
Volume 60
Issue 1 *Twenty Years of South African
Constitutionalism: Constitutional Rights,
Judicial Independence and the Transition to
Democracy*

Article 9

January 2016

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Recommended Citation

MARK KENDE, *Corruption Cases and Separation of Powers in the South African Courts and U.S. Supreme Court*, 60 N.Y.L. SCH. L. REV. (2015-2016).

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60 N.Y.L. SCH. L. REV. 183 (2015–2016)

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CORRUPTION CASES AND SEPARATION OF POWERS

I. INTRODUCTION

In recent years, the South African Constitutional Court, the Supreme Court of Appeal, and several High Courts have served as anti-corruption fighters. Some of the judicial rulings are extraordinary in scope. In *Glenister v. President of South Africa (Glenister II)*, the Constitutional Court invalidated the existence of an independent government entity designed to fight corruption because the entity was too weak.¹ Another Constitutional Court decision nullified a presidential appointment to a national prosecuting position because of the President's unwillingness to pay heed to the appointee's integrity problems.²

In *Nkabinde v. Judicial Service Commission*, the South Gauteng High Court allowed an important disciplinary investigation involving Western Cape High Court Judge John Hlophe's alleged ex parte tampering with two Constitutional Court Justices, in a legal matter that implicated President Jacob Zuma, to go forward.³ And in *Democratic Alliance v. Acting National Director of Public Prosecutions* (the "Spy Tapes" case), the Supreme Court of Appeal ruled that the Democratic Alliance had the right to examine documents and audiotapes that explained why an investigation into possible financial corruption by Zuma was halted.⁴

These decisions reveal a risky yet important role for courts in a "dominant party democracy" in which the African National Congress's (ANC) dominance is one source of corruption.⁵ Moreover, the ANC has criticized the Constitutional Court on several occasions.⁶ In 2012, the Department of Justice and Constitutional Development authorized an academic study to consider whether the Court has been sufficiently transformative.⁷ Many suspect the study was an excuse to further criticize

1. 2011 (3) SA 347 (CC) at para. 248.

2. *See Democratic All. v. President of the Republic of S. Afr.* 2013 (1) SA 248 (CC) at paras. 86–89. The appointee, Menzi Simelane, was found to have made false allegations against the previous National Director of Public Prosecutions during the Ginwala Commission. *Id.* at paras. 50–53.

3. 2014 (12) BCLR 1477 (GJ) at paras. 1–3, 93, 121–23. A full bench of the High Court subsequently affirmed the decision. Ernest Mabuza, *Ruling Paves Way For Conduct Tribunal to Investigate Judge Hlophe*, BUS. DAY (Nov. 21, 2014), <http://www.bdlive.co.za/national/law/2014/11/21/ruling-paves-way-for-conduct-tribunal-to-investigate-judge-hlophe>. The two Constitutional Court Justices have now sought a judgment reversing that decision from the Supreme Court of Appeal, which will further delay the matter. *See* Franny Rabkin, *Top Judges Seek to Appeal*, BUS. DAY (Jan. 21, 2015), <http://www.bdlive.co.za/national/law/2015/01/21/top-judges-seek-to-appeal>.

4. 2012 (3) SA 486 (SCA) at paras. 37, 52. The Democratic Alliance is an opposing party to the ANC, the current dominant political party. *Id.* at para. 2.

5. *See* Sujit Choudhry, *'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1, 3 (2009); Zuma, *ANC in 'Eternal Corruption Scheme'*, NEWS24 (Oct. 10, 2014), <http://www.news24.com/SouthAfrica/Politics/Zuma-ANC-in-eternal-corruption-scheme-20141010>.

6. For examples of ANC criticisms, see Hamadziripi Tamukamoyo, *Double Speak About Judicial Reform in South Africa Raises Alarm Bells*, ISS AFRICA (Mar. 23, 2012), <http://www.issafrica.org/iss-today/double-speak-about-judicial-reform-in-south-africa-raises-alarm-bells>.

7. *See* DEP'T OF JUST. AND CONST. DEV., DISCUSSION DOCUMENT ON THE TRANSFORMATION OF THE JUDICIAL SYSTEM AND THE ROLE OF THE JUDICIARY IN THE DEVELOPMENTAL SOUTH AFRICAN STATE

the Court.⁸ This raises the question of whether the courts have gone too far in these cases, especially given their democratic fragility and given that courts in other countries would likely not have been so bold. In addition, some scholars have commented on the supposed weakness of the judicial reasoning in these cases,⁹ which makes them even more controversial.

