human Rights as an aid in preventing the re-emergence of totalitarian regimes. In South America it provided the Inter-American Court of Human Rights with the space to carve out a rule in assisting pushback against reconsolidation of military governments or extreme right-wing regimes with strong ties to the military. The African scenario was different. There was no sweeping region-wide democratic transformation. South Africa, albeit a totemic and era-defining transition to democracy, was part of a much patchier and more atomised set of African democratic transitions during the 1990s, with the result that, although it was a highly internationalised process, it was not a regionalised process.

2. THE CONSTITUTIONAL COURT AS THE CENTRAL PROTECTION AGAINST ANC CAPTURE OF THE DEMOCRATIC SYSTEM

The Constitutional Court has understandably been the prime focus for scholars analysing the capacity of South Africa’s 1996 Constitution to constrain the hegemony of the ANC and to prevent the party from overwhelming democratic controls and some form of multiparty constitutional political system. This is a clear thread in its jurisprudence, and a lens through which its jurisprudence has been analysed.¹⁰

Samuel Issacharoff has referred to the example of the South African Constitutional Court in crafting an argument that constitutional courts can operate as central actors pushing back against the potential for capture of the democratic order by powerful political actors. Noting the

⁸ A useful list of treaty ratifications is provided by the University of Minnesota’s Human Rights Library: <http://bit.ly/2t9tEZw>.

⁹ P Vale, *Whatever happened to the post-apartheid moment? Past hopes and possible futures for southern Africa* (CIIR, 2004) 17.

¹⁰ Recent works include Theunis Roux’s 2013 account of the ‘first’ Court under Chief Justice Chaskalson from 1995-2005 (which evidently predates even the establishment of the African Court on Human and Peoples’ Rights), and most recently, James Fowkes’ reappraisal of the Court’s role as “the looked-to guardian of that constitution against the rising threat of the ANC”, published last year. See T Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press, 2013); and J Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge University Press, 2016).

distinctive central role played by courts in “sculpting democratic politics” in many third wave democracies,¹¹ he suggests that a constitutional court’s role should be “to reinforce the functioning of democracy more broadly” by filling gaps in the governance structure—for example, by adjudicating on impeachment processes and the openness of electoral competition,¹² and by curbing the excessive concentration of power at any one site.¹³

Indeed, this has been an acute concern in South Africa since the transition to democracy in 1994. The ANC managed to grow its share of the vote with each successive election for the first three elections under democratic rule, winning almost two thirds of votes cast in the second general elections in 1999, with Thabo Mbeki succeeding Mandela as president, followed by seventy per cent. of the vote—its highest ever share—in the third general election in April 2004, which returned Mbeki for a second term as president, and in which the ANC also achieved majorities in seven of South Africa’s nine provincial legislatures.

The South African Constitutional Court has acted as a ‘hedge’ against ANC dominance and in upholding the values of a pluralist democracy in a variety of ways. For instance, the Court has explored in depth the meaning of ‘constitutional democracy’ in light of the 1996 Constitution, which, as Theunis Roux suggests, explicitly envisages democracy not merely as a system of governance, but a value system based not only on ‘the will of the people’ but also the principle that ‘every citizen is protected by law’. The Court has repeatedly insisted that human dignity, equality, freedom, and individual rights, repeatedly proclaimed within the text, are to be viewed not as subtracting from the democratic principle, but rather, lying in ‘constructive tension’ with majority rule.¹⁴ The Court has indicated its rejection of any winner-takes-all conception of majority rule and has emphasised the need for a deliberative democracy where the minority as well as the majority are included in public decision-making.

However, the Court has been criticised for failing to adopt robust positions in some of its judgments, which would have effected structural change in line with these values. [In particular, the Court has been criticised for upholding the constitutionality of a constitutional amendment permitting ‘floor-crossing’ by politicians (i.e. defecting to another party while retaining one’s seat), which has been characterised by some as a manipulation of the electoral system tending to strengthen the ANC’s dominance and stymying meaningful multi-party competition by weakening smaller opposition parties.¹⁵

That said, despite significant challenges and concerns regarding excessive ANC hegemony, hope was the dominant register for discussion of South African democracy during its first decade, and into its second. In particular, the successes of the Constitutional Court in constraining the government, and the government’s apparent willingness to abide by the Court’s rulings, seemed to indicate a positive trajectory in the crafting of a functioning democratic order underpinned by a robust rule of law.¹⁶

However, in the past ten years hope has turned to increasingly acute concern regarding the trajectory of South African democracy. Since the ascent of Jacob Zuma to the presidency following the ANC’s victory in the 2009 general election, democratic institutions have been under increasing threat, the ANC, including Zuma himself, has been mired in high-profile corruption allegations and scandals, and the government under Jacob Zuma has appeared to grow increasingly unhappy with institutional constraints on its power. Particularly concerning developments have included threats against the media, measures to seriously curb the freedom of information, the

¹¹ Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015) 9.

