

# CONSTITUTIONALISM, RIGHTS, AND INTERNATIONAL LAW: THE *GLENISTER* DECISION

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## INTRODUCTION

It has been seventeen years since South Africa became a democracy under a supreme law, the Constitution. With the transition came a radical shift in the role of the legal system in our country. Under apartheid, the law was an instrument of oppression. In fact, the chief feature of apartheid was that it was a system of racist subordination that was articulated, enforced, and minutely regulated through the law. That legacy the constitutional negotiators determined to cast away. Instead, they embodied a series of high aspirations and promises in a visionary and ambitious document, the nation's founding Constitution.

In the nearly two decades since democracy, the South African Constitution has become widely regarded as one of the world's most progressive founding charters.<sup>1</sup> And the Court that is its guardian, South Africa's highest court in constitutional matters, has given resonant content to the promise of constitutional rights. In a range of ground-breaking decisions, it has, for instance:

- Ruled the death penalty unconstitutional;<sup>2</sup>
- Declared that the “rendition” of an accused suspect to a country that imposes the death penalty is unconstitutional, and required the government to draw its ruling to the attention of the foreign country's courts;<sup>3</sup>
- In the midst of an impassioned public debate about the etiology of AIDS and the efficacy of anti-retroviral treatment, ordered the government to start making treatment available to

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1. See generally Heinz Klug, *The Constitution of South Africa: a Contextual Analysis* 113 (Oxford, Hart Publishing, 2010) (providing international assessments of the South African Constitution).

2. *State v. Makwanyane* 1995 (3) SA 391 (CC).

3. *Mohamed v. President of South Africa* 2001 (3) SA 893 (CC).

those living with HIV;<sup>4</sup>

- Declared that resident non-citizens are entitled to social benefits;<sup>5</sup>
- Insisted on full equality for gays and lesbians, including the right to marry.<sup>6</sup>

A distinctive feature of the Constitution was its treatment of international law. Under apartheid, international law was reviled as a source of alien and hostile doctrines. For instance, on 30 November 1973, the United Nations General Assembly opened for signature and ratification the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA), which 76 countries have ratified.<sup>7</sup>

Instead of treating international law as an enemy, the Constitution embraced it. It provided that international agreements that were approved by resolution of both houses of the legislature became binding “on the Republic.”<sup>8</sup> It declared customary international law “law in the Republic,” unless inconsistent with statute or the Constitution.<sup>9</sup> It required courts, when interpreting legislation, to prefer “any reasonable interpretation” that conforms with international law, over any alternative inconsistent interpretation.<sup>10</sup> And, most significantly, it made provision for international

4. Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC).

5. Khosa v. Minister of Social Development 2004 (6) SA 505 (CC).

6. Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC).

7. G.A. Res. 3068 (XXVIII) U.N. GAOR 28th Sess., Supp. No. 30, U.N. Doc. A/9030, at 75 (Nov. 30, 1973). List of signatories available at UN TREATY COLLECTION , CHAPTER IV, HUMAN RIGHTS [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOLINE&tabid=2&mtdsg\\_no=IV-7&chapter=4&lang=en#1](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOLINE&tabid=2&mtdsg_no=IV-7&chapter=4&lang=en#1) (last visited Feb. 10, 2013).

8. Section 231 of the Constitution provides:

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.” S. AFR. CONST. § 231.

9. S. AFR. CONST. § 232 (“Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”).

10. S. AFR. CONST. § 233 (“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative

law in the Bill of Rights itself. It expressly cast an obligation on courts, when interpreting the Bill of Rights, to “consider international law.”<sup>11</sup>

These provisions cut across the well-known debate amongst international law practitioners and scholars about how international law provisions interact with national law. The “monist” position, as is well known, is that the international and national legal rules form one, unified system.<sup>12</sup> Hence, there is no need for a state to incorporate its international treaty obligations into its national law as these obligations automatically become domestically enforceable when the state ratifies the agreement.<sup>13</sup>

International law “dualists,” on the other hand, view international law, which regulates the behavior of states, and domestic law, which regulates the behavior of individuals within states, as two separate yet coexisting spheres of law that operate on separate “planes.”<sup>14</sup> In particular, dualists insist that domestic law must specifically translate international law into its sphere before it can have domestic effect.<sup>15</sup> It was this divide, and in particular the fact that the Bill of Rights accorded express recognition to international law, that became part of the drama in the decision that is the subject of this lecture, and to which I now turn.

## I. BACKGROUND TO *GLENISTER*

Since judgment was handed down on 17 March 2011, the decision in *Glenister v. President of the Republic of South Africa*<sup>16</sup> has received both acclaim and criticism from legal scholars, political analysts, and civic-minded South Africans. The case involved a challenge to the constitutional validity of legislation that disbanded the country’s elite corruption-fighting unit, the Directorate of Special Operations (DSO) (“the Scorpions”), and replaced it with the Directorate for Priority Crime Investigation (DPCI) (“the Hawks”).<sup>17</sup> The decision was attended by very considerable political controversy. It was eventually challenged in court by a lone litigant, Mr. Hugh Glenister, though opinion polls seemed to indicate that he had very

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interpretation that is inconsistent with international law.”).

11. S. AFR. CONST. § 39(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”).

12. JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE (Lucienne Walters, ed., 3d ed., 2005) at 47.

13. *Id.*

14. *Id.*

15. *Id.*

16. 2011 (3) SA 347 (CC).

17. *Id.*

wide cross-party and cross-racial support for his views.<sup>18</sup>

One thing is worth noting from the outset. This case could never have been heard in the United States. Here, it seems U.S. courts would have considered Mr. Glenister an interfering busybody. By contrast, under the South African Constitution's broad standing provisions, his challenge was heard and eventually vindicated in the Constitutional Court. Not only that, but the resulting judgment has been described as one of the most significant decisions on government accountability in post-apartheid South Africa.