Part II.A of this essay examines the U.S. Supreme Court's handling of various scandals, particularly Watergate and the situations involving Whitewater and Monica Lewinsky, that have parallels to the allegations that Zuma participated in criminal financial misconduct¹⁰ and committed sexual assault.¹¹ Comparisons of the structural features of constitutions are difficult, but it is still useful to note that high-level corruption is not merely a developing country problem. Part II.B looks at the scholarly criticisms of *Glenister II*. Part II.C argues that the South African courts must play an active role in combatting corruption for pragmatic reasons, at least for the time being. Part III concludes the paper.

II. THE COURT AS CORRUPTION FIGHTER

A. *The U.S. Example*

If the U.S. Supreme Court received a claim, akin to that in *Glenister II*, that a national anti-corruption body was too weak, the Court would likely dismiss the case, either for lack of standing¹² or under the political question doctrine.¹³ Similarly, a lawsuit alleging that a U.S. President did not deliberate sufficiently over a Cabinet appointee's supposed lack of integrity—as in *Democratic Alliance v. President of the*

(Feb. 2012), <http://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf>. To my knowledge, the academic review of whether the Constitutional Court is transformative enough is still ongoing.

8. See, e.g., Pierre de Vos, *Mixed Signals on the Review of our Courts*, CONSTITUTIONALLY SPEAKING (Feb. 29, 2012), <http://constitutionallyspeaking.co.za/mixed-signals-on-the-review-of-our-courts/>.
9. See K. Malan, *Reassessing Judicial Independence and Impartiality Against the Backdrop of Judicial Appointments in South Africa*, 17 POTCHEFSTROOM ELECTRONIC L.J., 2014, at 1964, 2010–14, <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/issuepages/2014volume17no5/2014%2817%295%20Malan.pdf>; see also *infra* notes 62–65.
10. David Smith, *Jacob Zuma Accused of Corruption 'on a Grand Scale' in South Africa*, THE GUARDIAN (Nov. 29, 2013), <http://www.theguardian.com/world/2013/nov/29/jacob-zuma-accused-corruption-south-africa>.
11. *Jacob Zuma Cleared of Rape*, THE GUARDIAN (May 8, 2006), <http://www.theguardian.com/world/2006/may/08/aids.southafrica>.
12. The U.S. doctrine of standing requires that a plaintiff allege “personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Allen v. Wright*, 468 U.S. 737, 751 (1984). The entity in *Glenister II* purportedly lacked adequate power as opposed to having excess authority that could injure someone.
13. The U.S. political question doctrine renders a question before a court non-justiciable when there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it,” among other factors. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

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*Republic of South Africa*¹⁴—would likely be dismissed as a political question. But other U.S. Supreme Court cases have ruled on issues of separation of powers and corruption.

One U.S. Supreme Court case that actually links the scandals that enveloped President Richard M. Nixon (Watergate) and President William J. Clinton (Whitewater/Lewinsky) is *Morrison v. Olson*.¹⁵ Congress enacted Title VI of the Ethics in Government Act of 1978 (the “Independent Counsel Act”) because Nixon had fired Archibald Cox, the first special prosecutor investigating his involvement in the Watergate scandal, and it had been difficult to find another independent attorney to continue.¹⁶ Moreover, the second special prosecutor, Leon Jaworski, was also vulnerable to losing his position, though he eventually obtained the audiotapes that were the key to Nixon’s demise in the Supreme Court case of *United States v. Nixon*.¹⁷ After Watergate, the Independent Counsel Act authorized the U.S. Attorney General to initially investigate and report to a three-judge panel whether there was sufficient reason to appoint such a counsel, who could not be fired except for cause.¹⁸

In *Morrison*, the Court addressed the President’s power under Article II of the U.S. Constitution.¹⁹ The issue was whether the Independent Counsel position violated separation of powers, as the appointee did not fit neatly into the prosecutorial hierarchy of the executive branch and had significant unchecked power.²⁰

Article II of the U.S. Constitution differentiates between “inferior” and “principal” executive officers in the federal government.²¹ The President appoints principal officers upon the Senate’s advice and consent, which requires approval by a majority of the Senate.²² Principal officers also serve at the will of the President, who can generally remove them with or without cause, given the importance of an administration’s ability to work effectively on important matters.²³ Under Article II,

14. 2013 (1) SA 248 (CC).

15. 487 U.S. 654 (1988).