¹² Issacharoff’s ‘Democratic Hedging’ 986–7.

¹³ Issacharoff, *Fragile Democracies*.

¹⁴ T Roux, ‘The Principle of Democracy in South African Constitutional Law’ in S Woolman & M Bishop (eds), *Constitutional Conversations* (Pretoria University Law Press, 2008) 82.

¹⁵ *Ibid.* 351–64.

¹⁶ See e.g. Fowkes, *Building the Constitution* (n 10).

announcement of a review of the Constitutional Court's powers in 2012, Zuma's attempt to extend the Chief Justice's term, removing the opposition's power to force a debate in parliament on a given issue, and the undermining of prosecutorial independence.¹⁷

As Issacharoff recounts, the Constitutional Court has been the central obstacle to many of these measures. Spatial constraints preclude consideration of all key judgments, but by way of example, in two key cases taken against President Zuma, *Democratic Alliance*¹⁸ and *Glenister*,¹⁹ the Court has been called to intervene to stymie amendments to the appointment process for the National Director of Public Prosecutions (NDPP) and the independence of the National Prosecuting Authority (NPA), respectively, aimed at attenuating the capacity of prosecutorial agencies to address official corruption.²⁰ In its judgment of October 2012 in *Democratic Alliance* the Court managed to quash the president's appointment of the candidate selected as NDPP on the basis of limited procedural reasoning that there had been a failure to investigate evidence of dishonesty against the candidate. In *Glenister*, delivered in March 2011, the Court, in another careful judgment, recognised that transfer of some anticorruption powers to the police and disbandment of a particular anticorruption unit within the NPA were, in principle, permissible, but that the amendment removed important protections of prosecutorial independence by placing power in the hands of political actors who might themselves be subject to prosecution.

Of relevance in the context of this paper, Issacharoff notes that the Court eschewed the option of basing its judgment in *Glenister* on democratic principles within the Constitution, choosing instead to invoke Section 39 (as well as Sections 231(2) and 7(2)) to ground its holding that international conventions to which South Africa is a party require member states to maintain anticorruption agencies with a sufficient level of independence, with the result that a failure to meet this requirement could not be considered reasonable.²¹ Issacharoff argues (rightly) that the reasoning was not entirely convincing, but it is clear that the Court's recourse to international obligations allowed it to escape a more uncomfortable ruling that challenged the Zuma government head-on:

Placing responsibility for its decision on international law is an interesting judicial expedient. It has the effect of avoiding a direct confrontation with the constitutional underpinnings of democratic authority and instead turning attention to the commands of foreign engagements. The court could sidestep any engagement with the hard questions of the one-party weight of the ANC and instead purport to act as the simple messenger of international law. It was the South African government that entered into the international covenants and the court could act as if its hands were tied.²²

Amidst corruption scandals and a widespread perception of economic mismanagement by the ANC, new opposition parties have appeared and the ANC has seen its vote share start to decline. It won power in the 2014 elections with a smaller vote share than in 2009, dropping from just under two-thirds (65.9%) of the national vote to 62.15%. In the 2016 municipal elections the ANC suffered a significant further drop in support compared to the 2014 parliamentary elections,²³ bringing its national vote share to 54% and losing its control of three key cities. This appears to have been spurred partly by the Constitutional Court's damning judgment in the *Nkandla*²⁴

¹⁷ See, for example, the yearly assessments by Freedom House in its flagship annual publication, *Freedom in the World*. See also Issacharoff, *Fragile Democracies* Chapter 11; P de Vos, 'Let Me Tell You a Secret...' Constitutionally Speaking 31 May 2011 <http://bit.ly/2tFtrOm>; and S Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285, 288.

¹⁸ *Democratic Alliance v. President of the Republic of South Africa and Others* 2013 (1) SA 248 CC (S. Afr.).

¹⁹ *Glenister v. President of the Republic of South Africa and Others* 2011 (3) SA 347 CC (S. Afr.).

²⁰ See Issacharoff, *Fragile Democracies* Chapter 11 260ff.

²¹ *Ibid.* 261.

²² *Ibid.* 262.

²³ See e.g. S Rykief, 'South Africa's 2016 municipal elections – why the excitement?' *GroundUp* 23 August 2016 <http://bit.ly/2tjOsfk>.