#### A. The "Scorpions" and South Africa's body politic

The Scorpions unit was established by the National Prosecuting Authority Act (NPA Act)<sup>19</sup> in 2001 to deal with national priority crimes and to supplement the efforts of existing law enforcement agencies in tackling serious crime. It was located within the National Prosecuting Authority (NPA), whose independence the Constitution safeguards and requires.<sup>20</sup> As a specialist unit, it enjoyed extensive powers of investigation. These included the power to gather, keep, and analyze information, and to institute criminal proceedings relating to organized crime and other specified offences, including high-level corruption.<sup>21</sup>

#### B. Backdrop and political motivation

The background to Mr. Glenister's court challenge reveals the confluence of two different conceptions of the use of instruments of government: the use of state power, on the one hand, to pursue private, individual agendas; and the use of state power, on the other, to secure clean and accountable government.

On one hand, political actors accused the Scorpions of selective investigation and enforcement of the law. The unit was alleged to have

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18. According to opinion poll evidence Mr Glenister included in the record. For example, in 2008, Ipsos-Markinor conducted a survey of 1,496 adults in urban areas throughout South Africa. After adjustment and weighting, the survey represented the views of 6 911 000 South Africans. The survey looked into the public views on the disbandment of the Scorpions. According to the survey, 64% of South Africans held the view that disbandment of the Scorpions would be a bad idea.

19. Act 32 of 1998 § 7(1).

20. S. AFR. CONST. § 179(4) ("National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.").

21. The National Prosecuting Authority Act 32 of 1998 § 7(1), prior to amendment, stated that "(1) (a) The President may, by proclamation in the *Gazette*, establish not more than three Investigating Directorates in the *Office of the National Director*, in respect of specific offences or specified categories of offences."

Section 179 of the Constitution provides that the NPA has had original constitutional authority to institute criminal proceedings as also "to carry out any necessary functions incidental to instituting criminal proceedings."

been used by one political faction to entrench itself by undermining its detractors.<sup>22</sup> Many claimed that the Scorpions were a highly effective corruption-fighting unit.<sup>23</sup> They contended that its independence allowed it to investigate, and to successfully prosecute, high-profile politicians guilty of corruption.<sup>24</sup> Given the unit's success, it was claimed to pose a threat to corrupt political leaders, who consequently sought to dissolve it.<sup>25</sup> Others resented the powers and impact of the unit. They claimed that its "independence" was a front that allowed it to be used to persecute political enemies, in particular the enemies of President Thabo Mbeki.<sup>26</sup> They further claimed that the unit's investigations against prominent post-transition politicians had a racial edge, and brought the new order into discredit.<sup>27</sup> Ultimately, the controversy was about the factional use of power, with each side intently asserting the guilt of the other.

### C. Polokwane and the dissolution of the Scorpions

The African National Congress (ANC), the ruling party, held its national conference in Polokwane in December 2007. There, President Mbeki was ousted as leader of the ANC. In his stead, Mr. Jacob Zuma was elected. One of the most significant resolutions the conference adopted was

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22. See, e.g., *Mbeki's Government Sounds Death Knell for Scorpions*, MAIL AND GUARDIAN, May 4, 2008) available at <http://mg.co.za/article/2008-05-04-mbekis-govt-sounds-death-knell-for-scorpions> ("Zuma's camp accused the Scorpions of engaging in a plot to smear and deny Zuma the ANC top job... [and] [t]he Scorpions had waged a turf war with the police and were accused of using their power to settle scores, most notably in Zuma's corruption case but also in an investigation of the country's police chief.").

23. As one commentator noted: "Defenders of the Scorpions often argue that it was a successful and laudable body because it won more than 90% of the cases it brought to court." PIERRE DE VOS, *Scorpions was not Truly Independent*, CONSTITUTIONALLY SPEAKING, Mar 22, 2011, available at <http://constitutionallyspeaking.co.za/scorpions-was-not-truly-independent>.

24. See DA: *Scorpions are the last effective corruption busters*, MAIL AND GUARDIAN, Feb. 5, 2008 available at <http://mg.co.za/article/2008-02-05-da-scorpions-are-the-last-effective-corruptionbusters> (reporting that the opposition party took this position).

25. See, e.g., MICHAEL HAMLYN, *Scorpions' disbanding 'is to protect ANC'*, MAIL AND GUARDIAN, Jan. 21, 2008, available at <http://mg.co.za/article/2008-01-21-scorpions-disbanding-is-to-protect-anc>; *Demise of Scorpions 'Meant to Shield ANC Members'*, MAIL AND GUARDIAN Aug. 6, 2008.

26. See, e.g., PIERRE DE VOS, *supra* note 23. ("[T]he argument was advanced that the Scorpions had become a law unto itself and had been abused by politicians who used the Scorpions to target some but not other politicians. President Mbeki, so the argument went, used the Scorpions to target Jacob Zuma, but this was unfair because many politicians had done corrupt things but only a few like Zuma were targeted by the Scorpions.").

27. See, e.g., ANDRE GROBLER *Dissent and Disgust at Hearing on Scorpions' Future* MAIL & GUARDIAN, (Aug 14, 2008) available at <http://mg.co.za/article/2008-08-14-dissent-and-disgust-at-hearing-on-scorpions-future> (alleging that the Scorpions "in most cases entered into plea bargains with white people while in many cases black people were prosecuted.").

an express decision requiring the dissolution of the Scorpions.<sup>28</sup>

## II. MR. GLENISTER'S CHALLENGE

In April 2008, the Cabinet approved draft legislation that dissolved the DSO and replaced it with a specialized crime-fighting unit, the DPCL.<sup>29</sup> This unit would be located within the South African Police Services (SAPS).<sup>30</sup> Mr. Glenister launched an anticipatory challenge in response to the Cabinet decision and was rebuffed in the High Court.<sup>31</sup> In October 2008, the Constitutional Court, too, rejected the challenge.<sup>32</sup> The Court ruled that Mr. Glenister had failed to establish justification for judicial intervention in the affairs of Parliament.<sup>33</sup> The Court left open the possibility that it might intervene in the legislative process if “material and irreversible harm” would otherwise result—but Mr. Glenister had not shown any such harm.<sup>34</sup>