16. Carol Elder Bruce, *An Independent Counsel Law Needs to be Restored*, N.Y. TIMES: THE OPINION PAGES ROOM FOR DEBATE (June 13, 2012), <http://www.nytimes.com/roomfordebate/2012/06/13/did-any-good-come-of-watergate/an-independent-counsel-law-needs-to-be-restored>; Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST (Oct. 21, 1973), <http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>. Cox’s firing is similar to the ANC government’s decision to disband the powerful Scorpions anti-corruption unit in that Cox and the Scorpions were both removed by political foes being investigated for corruption or scandal. *Scorpions Stung: South Africa’s Special Crime-Busting Team May Be On Its Way Out*, THE ECONOMIST (May 8, 2008), <http://www.economist.com/node/11333160>.

17. 418 U.S. 683 (1974). This echoes the audiotapes controversy in the South African *Spy Tapes* case. See *Spy Tapes: Scorpions Boss Wanted to Charge Zuma*, MAIL & GUARDIAN (Sept. 28, 2014), <http://mg.co.za/article/2014-09-28-spy-tapes-scorpions-boss-wanted-to-charge-zuma-report>.

18. *Morrison*, 487 U.S. at 660–63, 661 n.3.

19. *Id.* at 659–60.

20. *Id.*

21. U.S. CONST. art. II, § 2; see also *Morrison*, 487 U.S. at 670–72.

22. U.S. CONST. art. II, § 2; see also *Morrison*, 487 U.S. at 670–72.

23. See *Morrison*, 487 U.S. at 688–90.

“Congress may . . . vest the [a]ppointment of . . . inferior [o]fficers . . . in the President . . . the Courts of Law, or in the Heads of Departments.”²⁴ A high-ranking member of the President’s Cabinet, such as the Secretary of Health and Human Services, would likely be an example of a principal officer.²⁵ By contrast, the United States Attorney for the Southern District of Iowa, who is under the supervision and domain of the U.S. Attorney General, would likely be deemed an inferior officer due to the position’s limited authority.²⁶

Under the Independent Counsel Act, the U.S. Attorney General did not exercise the same authority over the Independent Counsel that it exercised over U.S. Attorneys, and the Independent Counsel usually had just one target and virtually unlimited resources.²⁷ Moreover, members of the judicial branch, rather than the executive branch, selected the Independent Counsel.²⁸ The Supreme Court upheld the law based on several technical grounds and on the equitable need to have someone independent to investigate high-ranking officials.²⁹ The Court therefore decided the restrictions on the President’s ability to remove an Independent Counsel under the Independent Counsel Act were permitted and noted that there were other relatively independent agencies in existence.³⁰

Justice Antonin Scalia delivered a powerful lone dissent arguing that the Independent Counsel had the power of a principal officer under Article II and that the Independent Counsel Act’s appointment and removal mechanisms were not reconcilable with the three branches of government.³¹ Scalia wrote that the Independent Counsel was essentially outside the executive branch.³² Moreover, Scalia was concerned that unlike ordinary prosecutors, the Independent Counsel would have virtually unlimited funds to focus on one or two main targets.³³

The Independent Counsel Act subsequently became an issue during the Clinton presidency when Independent Counsel Kenneth Starr aggressively investigated both the Whitewater real estate deal and the allegations that Clinton had committed perjury about having sexual relations with then-White House intern Monica

24. U.S. CONST. art. II, § 2.

25. The Secretary of Health and Human Services is appointed by the President in accordance with the advice and consent procedure under Article II. See *The Executive Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/1600/executive-branch> (last visited Feb. 15, 2016).

26. *E.g.*, *United States v. Rijo*, 87 F. Supp. 2d 69, 70 (D. P.R. 2000) (“United States Attorneys . . . have consistently been held to be inferior officers . . .”).

27. See *Morrison*, 487 U.S. at 670–83.

28. *Id.* at 661, 677.

29. See *id.* at 696–97.

30. *Id.* at 687–97.

31. *Id.* at 697–734 (Scalia, J., dissenting).

32. *Id.* at 703, 719 (Scalia, J., dissenting).

33. *Id.* at 714 (Scalia, J., dissenting).