²⁴ *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* [2016] ZACC 11.

corruption case against President Jacob Zuma, holding that he had violated the Constitution by failing to repay government money spent on his private residence. With thousands protesting in April 2017 to demand Zuma's resignation, there is increasing talk that the ANC's support could dip below 50% in the 2019 elections, or that it could even lose power.²⁵

External assessments have increasingly suggested a decline in the health of South Africa's democratic system. The leading democracy assessment organisation Freedom House has voiced increasing concerns in its annual reports, and the state's overall 'freedom rating' and rating for 'political rights' have both been lowered since 2007 (albeit only marginally). In October 2016 South Africa was removed from the highest band of best performers regarding 'overall governance' in the Mo Ibrahim Foundation's report on 'a decade of African democracy', ranking it among the ten "most deteriorated" democracies in Africa in the decade since 2006.²⁶ Significantly, South Africa was rated as showing the steepest decline in the measure "Safety and the rule of law", with a precipitous decline in the 'accountability' sub-category reflecting serious negative trends in the fight against corruption.²⁷

What matters here is the state's democratic trajectory rather than its position on the scale today. There is a strong argument that South Africa is suffering democratic decay, as defined above, in that there has been an incremental degradation of the structures and substance of liberal constitutional democracy. Indeed, Issacharoff (among others) has spoken of "the peril of constitutional retreat" and even the "risk of descent into the excesses associated with strong-arm rule".²⁸ It is clear that South Africa is at a critical juncture regarding its democratic development.

It is important here to emphasise that this is not to claim that the Constitutional Court has failed in its role as a central constraint on ANC capture of the democratic system. Rather, it is to recognise that there are very significant limits to what any constitutional court can achieve in the face of a political party and movement with extraordinary (albeit declining) majority support, and which evinces a less than secure commitment to liberal constitutional democracy.

3. THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: AN OVERLOOKED ACTOR

This section and the following section consider whether the African Court on Human and Peoples' Rights could provide any 'added value' as an additional bulwark against the excessive concentration of power, and incremental hollowing out of democratic government, by the ANC under Zuma. First, this section briefly narrates the experience of the African Court since its establishment in 2006.

Following a long period of advocacy by academics and NGOs the African Union adopted a protocol in 1998 to establish an African Court on Human and Peoples' Rights.²⁹ The protocol did not enter into force until January 2005, and the Court was finally established in 2006. Although the Court came into being in a rather more democratic regional climate, with a number of new electoral democracies having emerged in the 1990s (including Benin, Namibia, Malawi, Mali, South Africa and Tanzania), its operation is more restricted than the other two regional human rights

²⁵ See e.g. 'Political parties stage anti-Zuma protests in Pretoria' *Al Jazeera* 12 April 2017 <http://bit.ly/2osBoU7>; and L Mkentane, T Monama and G Matlala, 'ANC 'faces real prospect of losing 2019 poll'' *IOL* 21 April 2017 <http://bit.ly/2ox7vPf>.

²⁶ See the second page of Mo Ibrahim Foundation, *A Decade of African Governance 2006-2015* (October 2016).

²⁷ *Ibid.* 26, 32. The state did, however, show a small improvement in the 'judicial independence sub-category'. *Ibid.* 34.

²⁸ Issacharoff, *Fragile Democracies* 242, 268.

²⁹ Cole, 'The African Court' 26.

courts. Cases can be brought before the Court by the Commission, a State, or an African inter-governmental organisation. However, there has been seemingly little appetite to do so.³⁰

The Court has the power to allow individuals and NGOs to petition it directly, where a State has made an optional declaration recognising such petitions. However, only eight of the thirty States under the Court's jurisdiction have done so; a factor viewed as significantly limiting the scope of the Court's material jurisdiction, and leading to a six-year wait for its first merits decision in a contentious case.³¹ Thus, unlike the European Court's impact in Central and Eastern Europe or the Inter-American Court in Latin America, the African Court has had no hand in the early years of a variety of African democratisation processes, including the first twelve years of democratic rule in South Africa.

That the African Court has been somewhat overlooked in the South African context is therefore, in one way, unsurprising. Beginning operation just ten years ago, on 2 July 2006, as its first eleven judges were sworn in before a summit meeting of African leaders in the Gambian capital, Banjul,³² it did not deliver its first merits judgment until 2013 and has yet to penetrate the consciousness of individuals and political leaders across the continent.