The very next day, Parliament passed the National Prosecuting Authority Amendment Act<sup>35</sup> (NPA Amendment Act) and the South African Police Service Amendment Act<sup>36</sup> (SAPS Amendment Act). On 27 January 2009, President Zuma gave the laws his assent. In response, Mr. Glenister brought renewed proceedings challenging the statutes' constitutional validity.<sup>37</sup> Two judges of the Western Cape High Court dismissed his application.<sup>38</sup> He consequently applied for leave to appeal to the Constitutional Court or, alternatively, for direct access to the Constitutional

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28. 52<sup>nd</sup> National Conference Resolutions Dec. 20, 2007. The resolution dissolving the Scorpions provided:

### SINGLE POLICE SERVICE

The constitutional imperative that there be a Single Police Service should be implemented.

The municipal, metro and traffic police, be placed under the command and control of the National Commissioner of the South African Police Service, as a force multiplier.

The Directorate of Special Operations (Scorpions) be dissolved.

Members of the DSO performing policing functions must fall under the South African Police Services.

The relevant legislative changes be effected as a matter of urgency to give effect to the foregoing resolution.

29. National Prosecuting Authority Amendment Act 56 of 2008.

30. South African Police Service Amendment Act 57 of 2008.

31. *Glenister v. President of . South Africa* 2009 (1) SA 143. (ZAGPHC).

32. *Glenister v. President of South Africa* 2009 (1) SA 287 (CC) [hereinafter *Glenister I*].

33. *Id.* at para. 57.

34. *Id.*

35. National Prosecuting Authority Act 56 of 2008.

36. South African Police Service Amendment Act 57 of 2008.

37. *Glenister v President of South Africa* 2010 (1) SA 92 (ZAWCHC) [hereinafter, *Glenister II*].

38. *Id.*

Court.<sup>39</sup>

### III. MR. GLENISTER'S LEGAL STANDING AND THE AMICUS INTERVENTION

Mr. Glenister is a businessman. He brought the application on the basis of his own interest in the survival and growth of the economy.<sup>40</sup> This, he alleged, was threatened by crime and thus by the disbanding of an effective crime-fighting unit such as the DSO.<sup>41</sup> In addition, he brought the application in the interest of the group or class of persons affected by the legislation, and in the public interest.<sup>42</sup>

As I mentioned earlier, Mr. Glenister's suit would have been dismissed in many legal systems on the basis that he lacked legal standing to challenge the legislation.<sup>43</sup> However, the broad standing provisions in the Bill of Rights made his challenge possible.<sup>44</sup>

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39. S. AFR. CONST., § 167 (allowing applicants, in exceptional circumstances, to apply directly to the Constitutional Court.). Section 167(6)(a) provides:“(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court- (a) to bring a matter directly to the Constitutional Court.”

The Notice of Motion submitted by Mr Glenister prayed for leave to appeal to the constitutional Court or, in the alternative, for direct access to the Court. *See also Glenister II* at para. 3.

40. For descriptions of the capacity in which Mr. Glenister sued, see *Glenister I* at 4 para. 5.

41. *Id.*

42. *Id.*

43. The impossibility of this case being brought in U.S. federal courts results not just from the more limited set of obligations placed upon the state in the U.S. Constitution. Even if an obligation to establish and maintain an independent body to combat corruption and organized crime were to be read into the U.S. Constitution, the American twin of Mr. Glenister would likely not have standing in a U.S. federal court to bring suit. This is because she would likely not be able to show that she, or any class which she may seek to represent, suffered injury in fact as a result of the legislation dismantling the Scorpions and establishing the Hawks. The “case or controversy” requirement of Art. III, Section 2 of the U.S. Constitution has been interpreted to impose strict standing requirements that have no analogue in South African law. South African citizens have the right, by virtue of section 38 of the South African constitution, to seek relief from an appropriate court wherever their rights have been “infringed or threatened.” In contrast, a complainant will not have standing in a U.S. federal court without showing that: first, the conduct sought to be challenged has caused injury in fact; and second, the interest sought to be protected is within the zone of interests that was intended to be protected by the constitutional guarantee in question. *See Ass'n of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 152—53 (1970). It should be noted that, if Mr. Glenister's American twin could establish that the disbanding of the Scorpions and the establishment of the Hawks would necessarily result in increased corruption and organized crime, and she could also show that she, personally, would experience injury as a result (economic or otherwise), then she could be found to have standing to challenge the impugned legislation. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973).

44. Section 38 of the Constitution sets out a broad approach to standing by, providing that:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief,

Section 38 of the Constitution lists the persons that may approach the Court to allege an infringement of any right in the Bill of Rights.<sup>45</sup> It grants standing to anyone acting in his or her own interest; to anyone acting on behalf of another person who cannot act in his or her own name; to anyone acting as a member of, or in the interest of, a group or class of persons; to anyone acting in the public interest; and to any association acting in the interest of its members.<sup>46</sup>

Although urged to do so in the past, the Court has declined to take a narrow approach to these provisions. Instead, it has emphasized that the standing provision is aimed at ensuring the full and proper protection of constitutional rights.<sup>47</sup> It was under these broad provisions that Mr. Glenister's plea for access to the Court was granted without challenge from the government.<sup>48</sup>

To this should be added that the Court has generous rules governing the admission of amici curiae.<sup>49</sup> And indeed the amicus in this case, the Helen Suzman Foundation, played a crucial part in the adjudication. The principal arguments that Mr. Glenister's own legal team advanced on statutory invalidity (that the legislation was irrational,<sup>50</sup> and that it was invalid because of political taint<sup>51</sup> and because of want of public

including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

S. AFR. CONST., 1996, ch. 2, § 38.

45. Section 38 diverges radically from the narrow standing requirements in the pre-constitutional South African common law. Those required that a person approaching the court for relief must demonstrate an interest in the subject matter of the litigation, in the sense that he or she was personally, adversely affected by the impugned conduct. See *Lawyers for Human Rights v. Minister of Home Affairs* 2004 (4) SA 125 (CC) at 9 para. 14.