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Lewinsky.³⁴ A pending civil lawsuit by Paula Jones alleging that Clinton had sexually harassed her when she was a state employee during his tenure as Governor of Arkansas³⁵ opened the door to more Lewinsky evidence.³⁶ In *Clinton v. Jones*, the Supreme Court ruled that the Jones civil lawsuit could proceed despite Clinton's efforts to seek a stay or a form of immunity.³⁷ The Court determined that the lawsuit would not unduly interfere with the President's functions.³⁸ Unlike the sexual assault case in which Zuma was controversially acquitted,³⁹ however, no criminal prosecution was brought against Clinton for his alleged sexual overtures towards Jones.⁴⁰ In the end, Starr spent over forty million dollars in public funds and the U.S. Senate acquitted Clinton during impeachment proceedings.⁴¹ Clinton remains popular today,⁴² and Zuma's ANC remains dominant.⁴³ The Independent Counsel Act expired in 1999, and in retrospect, some liberal scholars believe, Scalia's dissent in *Morrison* was right.⁴⁴

Admittedly, there is a key distinction between the U.S. Supreme Court's analysis of the Independent Counsel Act and the anti-corruption entity at issue in *Glenister II*. One of the constitutional issues in *Morrison* was whether the Independent Counsel was too powerful.⁴⁵ By contrast, the issue in *Glenister II* was whether the entity was sufficiently strong or independent.⁴⁶ But both cases shed light on how their respective judiciaries have policed corruption.

34. See KEN GORMLEY, *THE DEATH OF AMERICAN VIRTUE: CLINTON VS. STARR* 213, 407 (2010).

35. See *Clinton v. Jones*, 520 U.S. 681 (1997).

36. See Peter Baker, *Clinton Denied Initiating Job Help for Lewinsky*, WASH. POST (Mar. 5, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/jones030598.htm>.

37. 520 U.S. at 705–06.

38. *Id.* at 708.

39. *S. Africa's Zuma Cleared of Rape*, BBC NEWS (May 8, 2006), <http://news.bbc.co.uk/2/hi/4750731.stm>.

40. See Josh Gerstein, *Clinton Eligible, Once Again, to Practice Law*, N.Y. SUN (Jan. 17, 2006), <http://www.nysun.com/national/clinton-eligible-once-again-to-practice-law/25965/>.

41. Naftali Bendavid & James Warren, *Hubbell Deals with Starr, Agrees to Plead Guilty to Cover-up Charge*, CHI. TRIB. (June 29, 1999), http://articles.chicagotribune.com/1999-06-29/news/9906290100_1_webster-hubbell-hillary-clinton-castle-grande.

42. See Matt Berman, *Bill Clinton is the Best Friend Democrats Have for 2014*, NAT'L J. (Mar. 12, 2014), <http://www.nationaljournal.com/politics/bill-clinton-is-the-best-friend-democrats-have-for-2014-20140312>.

43. See *Presidents of the African National Congress*, AFRICAN NAT'L CONGRESS, www.anc.org.za/show.php?id=3999 (last visited Feb. 15, 2016) (showing President Zuma's 2012 election to a second term ending in 2017).

44. See Tasha Vincent, *The Evolution of Witch Hunting?: The Life and Death of the Independent Counsel Act*, INFOPLEASE, <http://www.infoplease.com/spot/indepccounsel1.html> (last visited Feb. 15, 2016).

45. See *Morrison v. Olson*, 487 U.S. 654, 659–60 (1988).

46. 2011 (3) SA 347 (CC) at paras. 160, 163.

B. *Glenister II*

Several scholars have criticized the *Glenister II* majority's legal reasoning—but here the critics are wrong. This section will examine these criticisms and *Glenister II*'s likely legacy, especially in light of further judicial developments.

In *Glenister II*, the Constitutional Court addressed the independence of a new prosecutorial entity, the Hawks.⁴⁷ The Hawks were created because a powerful anti-corruption unit, known as the Scorpions—that had been located in the relatively independent National Prosecuting Authority⁴⁸—was disbanded just as it appeared to be preparing an indictment against Zuma for financial improprieties.⁴⁹ The Court ruled that the Hawks—who now came under the supervision of the Minister of Police—were not independent enough for predominantly two reasons: (1) the chances for government interference in their mission, and (2) the lack of meaningful job security.⁵⁰

The most controversial part of *Glenister II* was the Constitutional Court's emphasis on how various international conventions required a more independent anti-corruption agency.⁵¹ The Court specifically cited the United Nations (UN) Convention against Corruption,⁵² which states, “[e]ach State Party shall grant the body [tasked with preventing corruption] . . . the necessary independence . . . to carry out its . . . functions effectively and free from any undue influence.”⁵³ What transformed the issues in *Glenister II* into constitutional issues rather than international law and policy issues? The Court found that international law influenced how the relevant Bill of Rights provisions should be interpreted.⁵⁴ Thus, the majority ruled that the Hawks' lack of independence violated section 7 of the Constitution, because “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights,”⁵⁵ and

47. *Id.* at para. 160.

48. The National Prosecuting Authority was created by section 179 of the South African Constitution for the purpose of conducting criminal trials on behalf of the state. S. AFR. CONST., 1996, § 179.