As the Court's president recently observed, even in the Court's permanent seat, the city of Arusha in northern Tanzania, "there are people who are wondering if there is such a court in the city."³³ A recent interview with Lenser Anyango of the Network of African National Human Rights Institutions (NANHRI)—which brings together 44 national human rights institutions from across the region—revealed a strong sense among human rights activists across the continent that the Court is an "alien institution" and that most rights bodies are "detached, disinterested and disconnected from the African Court process."³⁴

In the arena of international scholarship, the Court remains the Cinderella of regional human rights courts, toiling away in relative obscurity. In-depth analysis of its decisions is rare, and there is a lingering impression that it is a poor relation of its counterparts in Strasbourg and San José.³⁵

However, when viewed against the first-decade achievements of the European and Inter-American courts, it becomes clearer that the African Court has made very tangible progress and deserves our attention. Accession to the African Court's jurisdiction compares relatively favourably with that of the European and Inter-American human rights courts at the ten-year mark: 30 states have recognised the Court's jurisdiction—more than half of the AU's 54 member states.³⁶ However, to date a mere nine states have made the requisite declaration to allow direct

³⁰ M Ssenyonjo, 'Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008-2012' (2013) 2(1) *International Human Rights Law Review* 17, 51–4.

³¹ To date, only Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania have made such declarations. Rwanda has since withdrawn its declaration, discussed below.

³² Formally, the Court was established on 25 January 2004, with the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

³³ 'African rights court unknown to many' *The Citizen* (23 August 2016) <http://bit.ly/2u9oVs0>.

³⁴ 'An alien institution: a Q&A with the Network of African National Human Rights Institutions' *The ACTHPR Monitor* 24 November 2015 <http://bit.ly/2uBZxYL>.

³⁵ The main analyses published since the Court began operating in 2006 are RGV Cole., 'The African Court on Human and Peoples' Rights: Will Political Stereotypes Form an Obstacle to the Enforcement of its Decisions?' (2010) 43 *The Comparative and International Law Journal of Southern Africa* 23; and M Ssenyonjo, 'Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008-2012' (2013) 2(1) *International Human Rights Law Review* 17.

³⁶ See <http://bit.ly/2uCmo6e>. The most reliable statistics on the African Court are available the ACTHPR Monitor (www.acthprmonitor.org).

individual petitions to the Court,³⁷ and one, Rwanda, rescinded this recognition in early 2016.³⁸ This slow uptake has significantly limited the scope of the Court's material jurisdiction, and is one factor in the six-year wait for its first merits decision in a contentious case.³⁹ The Court has generally been reliant on the referral of cases by the African Commission on Human and Peoples' Rights, which appeared to evince considerable reluctance in the early years—referring only two cases before 2012.⁴⁰

The Court's most underappreciated achievement is its robust jurisprudence. After a quiet beginning, the Court has arguably achieved more significant first-decade jurisprudential development than either of its counterparts—significantly aided, it must be said, by drawing on the case-law and models of these courts. The Court is also empowered to adjudicate on violations of other human rights treaties where they have been ratified by the respondent state, which means its judgments often rest not only on the African Charter on Human and Peoples' Rights ('Banjul Charter' or 'African Charter'), but also the International Covenant on Civil and Political Rights and African Charter on Democracy, Elections and Governance, among others. In fact, nothing prevents the Court from deciding a case entirely on the basis of treaties other than the African Charter.⁴¹

The Court has issued a series of forceful merits judgments since 2013, firmly upholding the rights contained in the African Charter on Human and Peoples' Rights and finding violations in every one of its merits judgments to date, has marked the Court out as an assertive actor on a par with the boldest international courts, and one that has refused to simply genuflect to claims of state sovereignty. In the Court's first merits judgment, *Mtikila v. Tanzania*⁴² the Court unanimously found the State's constitutional ban on independent candidacy in elections a violation of the African Charter. In its judgment the Court adopted the same general interpretive methodologies as the European and Inter-American Courts, tending toward generous readings of the rights in the Banjul Charter, recognising the Charter as a 'living instrument', and making use of proportionality analysis to mitigate the effect of 'clawback clauses' in the Charter, which could lead to undermining of the rights guaranteed.⁴³ Like the Inter-American Court, it has eschewed any formal margin of appreciation doctrine, which suggests that it intends to accord less leeway to the states under its remit than the European Court has tended to give.

In March and December 2014, the Court found two violations of the Charter in cases against Burkina Faso. In *Zongo v. Burkina Faso*⁴⁴ the Court found the State in violation of rights to judicial protection and free speech for failing to investigate and prosecute the killers of a journalist and his companions in 1998. In *Konaté v. Burkina Faso*⁴⁵ the Court unanimously ruled a 12-month sentence of imprisonment for criminal defamation imposed on the applicant journalist in 2012 (for having accused a public prosecutor of corruption) to be a violation of the right to freedom of expression in the African Charter. In three judgments against Tanzania, decided in 2015 and 2016,

³⁷ Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia.