46. S. AFR. CONST., 1996, ch. 2, § 38.

47. *Ferreira v. Levin NO* 1996 (1) SA 984 (CC) at 241 para. 165 (S. Afr.) stated that—  
“Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.”

48. *Glenister I* at 4–5 paras. 5–7 (accepting the capacity and standing of the applicants without challenge). See also *Glenister II* at 83 para. 161.

49. Rule 10 of the rules of the Constitutional Court provides that “any person interested in any matter before the Court” may apply for amicus status. “Interest” has here, too, been interpreted very amply. Government Notice R1675 (S. Afr.).

50. *Glenister II* at paras. 59, 162.

51. *Id.* at paras. 71–82, 162.



consultation preceding its enactment<sup>52</sup>) were rejected.<sup>53</sup> However, the arguments that ultimately found favor with the Court were in essence those the amicus advanced.<sup>54</sup>

#### IV. ISSUES BEFORE THE COURT

The case distilled to two main issues. The first was the nature of government's obligations in dealing with corruption. Do the international law obligations resting on the state oblige it to create an independent anti-corruption unit? If so, do these obligations find direct intra-country constitutional force? Or are they obligations under international law alone?

To elicit the jurisdiction of the Constitutional Court, an applicant must show that his case raises a "constitutional issue."<sup>55</sup> There was no doubt that the debate about the extent of government's anti-corruption obligations raised a constitutional issue. If there were an in-country constitutional obligation to create an independent anti-corruption unit, the second question was whether the DPCI was in fact sufficiently independent.

Both the majority and the minority recognized that under international law the state is obliged to establish and maintain an independent body to combat corruption and organized crime.<sup>56</sup> But the Court split five to four on two crucial questions regarding this obligation. The first was its source; the second was its intra-country impact.

The majority<sup>57</sup> held that the source is the Constitution itself.<sup>58</sup> Although the Constitution does not in express terms command that a corruption-fighting unit should be established, its scheme taken as a whole imposes a strong ("pressing") duty on the state to set up a concrete,

52. *Id.* at paras. 33–38, 162.

53. *Id.* at paras. 38, 70, 82, 16.

54. Many of the arguments raised by the amicus are discussed and accepted by the majority. *Id.* at paras. 175–206, 210–50.

55. Section 167 provides in part:

(3) The Constitutional Court-

(a) is the highest court in all constitutional matters;

(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and

(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

...

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. S. AFR. CONST., 1996, ch. 8, § 167.

56. *Glenister II* at 56 para. 115 (minority) and 96–101 paras. 183–89 (majority).

57. The majority judgment was written jointly by Moseneke DCJ and Cameron J, with Froneman J, Nkabinde J and Skweyiya J concurring. *Id.* at 83–130.

58. *Id.* at 100–03 paras. 189–95.

effective and independent mechanism to prevent and root out corruption.<sup>59</sup> Read together, the international and constitutional law obligations of the state require that it establish a corruption-fighting unit that is adequately independent.

The majority thus held, first, that the obligation was constitutionally domesticated and, second, that its impact was to require legislation designed to counter corruption subject to constitutional scrutiny. The majority therefore proceeded to scrutinize the statutory provisions that established the DPCI.<sup>60</sup> This led to a third major difference within the Court. The majority held that the body was insufficiently insulated from political influence in its structure and functioning.<sup>61</sup> This was because the form of oversight exercised over the unit made it vulnerable to political influence.<sup>62</sup> In addition, the safeguards against interference the provisions erected were inadequate to save the DPCI from a significant risk of political influence and interference.<sup>63</sup>

The minority,<sup>64</sup> by contrast, found against the challenge and would have dismissed the appeal. It would have held that the Constitution (section 7(2) in particular) does not specifically impose an obligation on the state to establish an independent corruption-fighting unit.<sup>65</sup> Even if a constitutional obligation of this sort existed, the dissenting judgment considered that the structural and operational autonomy afforded the DPCI was adequately designed to prevent undue interference.<sup>66</sup> The DPCI's independence was thus safeguarded.

#### V. THE DOMESTICATION OF INTERNATIONAL LAW: WEAVING TOGETHER SECTIONS 39(1) AND 7(2)

My main remaining focus is the majority reasoning on the first issue—in particular, the judgment's treatment of the state's international law obligations and their domestication. As a starting point, it is useful to understand these obligations before going on to explore the Court's reasoning.

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59. *Id.* at 91 para. 175.

60. *Id.* at 109–28 paras. 208–48.

61. *Id.* at 128–29 paras. 248–50.

62. *Id.*

63. *Id.*

64. The minority judgment was written by Ngcobo CJ, with Brand AJ, Mogoeng J and Yacoob J concurring. *Id.* at 1–82.

65. *Id.* at 55–56 para.113.

66. *Id.* at 81 para. 156.

### A. South Africa's international law obligations and the Constitution

Various international treaties South Africa has ratified impose an obligation to create independent institutions to investigate and deal with corruption. The international instruments the Republic has signed and ratified include:

- the United Nations Corruption Convention;<sup>67</sup>
- the African Union Convention;<sup>68</sup>
- the OECD Convention;<sup>69</sup>
- the United Nations Organized Crime Convention;<sup>70</sup> and
- two Southern African Development Community protocols.<sup>71</sup>

It is worth underscoring that “ratification” of international treaties occurs when both branches of the South African legislature adopt a resolution approving the treaty.<sup>72</sup> This provides an element of express and active legislative assent that many might think would resonate domestically. That became one of the most contentious issues in the case.