49. See Mmanaledi Mataboge & Lionel Faull, *Scorpions Disbanding Unconstitutional*, MAIL & GUARDIAN (Mar. 18, 2011), <http://mg.co.za/article/2011-03-18-scorpions-disbanding-unconstitutional>; Wendell Roelf, *South Africa's Scorpion Crimefighters to be Disbanded*, REUTERS, (Feb. 12, 2008, 11:19 A.M.), <http://www.reuters.com/article/2008/02/12/us-safrica-scorpions-idUSL1223114320080212>. A Zuma confidant had already been convicted in a related case involving the arms scandal. Mataboge & Faull, *supra*.

50. See *Glenister II*, 2011 (3) SA 347 at para. 248. For example, even the Hawks' salaries were decided by the officials they might investigate. *Id.* at para. 227.

51. *Id.* at paras. 179–202.

52. *Id.* at para. 183.

53. G.A. Res. 58/4, annex, United Nations Convention Against Corruption, art. 6, ¶ 2 (adopted Oct. 31, 2003), https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. South Africa is a signatory to the Convention. *Glenister II*, 2011 (3) SA 347 at para. 85 & n.64 (Ngcobo, CJ., dissenting).

54. *Glenister II*, 2011 (3) SA 347 at paras. 192–94, 201–02.

55. *Id.* at paras. 166–78, 194, 200 (quoting S. AFR. CONST., 1996, § 7(2)).

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noted that corruption undermines democracy, dignity, equality, freedom, and the rule of law.⁵⁶

According to the *Glenister II* dissent, however, the establishment of the Hawks was a parliamentary policy matter that the Court could not second-guess if the entity met basic elements of independence.⁵⁷ The dissent maintained that whether the Hawks were as independent as the Scorpions was irrelevant and that the focus should be on rationality, not retrogression (a comparison with the prior institution).⁵⁸ Moreover, international law did not bind the government because the conventions were not self-executing.⁵⁹ The dissent further argued that the majority misinterpreted international law since international law supposedly did not require the anti-corruption entity to have as much independence as the majority had ruled.⁶⁰ It was a rare, closely divided, 5–4 decision, akin to the U.S. Supreme Court’s most controversial cases.⁶¹

Scholars like Samuel Issacharoff,⁶² Theunis Roux,⁶³ and Ziyad Motala⁶⁴ have criticized the *Glenister II* Court’s purportedly confused reasoning and reliance on international law. Motala virtually accuses the Court of lawlessness.⁶⁵ Pierre de Vos,⁶⁶ George Devenish,⁶⁷ and Justice Edwin Cameron⁶⁸ have authored defenses. Determining the correctness of the criticism requires an analysis of how international law was used in *Glenister II*. One of the most detailed scholarly examinations is by Juha Tuovinen, who argues that both the majority and the dissent were wrong.⁶⁹ First, a little background.

56. *Id.* at para. 170.

57. *Id.* at paras. 65–68 (Ngcobo, CJ., dissenting).

58. *Id.* at paras. 59, 68, 73 (Ngcobo, CJ., dissenting). The majority disagreed by pointing out how retrogression affected public perceptions of corruption in the democracy. *Id.* at paras. 209–10.

59. *Id.* at paras. 85–99 (Ngcobo, CJ., dissenting).

60. *Id.* at paras. 117–24 (Ngcobo, CJ., dissenting).

61. *See* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

62. Samuel Issacharoff, *The Democratic Risk to Democratic Transitions*, 5 CONST. CT. REV. 1, 27–30 (2013).

63. Theunis Roux, *The South African Constitutional Court’s Democratic Rights Jurisprudence*, 5 CONST. CT. REV. 33, 69–70 (2013).

64. Ziyad Motala, *Divination Through a Strange Lens*, TIMES LIVE (Mar. 26, 2011), <http://www.timeslive.co.za/opinion/columnists/2011/03/26/divination-through-a-strange-lens>.

65. *Id.*

66. Pierre de Vos, *How Not to Criticise a Court Judgment*, CONSTITUTIONALLY SPEAKING (Mar. 28, 2011), <http://constitutionallyspeaking.co.za/how-not-to-criticise-a-court-judgment/>.

67. George Devenish, *The Scorpions vs The Hawks – A Royal Battle*, IFAISA (Aug. 11, 2010), <http://accountabilitynow.org.za/scorpions-vs-hawks-royal-battle/>.

68. Edwin Cameron, *Constitutionalism, Rights, and International Law: The Glenister Decision*, 23 DUKE J. COMP. & INT’L L. 389 (2013).