³⁸ See Centre for Human Rights University of Pretoria, 'Report: Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court' 22 March 2016 <http://bit.ly/2sFPMam>.

³⁹ To date, only Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania have made the required declaration. Rwanda has since withdrawn its declaration.

⁴⁰ M Ssenyonjo, 'Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008-2012' 2(1) *International Human Rights Law Review* 17 (2013) at 51-54.

⁴¹ See e.g. O Windridge, 'Not a Charter Article in Sight: the Case of APDH and IHRDA v Mali' ACtHPR Monitor 7 July 2017 <http://bit.ly/2tBB2xN>.

⁴² ACtHPR, App. 009/2011 and 011/2011 (14 June 2013).

⁴³ Example of such 'clawback clauses' are the right to freedom of expression in Article 9(2) ("Every individual shall have the right to express and disseminate his opinions within the law.") and the right to association in Article 10(1) ("Every individual shall have the right to free association provided that he abides by the law.")

⁴⁴ ACtHPR, App. No. 013/2011 (28 March 2014).

⁴⁵ ACtHPR, App. No. 004/2013 (5 December 2014).

the Court took robust stances, finding the State in violation of the right to a fair trial in Article 7 of the African Charter in each case.⁴⁶

In late 2016 the Court delivered another strong judgment on an electoral matter, ruling in *APDH v. Côte d'Ivoire*⁴⁷ that a new law on the Electoral Commission in the respondent state was in violation of the right to equal protection of the law guaranteed in Article 3(2) of the Banjul Charter, and Article 10(3) of the African Charter on Democracy, Elections and Governance insofar as it placed the President and his allies in a more favourable position than other candidates for all elections, presidential or otherwise, by stuffing the body with representatives of the President, government ministers and the President of the National Assembly (parliament).⁴⁸

4. A MISSED OPPORTUNITY FOR SOUTH AFRICA?

Nested within the wider question of under-appreciation of the African Court's remarkable jurisprudence is the specific question, in the South African context, of whether that Court could have provided an additional bulwark against ANC capture of the democratic system. The African Court has, after all, issued a number of robust and well-reasoned judgments on matters that all appear relevant to the South African context, or potential issues that might arise in the South African context, including exclusionary electoral rules, manipulation of the electoral framework, and repression of actors seeking to hold State actors to account for human rights abuses and corruption.

This paper does not go so far as to engage in conjecture as to whether the African Court of Human Rights could have provided 'added value' in the aim of protecting South Africa's democratic system from ANC dominance had it been established as early as 1994. However, it seems worthwhile to reflect on whether the African Court could have played a greater role at least since its establishment in 2006, particularly given that its establishment briefly pre-dates the shift toward increasing concern for the trajectory of South Africa's democratic system under President Zuma. More widely, this reflection provides a useful way of considering what role a regional human rights court can play in providing additional protection to a democratic system dominated by one political party, or by a government with authoritarian tendencies.

It is important to emphasise here that despite South Africa's having ratified the protocol establishing the Court in 2002, the state has had little interaction with the Court since it began operating in 2006. The Court has not yet issued any judgment in a case against South Africa, and the state has not yet made the optional declaration required to permit applications from individuals and NGOs to the Court. Indeed, the fact that South Africa, as regional hegemon, does not seem to have strongly encouraged other states to ratify the protocol or to make the optional declaration may tell its own story about the resistance of successive ANC governments to rights adjudication by an external court.

Regional human rights courts as defenders of democracy: advantages and disadvantages

As an institution, the African Court might be viewed as suffering serious deficiencies as a potential bulwark against ANC capture of the democratic system. Like many other international and regional courts, it suffers from a lack of visibility and recognition at the domestic level, it has very limited power to achieve enforcement of its judgments, and it faces serious epistemic limits in understanding the complexities of the domestic context. However, alongside the disadvantages

⁴⁶ *Thomas v. Tanzania* ACHPR, App. No. 005/2013 (20 November 2015); *Onyango v. Tanzania* ACHPR, App. No. 006/2013 (18 March 2016); and *Abubakari v. Tanzania* ACHPR, App. No. 007/2013 (3 June 2016).

⁴⁷ ACtHPR, App. No. 001/2014 (18 November 2016).

⁴⁸ The Court's most recent judgment, in *African Commission v. Kenya*, ACtHPR, App. No. 006/2012 (26 May 2017) concerned the eviction of the Ogiek people from their ancestral lands and is not directly relevant to the matters discussed in this paper.

come significant advantages that are of particular importance in the context of pushback against the hollowing out of democratic governance by politically powerful actors.