Article 6(1)(a) of the U.N. Corruption Convention requires each party state to guarantee the existence of a body tasked with the prevention of corruption.<sup>73</sup> Article 6(2) requires the state to grant the body “the necessary independence, in accordance with the fundamental principles of its legal system, to enable [it] to carry out its . . . function effectively and free from undue influence.”<sup>74</sup> South Africa ratified the U.N. Convention on 22

67. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/58/422 (Dec. 9, 2003). South Africa ratified the United Nations Corruption Convention on 22 November 2004.

68. The African Union Convention was adopted on 11 July 2003 and entered into force on 5 August 2006. South Africa signed the Convention on 16 March 2004 and ratified the Convention on 11 November 2005. African Union Convention on Preventing and Combating Corruption, Jul. 11, 2003

69. OED Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Jun, 19, 2007. South Africa ratified the OECD Convention on 19 June 2007.

70. United Nations Convention Against Transactional Organized Crime, U.N. Doc. A/RES/55/25 (Nov. 15, 2000). Ratified by South Africa on 20 February 2004.

71. Southern African Development Community Protocol Against Corruption (SADC Corruption Protocol), Aug. 14, 2001; Southern African Development Community Protocol on Combating Illicit Drugs (SADC Drugs Protocol), Aug. 24, 1996.

72. S. AFR. CONST., 1996, ch.14, § 231(2).

73. Article 6(1)(a) states:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

(a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies.

United Nations Convention Against Corruption, art. 6(1)(a), G.A. Res. 58/4, U.N. Doc. A/58/422 (Dec. 9, 2003).

74. *Id.* art. 6(2).

November 2004 and this ratification included formal adoption of the Convention by resolution of both houses of Parliament pursuant to the terms of section 231(2) of the Constitution.<sup>75</sup>

In addition, Parliament enacted the Prevention and Combating of Corrupt Activities Act (PRECCA).<sup>76</sup> PRECCA provides for practical measures to investigate corruption, but of more immediate significance to the litigation was the statute's preamble, which lavishly expounds the socially and politically corrosive effects of corruption.<sup>77</sup> These are that corruption undermines the Bill of Rights, damages democratic institutions, requires international cooperation, and is a prime responsibility of the state.<sup>78</sup> The applicant invoked all of these premises to give constitutional force to his complaint against DPCI.<sup>79</sup>

The crucial conclusion the majority reached is that the obligation to create an adequately independent corruption-fighting unit was not sourced in international law alone. Instead, it stems from the Constitution itself and, what is more, it has direct domestic constitutional force. To reach this conclusion, various grounds within the Constitution were explored.

## B. Section 231

One possible line of argument relied on the binding nature of the Republic's obligations under section 231(2) of the Constitution. Pursuant to section 231(2), an international agreement "binds the Republic" after it has been approved by resolution in both the National Assembly and the

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75. *Glenister II* at 40–41 n.64, ("The Convention was adopted on 31 October 2003 and entered into force on 14 December 2005. South Africa signed the Convention on 9 December 2003 and ratified it on 22 November 2004. We have not been able to establish whether the Convention was in fact approved by a resolution of Parliament as required by section 231(2) of the Constitution. Having regard to legislative practice, it appears that once an international agreement has been approved by resolutions of both the National Assembly and the National Council of Provinces, the executive publishes a notice in the Government Gazette for the general information of the public. See, for example, GN 1534 GG 32722, 20 November 2009 (confirming approval, by resolution in both the National Assembly and the National Council of Provinces, of the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971).").

76. Act 12 of 2004 (S. Afr.).

77. For example, the preamble to PRECCA states inter alia that: "corruption and related corrupt activities . . . endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime; . . . the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law; . . . corruption is a transnational phenomenon that crosses national borders and affects all societies and economies, and is equally destructive and reprehensible within both the public and private spheres of life, so that regional and international cooperation is essential to prevent and control corruption and related corrupt activities." *Id.*

78. *Id.*

79. See *Glenister II* at para. 85.

NCOP.<sup>80</sup> Purely “technical, administrative or executive” treaties take effect without express parliamentary adoption.<sup>81</sup> The National Assembly ratified the U.N. Convention against Corruption on 14 September 2004 and the NCOP ratified the convention on 21 September 2004.

This provision must be read with the provisions of the Constitution that define what “the Republic” is. The crucial question was whether the legislature was directly bound because “the Republic” was bound.

Section 43 of the Constitution is headed “Legislative authority of the Republic.”<sup>82</sup> It provides that “in the Republic, the legislative authority” in the national sphere “is vested in Parliament.”<sup>83</sup> Section 44(4) requires that, when exercising its legislative authority, “Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.”<sup>84</sup> Since the treaties in question were indeed approved by Parliament and therefore “bind the Republic” whose legislative authority is vested nationally in Parliament, the argument was that the treaty obligations were directly binding on Parliament itself.

The argument would have had the effect that every time Parliament ratifies an international agreement, it limits its own legislative power and must henceforth legislate only in accordance with the treaty in question. This effect would have been subject to an obvious limitation—namely that

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80. S. AFR. CONST., 1996, ch.14, § 231. This line of argument was dealt with by the minority at paras. 87–103 and by the majority at paras. 180–82. Section 231 of the Constitution, headed “International agreements” provides:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

81. S. AFR. CONST., 1996, ch.14, § 231(3).

82. S. AFR. CONST., 1996, ch.4, § 43.

83. S. AFR. CONST., 1996, ch.4, § 43(a).

84. S. AFR. CONST., 1996, ch.4, § 44(4).

Parliament cannot by ratifying a treaty adopt provisions incompatible with those of the Constitution.<sup>85</sup>

Nevertheless, this line of reasoning would have had a radical consequence—that legal obligations in international treaties ratified by the Republic would become directly “constitutionalized.” The Court, however, did not favor this argument. It held that:

[T]he main force of section 231(2) is directed at the Republic’s legal obligations under international law, rather than transforming the rights and obligations contained in international agreements into home-grown constitutional rights and obligations. Even though the section provides that the agreement “binds the Republic” and Parliament exercises the Republic’s legislative power, which it must do in accordance with and within the limits of the Constitution, the provision must be read in conjunction with the other provisions within section 231. Here, section 231(4) is of particular significance. It provides that an international agreement “becomes law in the Republic when it is enacted into law by national legislation”. The fact that section 231(4) expressly creates a path for the domestication of international agreements may be an indication that section 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them. It follows that the incorporation of an international agreement creates ordinary domestic statutory obligations. Incorporation by itself does not transform the rights and obligations in it into constitutional rights and obligations.<sup>86</sup>

### C. Section 7(2)

But the rejection of the argument based solely on section 231 did not mean that the Republic’s ratification of the international treaties had no domestic constitutional impact. On the contrary, the majority held that the provision remains highly pertinent. It found that the binding nature of international law obligations on the Republic was most significant when the Court interprets the state’s obligations under section 7(2) of the Bill of Rights.<sup>87</sup>

Section 7(2) of the Bill of Rights requires that the “state must “respect, protect, promote and fulfill the rights in the Bill of Rights.”<sup>88</sup> It is these

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85. *Glenister II* at pars. 98–100; 180–82.

86. *Glenister II* at para. 181.

87. *See Glenister II* at paras. 189–92.

88. S. AFR. CONST., 1996, ch. 2, § 7(2.) Section 7(2) of the Bill of Rights states that “The state must respect, protect, promote and fulfil the rights in the Bill of rights.” Professor Henry Shue, in his ground-breaking work on international distributive justice, argued that it is incorrect to say that rights are either positive or negative—instead, they all require the performance of multiple kinds of duties, including by the state. He names three kinds of duties which must necessarily be performed if a basic

very rights that corruption undermines. Indeed, this is precisely what Parliament recognized when it enacted the lavishly expressive preamble to PRECCA.<sup>89</sup>

PRECCA affords outspoken legislative recognition to the fact that corruption undermines the Bill of Rights. From this, the majority reasoned it must follow that the state's and also Parliament's obligation to respect, protect, promote and fulfill those rights embraces a duty to create effective anti-corruption institutions.<sup>90</sup>

The potent question was this: what is the content of that duty? Here, the majority invoked the crucial interpretive clause that I mentioned earlier.<sup>91</sup> It appears at the end of the Bill of Rights chapter in the Constitution. It provides that when interpreting the Bill of Rights, a court "must consider" international law.<sup>92</sup> This means, the majority found, that when in interpreting what the state's obligations are under section 7(2), the court "must consider" international law. It follows that the court "must consider" in determining the ambit of those obligations that the Republic is under an international law obligation to create anti-corruption institutions, and that these institutions must have "the necessary independence."

This reasoning was buttressed by the conclusion that the failure by Parliament, when abolishing the DSO, to invest the DPCI with the necessary autonomy in relation to its anti-corruption activities, rendered the legislation invalid.

The majority judgment went further. Invoking the Court's own previous decisions,<sup>93</sup> it found that implicit in section 7(2) is the obligation that the steps the state takes to protect and fulfill constitutional rights must be reasonable.<sup>94</sup> The majority concluded in the following excerpt that it is

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right is to be fulfilled: (i) duties to protect; (ii) duties to avoid; and (iii) duties to *aid*. See H Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* 52 (2nd ed.1996). Professor Fredman has recently set out how Shue's three-fold classification has been adopted in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR provides that all rights impose correlative duties on the State to respect, protect and fulfill them. See SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* 69 (2008).

89. See *supra* note 77.

90. See *Glenister II* at paras. 175–78.

91. *Glenister II* at para. 192.

92. S. AFR. CONST. 1996, ch. 2, § 39(1)(b).

93. *Rail Commuters Action Grp. v. Transnet Ltd t/a Metrorail*, 2005 (2) SA 359 (CC) at 61 para. 86 (S. Afr.)

("The duty thus identified requires Metrorail and the Commuter Corporation to ensure that reasonable measures are in place to provide for the safety of rail commuters. The standard of reasonableness requires the conduct of Metrorail and the Commuter Corporation to fall within the range of possible conduct that a reasonable decision-maker in the circumstances would have adopted.") (footnotes omitted).

94. *Glenister II* at para. 194.

not a reasonable constitutional measure to create an anti-corruption unit that is not adequately independent:

That the Republic is bound under international law to create an anti-corruption unit with appropriate independence is of the foremost interpretive significance in determining whether the state has fulfilled its duty to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) requires. Section 7(2) implicitly demands that the steps the state takes must be reasonable. To create an anti-corruption unit that is not adequately independent would not constitute a reasonable step. In reaching this conclusion, the fact that section 231(2) provides that an international agreement that Parliament ratifies “binds the Republic” is of prime significance. It makes it unreasonable for the state, in fulfilling its obligations under section 7(2), to create an anti-corruption entity that lacks sufficient independence.

This is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions. The conclusion that the Constitution requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself.<sup>95</sup>

The effect was dramatic. Not only does the duty to create an adequately independent corruption-fighting unit exist, but it is enforceable beyond the international sphere: it is enforceable domestically as well.

#### D. Cutting through the divide

The position thus taken in *Glenister* cuts through the theoretical debate about the relationship between international law and national law—the monism/dualism debate. Before *Glenister*, the legal position within South Africa regarding international treaties clearly reflected the dualist conception—a treaty that has been signed and ratified, but not enacted into local law, was regarded as “binding on South Africa [only] on the international plane.”<sup>96</sup> The nature of the relationships between signatory states to a treaty would be based on the common consent of the states parties<sup>97</sup> and has been likened to those obligations incurred in a private law contract. This position dramatically limited the domestic impact of the

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95. *Glenister II* at paras. 194–95.