69. Juha Tuovinen, *The Role of International Law in Constitutional Adjudication: Glenister v President of the Republic of South Africa*, 130 SALJ 661 (2013).

The South African Constitution is dualist in that the President may enter into treaties on behalf of the nation, but the treaties are not self-executing.⁷⁰ The treaties must be ratified by Parliament, and implementing legislation makes them binding law.⁷¹ South Africa also has a unique constitutional provision, section 39, which specifies that “[w]hen interpreting the Bill of Rights, a court . . . must consider international law; and . . . may consider foreign law.”⁷² Thus, international law can be binding statutory law in South Africa or instead, it can provide interpretive guidance regarding the Constitution. These two functions differ, especially since the interpretive role has a significant discretionary and constitutional component.

Tuovinen argues that the *Glenister II* majority failed to make clear how they used international law to reach their decision.⁷³ For example, the majority, jointly authored by Justice Cameron and Deputy Chief Justice Dikgang Moseneke, confusingly used different terms to describe the impact of international law.⁷⁴ Moreover, neither international law nor South African legislation explicitly requires a fully autonomous and independent anti-corruption agency.⁷⁵ In addition, South Africa’s executive branch signed and approved certain major international anti-corruption conventions, but they had not apparently been ratified by Parliament or enacted into domestic law.⁷⁶ These are powerful arguments.

Tuovinen also criticizes the dissent for its view that these international conventions have virtually no impact and that establishing the Hawks was purely a domestic parliamentary policy decision.⁷⁷ He argues that the dissent’s position is inconsistent with the Constitution’s discussion of the potentially “binding” or interpretive impact of international law.⁷⁸ In the end, he advocates for the Court to adopt a dialogical approach in which international law is fully considered and the substantive reasons for allowing it to influence constitutional law are fleshed out comprehensively.⁷⁹ Tuovinen believes that both the majority and the dissent failed to do this.⁸⁰

While the majority’s explanations of how it relied on international law vary in degree of merit, Tuovinen goes too far in saying the majority failed to engage in

70. S. AFR. CONST., 1996, § 231.

71. *Id.* This is similar to many countries, including the United States.

72. S. AFR. CONST., 1996, § 39(1)(b)–(c).

73. Tuovinen, *supra* note 69, at 664–67. For more of Tuovinen’s scholarly examination of the *Glenister II* decision, see Juha Tuovinen, *What to Do with International Law? Three Flaws in Glenister*, 5 CONST. CT. REV. 434 (2013).

74. Tuovinen, *supra* note 69, at 665–66.

75. *Id.* at 662.

76. *Id.* at 662–66.

77. *See id.* at 667–69; *see also Glenister II*, 2011 (3) SA 347 (CC) at paras. 99–103 (Ngcobo, CJ., dissenting).

78. *See* Tuovinen, *supra* note 69, at 668–69, 671–72.

79. *See id.* at 671–72.

80. *Id.* at 669, 671–72. Tuovinen acknowledges, however, that the varied anti-corruption conventions at issue require South Africa to have an anti-corruption entity with some level of independence. *Id.* at 662.

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sufficient substantive reasoning.⁸¹ I view the Court's use of international law as falling into the category of clarifying the meaning of various other constitutional provisions. Indeed, the majority made a strong and comprehensive argument about why international law should be constitutionally influential.⁸²

For example, the Constitutional Court pointed out that when South Africa signed the UN Convention against Corruption, then-Minister for the Public Service and Administration Geraldine J. Fraser-Moleketi said:

Corruption is a common feature in all political systems, despite the differences that may exist in their governing philosophies or their geography. Nation-states are increasingly aware that corruption presents a serious threat to their core principles and values, and hinders social and economic development. As a result, there has been a growing acceptance of the need to address the problem in a coordinated, comprehensive and sustainable way.⁸³

If anything, the Minister's assertions amount to drastic understatement given the scope of the governmental corruption problem. The *New York Times Magazine* even ran a feature story on corruption in South Africa and the country's new female Public Protector.⁸⁴ South Africa is also a signatory to the African Union Convention (which condemns corruption) and to the Southern African Development Community Protocol against Corruption.⁸⁵

South Africa's own Prevention and Combating of Corrupt Activities Act is designed to implement international conventions such as the UN Convention against Corruption.⁸⁶ The Constitutional Court eventually described four specific parts of the South African Constitution that demonstrate that key anti-corruption international law principles are embraced in South African law.⁸⁷

The Court then linked international law and the Constitution even more explicitly:

81. Another scholar agrees. See Bonita Meyersfeld, *Domesticating International Standards: The Direction of International Human Rights Law in South Africa*, 5 CONST. CT. REV. 398, 407 (2013) (approving of the Court's statement that it is "appropriating" international law). *But see* Franziska Sucker, *Approval of an International Treaty in Parliament: How Does Section 231(2) 'Bind the Republic'?*, 5 CONST. CT. REV. 416, 422–23, 429–33 (2013) (critiquing *Glenister II*'s lack of substantive reasoning).