The fact that the Court is not embedded within any domestic order provides it with two particular advantages. First, it interprets a pan-regional instrument enshrining a bill of rights and this leaves it somewhat separate from domestic constitutional power politics. It is not a creature of a domestic constitution, and is therefore somewhat freer to find ways of addressing political acts that might be procedurally, legally and constitutionally sound, but which go against the spirit of constitutionalism itself when viewed in the round. A regional human rights court is also not bound by specific constitutional rules at the domestic level; for instance, unlike the South African Constitutional Court, which tied itself in knots concerning lifting of the ban on ‘floor-crossing’ given the express text of the 1996 Constitution, the African Court would be free to find it to be a violation of the African Charter—or a violation of any number of other treaties that South Africa has signed, including the ICCPR and the African Charter on Democracy, Elections and Governance. In doing so it would not be required, unlike a domestic constitutional court, to assert the power to assess the constitutionality of constitutional amendments through an Indian-style ‘basic structure’ doctrine, or worse, to somehow claim that certain constitutional provisions are themselves unconstitutional.

Second is the fact that a regional human rights court has some slight additional insulation from political attack than a domestic constitutional court. This is not to overlook the fact that a number of sub-regional courts in Africa have been subjected to serious attacks in recent years, including the Southern African Development Community (SADC) Tribunal, the East African Court of Justice (EACJ), and the ECOWAS Court.⁴⁹ However, it is arguable that a serious attack on a court designed for the AU as a whole is harder to attack, especially as the number of states acceding to the Court’s jurisdiction continues to rise. A dubious plan to replace the Court with an African Court of Justice and Human Rights has not gained any traction to date.⁵⁰

Three principal roles for a regional human rights court

A regional human rights court might be viewed as potentially playing three different roles as a counterweight against democratic decay:

(i) ‘Hard’ bulwark

The most obvious role a court might play is in actively striking down laws, constitutional amendments and constitutional provisions that are enacted, introduced or manipulated to achieve undemocratic ends, as well as state acts that run contrary to recognised human rights.

However, the experience of the African Court and other regional human rights courts suggests limited success in this regard, and much often depends on how far a government has started to stray from the democratic path—or even whether electoral dividends are to be gained by refusing to implement the judgments of a ‘foreign’ court. For instance, In *Apitz v. Venezuela*,⁵¹ decided as democratic decay in Venezuela was becoming more apparent, the Court ordered the

⁴⁹ See A Føllesdal, B Peters, J Karlsson Schaffer & G Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge University Press, 2013) 8; and KJ Alter, JT Gathli & L Helfer, ‘Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences’ (2016) 27(2) *European Journal of International Law* 293.

⁵⁰ Protocol on the Statute of the African Court on Justice and Human Rights, adopted at the AU Summit in Sharm El-Sheikh, Egypt, on 1 July 2008. To date only five of the 15 ratifications necessary to enter into force have been made, by Libya, Mali, Burkina Faso, Benin and Congo.

⁵¹ IACtHR (Ser. C) No. 182 (5 August 2008).

reinstatement of three judges who had been fired by the Chávez regime, but this did not happen.⁵² In response to sustained pushback by the Inter-American Court concerning judicial independence in particular, the state left the jurisdiction of the Court in 2012 by denouncing the American Convention on Human Rights.

In South Africa the Zuma government's acquiescence in the dismantling of the SADC Tribunal (spearheaded by Zimbabwe and Tanzania), and its recent attempts to withdraw from the International Criminal Court, suggest that it may not be entirely averse to withdrawing from the jurisdiction of the African Court should it be subjected to a series of robust judgments.

(ii) 'Soft' Influencer

A more 'soft power' role for the African Court might be in influencing national courts to take a robust stand against moves aimed at degrading democratic governance, through more expansive readings of rights and democratic values in the African Charter and other international treaties. In a way the African Court is in a better position to do so than its sister courts in Europe and Latin America. Its capacity to directly interpret the African Charter on Democracy, Elections and Governance, in particular, has the potential to enhance the normative and guiding effect of that instrument as a pan-regional expression of democratic norms that transcends domestic law.

In effect, this provides the African Court with greater flexibility than the Constitutional Court to find a way of addressing government acts that are not illegal or technically unconstitutional, but which present bad faith alterations aimed at gutting democratic controls on political power: in effect, to look at a given measure and say 'this stinks', and to provide a convincing textual basis for declaring it invalid. In doing so, the Court could help to articulate with greater clarity, and based on national, regional and international standards, what might come within what Ros Dixon and David Landau call the substantive "democratic minimum core": the web of "longstanding commitments to free and fair elections, the separation of powers, basic human rights and government accountability" without which democratic governance is not possible.⁵³

As Amos Enabulele noted in a recent article,⁵⁴ beyond Section 39 of the South African Constitution, Section 233 provides additional textual basis for the South African Constitutional Court to have regard to African Court judgments, insofar as it states:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

However, in the South African context the real question is whether the Constitutional Court, having so painstakingly built its status as supreme interpreter of the Constitution, is willing to cede some supremacy to the African Court.⁵⁵ As Enabulele notes:

[I]t is difficult to be very optimistic that South African ... courts would interpret the relevant provision in favour of the supremacy of the decision of the African Court over established municipal law positions.⁵⁶

⁵² see A Huneus, 'Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights' in J Couso, A Huneus & R Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge University Press, 2010) 128–9.