96. Dugard, *supra* note 12, at 62. Dugard states that section 231(4) of the Constitution signifies a return to the pre-1994 dualist position in South Africa in that “an international agreement or treaty does not become part of domestic law until it is enacted into law by national legislation.” *Id.* at 61.

97. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 32 (May 28).



state's undertaking of international human rights obligations.

Under this conception, if a state in the application of its domestic law acts contrary to international law, it commits a breach of its international obligations—but solely under international law.<sup>98</sup> A “[s]tate that has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.”<sup>99</sup> However, the state is accountable for the breach only on the international plane and will incur sanction only if its conduct is challenged by other state actors.<sup>100</sup>

This conception was largely accepted by scholars even after the Constitution was adopted. It was, however, to some extent acknowledged that the state's international law obligations do have some domestic relevance. The Constitutional Court has recognized the importance of these obligations (both those incorporated into national law and those not yet incorporated) when interpreting legislation. For instance, in the *Azapo* case the Court stated that “the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law.”<sup>101</sup> In addition, in *S v. Makwanyane*, where the Court found the death penalty constitutionally invalid, the Court stated that international agreements and customary international law provide a framework within which the rights provisions of the Constitution could be evaluated and understood.<sup>102</sup>

But *Glenister* goes far further than this. It cuts through the debate and draws international law directly into the domestic sphere, using the provisions of the Constitution itself. Yet it does so without adopting a monist approach.

*Glenister* notes that the normal consequence of signing an international agreement is the creation of international law obligations for the state, enforceable in the international sphere between states.<sup>103</sup> However, the Constitution expressly provides that, when Parliament by resolution approves an international agreement, the Republic is “bound.”<sup>104</sup> The significance of this provision cannot be ignored. The Constitution sets

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98. DJ Harris, *Cases and Materials on International Law* 68 (6th ed. 2004).

99. Exchange of Greek and Turkish Populations (Lausanne Convention VI, Jan. 30, 1923, Art. 2), Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 21).

100. Dugard, *supra* note 12, at 62.

101. Azanian Peoples Org. (AZAPO) v. President of the Republic of South Africa 1996 (4) SA 671 (CC) at para. 26 (S. Afr.).

102. *S v. Makwanyane*, 1995 (3) SA 391 (CC) at 413–4 para. 35 (S. Afr.).

103. *Glenister II* at paras. 92, 182.

104. S. AFR. CONST. 1996, ch. 14, § 231(2).

the limits within which lawmakers exercise their legislative powers. It follows that the Constitution places an obligation on lawmakers to pay heed to the Republic's international obligations when drafting legislation. While section 231 does not have the effect of elevating all international obligations to the status of constitutional obligations, it does mean (when read with other provisions of the Constitution) that the state's international obligations are enforceable to some degree on the domestic plane, by domestic actors.

The majority in effect found that the constitutional scheme, taken as a whole, cannot mean that the national executive could proclaim and act in accordance with one position at the international level, but adopt a different approach within the domestic arena. A dichotomy of this sort would raise at least rule of law issues—and the rule of law is enshrined as a founding value of the Constitution.<sup>105</sup>

## VI. THE COURT'S SUSPENDED ORDER

Having established that the state had failed to meet its constitutional obligation to establish a sufficiently independent corruption-fighting unit, the Court declared Chapter 6A of the SAPS Amendment Act inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the DPCL.<sup>106</sup> However, the Court carefully emphasized the limits to its ruling. It did not prescribe what form the revised entity should take. It underlined that “the form and structure of the entity in question lie within the reasonable power of the state, provided only that whatever form and structure are chosen do indeed endow the entity in its operation with sufficient independence.”<sup>107</sup> Given that there were a number of forms that an independent corruption-fighting unit could take (and many policy choices involved), the Court suspended the order of constitutional invalidity for eighteen months to give the legislature the opportunity to remedy the deficiencies in the legislation.<sup>108</sup>

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105. The High Court of Australia in *Minister of State Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) 183 CLR 273 (Austl.), upheld the traditional doctrine whereby the “provisions of an international treaty to which Australia is party do not form part of Australian law” unless incorporated by statute. The Court, however, also held that “the fact that a treaty had not been incorporated did not mean that its ratification by the executive held no significance for Australian law.” Instead, the Court found that “ratification of the convention itself would constitute an adequate foundation for a legitimate expectation . . . that administrative decision-makers would act in conformity with the convention.” M.N. Shaw, *International Law* 121–22 (4th ed. 1997) (footnotes omitted).

106. *Glenister II* at para. 251 (Order 5).

107. *Glenister II* at para. 196.

108. *Glenister II* at para. 251 (Order 6).

## VII. FUTURE IMPLICATIONS: MAKING CONSTITUTIONAL RIGHTS REAL

*Glenister* has received lavish praise and acclaim on the one hand,<sup>109</sup> and mordant criticism on the other.<sup>110</sup> But its real significance lies in its recognition of the impact global law has on a domestic set of laws. It is uncertain what Parliament will enact in response to the Court's order regarding the Hawks unit.<sup>111</sup> But irrespective of the precise legislative response, *Glenister* has had an impact on South Africa's law and democracy in at least three respects—that is, with regard to the rule of law, democratic institutions and the separation of powers, and the continuing implications of the decision:

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109. One constitutional commentator called the decision “brave and brilliant” and “a monumental judgment in defence of the poor.” Pierre De Vos, *Glenister: A Monumental Judgment in Defence of the Poor*, Constitutionally Speaking Blog (Mar. 18, 2011), <http://constitutionallyspeaking.co.za/glenister-a-monumental-judgment-in-defence-of-the-poor/>.