82. See *Glenister II*, 2011 (3) SA 347 at paras. 170–202. The more than twenty paragraphs of analysis regarding the relationship between international law and the Constitution certainly satisfy the need for substantive reasoning.

83. *Id.* at para. 168 (quoting Geraldine J. Fraser-Moleketi, Minister for the Public Service and Administration South Africa, Opening Statement on the Occasion of the Signing Ceremony of the UN Convention against Corruption (Dec. 9, 2003), http://www.un.org/webcast/merida/statements/safri_2031209en.htm).

84. Alexis Okeowo, *Can Thulisile Madonsela Save South Africa From Itself?*, N.Y. TIMES MAG. (June 16, 2015), <http://nyti.ms/1ejRMyy>.

85. *Glenister II*, 2011 (3) SA 347 at para. 169 & nn.137–38.

86. *Id.* at para. 170–71.

87. *Id.* at para. 179 (citing S. AFR. CONST., 1996, § 39(1)(b); *id.* §§ 231–233).

The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere. In understanding how it does so, the starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the state and its organs “to provide appropriate protection to everyone through laws and structures designed to afford such protection.” Implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective.⁸⁸

The Court further elaborated:

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.⁸⁹

This reasoning repudiates Tuovinen’s contention that the Court’s majority lacked sufficient “substantive reasoning” to justify its strict anti-corruption interpretation of international law and the Constitution.⁹⁰ Additionally, the majority provided forty-three paragraphs on the Hawks’ deficiencies.⁹¹ This is more than adequate substantive reasoning.

C. *A Pragmatic Legal Coda*

I add a pragmatic legal argument in favor of *Glenister II*: The majority’s approach may be the only way to preserve democracy in a dominant party state, and preserving democracy is the essence of the South African Constitution.⁹² Without the protections

88. *Id.* at para. 189 (quoting *Carmichele v. Minister of Safety & Sec.* 2001 (4) SA 938 (CC) at para. 44).

89. *Id.* at para. 194.

90. Tuovinen, *supra* note 69, at 666–67. An article authored by Justice Cameron provided further rejoinders. Cameron, *supra* note 68.

91. *Glenister II*, 2011 (3) SA 347 at paras. 208–51. The vulnerability of the Hawks is not a mere abstraction. See Masego Rahlaga, *Hawks Boss’s Unlawful Suspension Overturned*, EYEWITNESS NEWS (Jan. 23, 2015), <http://ewn.co.za/2015/01/23/Anwa-Dramats-unlawful-suspension-overturned>.

92. See generally MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES (2009) (discussing the Court’s interpretive approach of “transformative pragmatism”).

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of a fully independent entity, there is no reason to assume that the ANC will refrain from engaging in more drastic actions to curtail opposition, including that of the judicial branch.⁹³ I say this with no view that the opposition parties are better, but with the realization that absolute power can corrupt absolutely. *Glenister II* is already a bellwether case that will help influence the various South African courts addressing other corruption issues.⁹⁴ The Constitutional Court's insistence on the creation of a truly independent agency is reminiscent of the U.S. Supreme Court's support for the practical necessity of a Bank of the United States in *McCulloch v. Maryland*.⁹⁵ In each case, the institution was not explicitly authorized by the respective constitution.

Numerous South African corruption cases are still pending. In late September of 2014, the South Gauteng High Court in *Nkabinde v. Judicial Service Commission* ruled that the special judicial services tribunal investigating Judge Hlophe's actions was legitimate and could continue, contrary to the views and desires of Hlophe and the two Constitutional Court Justices that Hlophe contacted.⁹⁶ The Judicial Service Commission had originally dismissed a complaint against Hlophe in 2009.⁹⁷ Three years later, however, the Commission decided to reinvestigate the matter pursuant to an amended statute.⁹⁸ The High Court rejected arguments that Hlophe was being subjected to illegal retroactive punishment based on the new statutory provisions.⁹⁹ The court said the statutory changes were mainly procedural and did not alter Hlophe's substantive rights.¹⁰⁰ The court also rejected the argument that the complaint in the earlier proceedings did not comply with the requirements of the amended statute.¹⁰¹ One can see how the High Court was fighting a kind of legal formalism—like that found in the *Glenister II* dissent—and how it was unwilling to countenance easy excuses to avoid examining corruption. Unfortunately, the Hlophe matter will be pursued to the Supreme Court of Appeal,¹⁰² meaning the public must continue to wait and have Judge Hlophe serve under a cloud of uncertainty. But the