⁵³ See R Dixon, 'Populist Constitutionalism and the Democratic Minimum Core' *Verfassungsblog* 26 April 2017 <http://bit.ly/2tKhGHp>.

⁵⁴ A Enabulele, 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?' (2016) 16(1) *African Human Rights Law Journal* 1, 19.

⁵⁵ It appears that no systematic analysis of the Constitutional Court's reference to African Court jurisprudence exists.

⁵⁶ *Ibid.* 19–20

Yet, it is an oversimplification to present a binary choice for the Constitutional Court as either ignoring African Court case-law or declaring itself bound by such case-law. The Constitutional Court, like constitutional courts in other regions, could choose to refer to African Court jurisprudence selectively, to bolster its decisions when necessary; a regional version of its invocation of international treaties in *Glenister*, discussed above. Clearly, such an approach would have to be managed carefully to ensure the integrity of the Court's jurisprudence.

In the context of the Zuma government's increasing antipathy to the Constitutional Court, increasing reference to African Court jurisprudence could either provide some additional anchoring for robust judgments, or have the converse effect of further delegitimising robust adjudication in the eyes of the government. In this connection, it is not inconceivable that the Constitutional Court could take inspiration from African Court judgments without citing its decisions: other courts, such as the Taiwanese Constitutional Court, routinely engage in such 'crypto-comparativism'.⁵⁷

(iii) Warning signal

A third particular role for a regional human rights court in addressing the incremental degradation of democratic governance is its role as a 'canary in the mineshaft', with its judgments constituting warnings as to the declining health of a given democratic system. This role, in a way, is written into the very source code of what a regional human rights court is meant to do. For instance, addressing opposition to the creation of a court before a meeting of the Parliamentary Assembly of the Council of Europe in 1949, former French minister Pierre-Henri Teitgen laid out the fundamental need for such an institution:

Many of our colleagues have pointed out that our countries are democratic and are deeply impregnated with a sense of freedom; they believe in morality and in a natural law. . . . Why is it necessary to build such a system? . . .

Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control. One by one, freedoms are suppressed, in one sphere after another. Public opinion and the entire national conscience are asphyxiated. And then, when everything is in order, the "Führer" is installed and the evolution continues even to the oven of the crematorium.

It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation menaced by this progressive corruption, to warn them of the peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or Dachau.

An international Court, within the Council of Europe, and a system of supervision and guarantees could be the conscience of which we all have need, and of which other countries have perhaps a special need.⁵⁸

Certainly, the European and Inter-American human rights courts have performed, and continue to perform, this signalling role concerning democratic decay in European and Latin American countries. As discussed above, the Inter-American Court issued a string of judgments as democracy in Venezuela under Hugo Chávez was incrementally degraded, which bore witness at a regional level to serious problems arising. In Europe the clearest contemporary examples are the European Court's ongoing adjudication concerning problematic laws and other acts in Poland and Hungary, both of which have suffered serious democratic decay in recent years. For instance, the European Court's finding of serious violations of the European Convention concerning judicial independence, the right to protest and the right to free speech in Hungary have been cited

⁵⁷ David Law and Wen-Chen Chang have analysed the extensive, but often uncited, use of foreign judgments by the Taiwanese Constitutional Court: DS Law and W-C Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 *Washington Law Review* 523, 558ff.

⁵⁸ Quoted in Robertson, 'The European Court' 10.

in European Commission documents, motions to address the situation in Hungary in the European Parliament, and in reports by the Council of Europe's Venice Commission.⁵⁹

This role might appear to be rather passive. However, it might be argued, for instance, that regional human rights courts should be more strongly integrated into the procedures for the triggering of regional intervention mechanisms to address serious threats against democratic governance;⁶⁰ for example, by allowing such courts to initiate a debate on such triggering among the political organs of the regional organisation, and/or by acting in an advisory capacity in such processes.