110. Professor Ziyad Motala contended that the decision lacks foundation in either domestic or international case law, that the text of the Constitution does not support it, and that the decision ignores the separation of powers by interfering in the policy choices of the Executive. See Ziyad Motala, *Divination through a strange lens*, Times Live (Mar. 26, 2011), available at <http://www.timeslive.co.za/opinion/columnists/article988909.ece/Divination-through-a-strange-lens> (S. Afr.). He argues that:

[T]he majority ignored all precedent and said international agreements, even though not made self-executing, create an obligation to create an independent anti-corruption entity. What makes the majority approach particularly egregious is there is no single international law text which supports their conclusion on the relationship between the anti-corruption unit and the executive. More importantly, there is not a single precedent from any country in the world which the majority could cite to support their interpretation that international law required an anti-corruption unit in terms of the framework they posited.

The decision does break ground. Whilst it does not rely directly on the specific wording of a single provision, the ruling draws deeply on the whole text of the Constitution – it looks at the constitutional scheme, and deeply wraps into that scheme the state's international law obligations. The Court has a duty to determine the obligations that the Constitution imposes. Although these may be viewed as novel or unique in nature, the obligations placed on government stem from the Constitution itself.

It is worth noting that Professor Motala seems to have misconstrued the majority judgment. He asserts that the Court overstepped the separation of powers and interfered with the Executive's policies choices – namely whether the Scorpions should be relocated to the South African Police Service from the National Prosecuting Authority:

“it falls within the power of parliament to establish an anti-corruption unit and to locate it within the SAPS. The constitution does not mandate to parliament where to locate the anti-corruption unit. The executive has the prerogative to initiate legislation in this regard, and it is ultimately for parliament to make a policy choice.”

However, both the majority and the minority held that it is within the power of Parliament to establish an anti-corruption unit and to locate it within the SAPS. The majority expressly found that Constitution does not prescribe to Parliament where to locate the anti-corruption unit. See *Glenister II* at ¶¶ 65–162.

111. Since the delivery of this lecture, Parliament enacted legislation in response to the Court's order. That legislation is currently subject to legal challenge. See, e.g., *Glenister prepares for round 3 in Concourt over Hawks Act*, POLITICSWEB (Nov 29, 2012) available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=343856&sn=Marketingweb+detail&pid=90389>.

### A. Rule of law

The judgment provided a dramatic vindication of the capacity of law to oversee the exercise of political and parliamentary power. The latter was measured against the norms of the Constitution and found wanting. In South Africa, the rule of law entails subjecting all power—private, corporate and governmental—to scrutiny under constitutional norms. *Glenister* was a powerful illustration of the rule of law in operation, even if its implications have yet to be realized.

### B. Democratic institutions and the separation of powers

The very robustness and innovativeness of the judgment has created its own resonances, some of which may require particular note.<sup>112</sup> The Secretary-General of the ruling African National Congress, for instance, portrayed the ruling as an example of judicial “hostility” towards the executive and Parliament, which could lead to “instability.”<sup>113</sup> But the rule of law, which requires an independent judiciary to pronounce on the legal limits of state, executive and legislative power, inevitably entails disputed decisions.<sup>114</sup> Controversy is thus its essential companion.

The nature of the debate *Glenister* has evoked is in this important sense comparable to that in other constitutional democracies.

### C. Future practical legal developments

The major substantive innovations of *Glenister* are, first, the domestication of international law; and, second, the reaffirmation that governmental measures in pursuance of the section 7(2) obligation to respect, protect, promote and fulfill the rights in the Bill of Rights must be reasonable. Regarding the domestication of international law, it remains to be seen what other international law provisions may yet be found to have a domestic Bill of Rights impact through sections 39 and 7. Regarding the

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112. This is illustrated by comments by Mr. Gwede Mantashe, Secretary General of the ANC, stating that “there is a great deal of hostility that comes through from the judiciary towards the executive and Parliament,” which unless addressed would “cause instability” and “undermine[ ]the other arms of government[.]” He went on to say that “you can’t have a judiciary that seeks to arrest the functioning of government” as it would create “a perception that says the judiciary is actually consolidating opposition to government.” When asked about the *Glenister* judgment specifically, he stated that the “judgment itself seeks to cast aspersion on the work of Parliament” and that it “ventures into political weighting of views.” Interview by Pierre De Vos with Gwede Mantashe, Sec’y Gen. ANC (Aug. 18, 2011), available at <http://constitutionallyspeaking.co.za/full-sowetan-interview-with-gwede-mantashe/>.

113. See Interview by Mpumelelo Mkhabela with Gwede Mantashe, Sec’y Gen. ANC (Aug. 18, 2011), available at <http://www.sowetanlive.co.za/news/2011/08/18/judges-moving-into-politics>.

114. For a recent discussion of the law as limiting state power, with the inevitable concomitant of the supervention of judicial rulings, see SCOTT J. SHAPIRO, LEGALITY 10-13 (2011).

government's obligation to realize the Bill of Rights, the reasonableness requirement that was re-asserted in *Glenister* may yet have a significant impact.

More broadly still, *Glenister* may be seen as lighting the as yet unmined potential of what is rightly considered a progressive Constitution. It lights the way on the possible impact of the South African Constitution's provisions. *Glenister* involved parliamentary and state power—but the Constitution may yet be found to have comparable effects on private power. The equality clause, for example, provides that “[e]quality includes the full and equal enjoyment of all rights and freedoms.”<sup>115</sup> The implications of this provision—which some may argue include radical egalitarianism—have not yet been explored. Only future constitutional litigation might tell us whether it does, and perhaps private, not state, agencies could face the challenges in issue.<sup>116</sup>

### CONCLUSION

Perhaps the most profound lesson of *Glenister* is that in a globalized world there should be no cover from properly undertaken international law obligations in the thicket of domestic law. There should be consonance, not dissonance, between what governments say and do internationally and what they say and do domestically. Our role as lawyers, and our duty, is to reduce the gap where it exists.

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115. S. AFR. CONST. 1996, ch. 2, § 9(2). There is no comparable provision in the Canadian Charter of Rights, upon which the South African Bill of Rights was modeled. The Charter's equality provision reads:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

See Canadian Charter of Rights and Freedoms, § 15, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.)

116. *Id.*