5. THE CHANGING THREAT AND THE ROLE OF COURTS

Perhaps a more fundamental challenge is that the threat posed to South Africa's democratic system has changed in recent times. A prominent report released in May 2017, produced by an alliance of South African universities and churches, shifts the discussion from the threat of ANC dominance of South Africa's democratic system to the displacement of the ANC as the central site of power by a Zuma-centred political and economic network of private and political actors, which has significant implications for how any court can defend the democratic order:

In our view the South African case is just one quite typical example of a global trend in the growth of increasingly authoritarian, neopatrimonial regimes where a symbiotic relationship between the constitutional and shadow states is maintained, but with real power shifting increasingly into the networks that comprise the shadow state. Understanding the South African context and challenge, therefore, is an important contribution to our understanding of this global phenomenon. It is also our contribution to the broad struggle to save South African democracy and development practice from a power elite that pursues its own interests at the expense of South African society, in particular the poorest people who will suffer first and most from the consequences of what is in reality a de facto silent coup.⁶¹

In its references to the “constitutional state” and the “shadow state” the report points to a particularly pressing problem for public law—and courts more particularly—in addressing incremental capture of the democratic system. The public law model, insofar as it focuses on adjudication by a constitutional court, and to a lesser extent by a regional human rights court, is designed to address more overt hollowing out of the democratic order, whether this is through laws aimed at curbing free speech, constraining the courts, or subduing the opposition—or even constitutional amendments with such objectives: “abusive constitutionalism” as David Landau terms it.

Indeed, Issacharoff has argued that the only means for a court to adequately constrain partisan capture of the democratic process is the adoption of a version of the Indian ‘basic structure’ doctrine, to police the validity of constitutional amendments, and thereby to adequately address instances of abusive constitutionalism. This, he contends, would empower courts to guard the fundamentals of democratic governance, such as plurality of representation, against majoritarian pressure—an approach he prefers to the enshrinement of ‘eternity clauses’ in the constitutional text on the basis that it affords the courts greater flexibility in their role.⁶²

However, this adjudicative model of democratic defence appears unsuited or unable to address much of the activity that characterises the ‘Mafia State’, which is characteristically covert

⁵⁹ See e.g. European Parliament resolution on the situation on Hungary (2017/2656(RSP)) (10 May 2017) <http://bit.ly/2uDGKfC>, citing a raft of recent judgments against Hungary by the Strasbourg Court.

⁶⁰ A useful analysis of such mechanisms in the EU, African Union and Organization of American States (OAS) is provided in a recent International IDEA report by Micha Wiebusch: *The Role of Regional Organizations in the Protection of Constitutionalism* (July 2016) <http://bit.ly/2uDkQco>.

⁶¹ H Bhorat M Buthelezi, I Chipkin, S Duma, L Mondli, C Peter, M Qobo & M Swilling, *Betrayal of the Promise: How South Africa is Being Stolen* (State Capacity Research Project, May 2017) <http://bit.ly/2raXcTK> 3.

⁶² Ibid. 1002–3.

and which often takes place without any obvious subversion or infringement of the rights and power framework set out in the constitutional text or regional bill of rights. To a certain extent this may simply be seen as a boundary issue. This is the liminal area in which the capacity of constitutional courts and regional human rights courts cedes to the territory of anti-corruption mechanisms, both national and international.

This does not, however, mean that constitutional courts and regional human rights courts have no role to play. As we see in various cases, such as the South African Constitutional Court's judgments in *Democratic Alliance* and *Glenister* and the African Court's judgment in *Konaté v. Burkina Faso* (finding the imprisonment of a journalist for criminal defamation, for accusing a prosecutor of corruption), these courts can play a role in guarding other sentinels of the democratic order, or at least highlighting manipulation and abuses by State authorities.

CONCLUSION

This paper has partly rested on mere conjecture: could the African Court on Human and Peoples' Rights have provided an additional bulwark against ANC capture of South Africa's democratic system since its establishment in 2006? We cannot fully answer that question, but contemplating the question requires us to reflect on a range of important sub-questions, including: what 'added value' can international human rights courts bring in constraining partisan capture of the democratic system in a state dominated by one political party? How does the context of potential capture, or democratic decay more widely, bring certain roles for a regional human rights court to the fore? Do we accept any interpretation of the law by a regional human rights court as long as it gets us where we need to go, in terms of defending democratic governance, or are there principled limits to how far such a court can go? Do we need to consider ways of better coordinating regional human rights courts with other organs designed to counter the hollowing out of democratic rule? Perhaps more fundamentally, the paper seeks to underscore the need for much more far-reaching and profound reflection on what our expectations of regional human rights courts are as 'defenders of democracy', what their advantages might be in this regard, and their limits in the face of different types of democratic decay. These are not easy questions, but become increasingly important as democratic decay spreads in states worldwide.