93. See, e.g., Karl Beck, *South Africa: Democracy, Rule of Law, and the Future*, FREEDOM HOUSE (Mar. 29, 2012), <https://freedomhouse.org/blog/south-africa-democracy-rule-law-and-future> (discussing the ANC's threats to put tighter controls on the judiciary).

94. See generally *Helen Suzman Found. v. President of the Republic of S. Afr. (Glenister III)* 2015 (2) SA 1 (CC).

95. 17 U.S. 316 (1819).

96. 2014 (12) BCLR 1477 (GJ) at para. 121. It would seem that these Justices should have professional ethical obligations to cooperate fully with the investigation.

97. *Id.* at para. 30.

98. *Id.* at para. 37.

99. *Id.* at para. 121.

100. *Id.*

101. *Id.* at para. 122.

102. Rabkin, *supra* note 3.

right to appeal is a price of justice. It is distressing, though, that the two Constitutional Court Justices who were involved support the appeal.¹⁰³

The Constitutional Court has also decided *Glenister III*.¹⁰⁴ After *Glenister II*, Parliament modified the statute governing the Hawks, but applicant Hugh Glenister and the Helen Suzman Foundation, using much of *Glenister II*'s reasoning, argued that this new entity is still not independent enough.¹⁰⁵ In *Glenister III*, the Constitutional Court agreed that the power of the Minister of Police to renew Hawk employees' positions and to suspend Hawk employees without pay for disciplinary reasons compromised the entity's independence.¹⁰⁶

Even the *Spy Tapes* case, which may reveal why the Scorpions' investigation into Zuma's financial dealings was halted, has not fully concluded, though the Democratic Alliance finally got the tapes.¹⁰⁷ There are apparently court limitations on the tapes' usage.¹⁰⁸ Nonetheless, the Democratic Alliance is now relying on new information to seek reexamination of the decision not to charge Zuma.¹⁰⁹ Interestingly, the National Prosecuting Authority opposes this request.¹¹⁰

III. CONCLUSION

South Africa has been fortunate that higher courts have been brave, and that judicial credibility does not yet seem too fragile to confront corruption, despite attacks from the ANC. Indeed, a doctrinal paradox is that the South African courts have, in these areas, apparently created greater judicial authority (just by adjudicating cases, as opposed to labeling them a political question or dismissing on standing grounds) than exists in the U.S. system, where the judiciary is often called "activist" in the extreme.¹¹¹ This shows that South African courts are taking a significant risk.

Hopefully a stronger South African anti-corruption agency can reduce pressure on the courts. It is clear that the Constitutional Court's reliance on international law has been vital in bolstering the judicial battle against corruption and in limiting ANC power. Great concerns, however, remain, as shown by the failure of the Constitutional Court Justices to fully cooperate in the seemingly never-ending Judge

103. *Id.*; see also Franny Rabkin, *Law Matters: The Other Side of the Bench*, BUS. DAY (Jan. 22, 2015), <http://www.bdlive.co.za/opinion/columnists/2015/01/22/law-matters-the-other-side-of-the-bench>.

104. 2015 (2) SA 1 (CC).

105. *Id.* at paras. 4–7, 82, 91.

106. *Id.* at paras. 82–92.

107. See *Democratic All. v. Acting Nat'l Dir. of Pub. Prosecutions* 2012 (3) SA 486 (SCA) at paras. 2–3, 33, 52.

108. See *id.* at para. 52; see also Stephen Grootes, *DA to Return to Court Over 'Spy Tapes'*, EYEWITNESS NEWS (Sept. 22, 2014), <http://ewn.co.za/2014/09/22/DA-to-return-to-court-over-spy-tapes>.

109. Stephen Grootes, *Spy Tapes: DA Gearing up to get Zuma Prosecuted for Corruption*, EYEWITNESS NEWS (Mar. 12, 2014), <http://ewn.co.za/2014/12/03/Spy-tapes-DA-confident-Zuma-guilty-of-corruption>.

110. *Zuma Spy Tapes Corruption Case to go Back to Court*, MAIL & GUARDIAN (Feb. 9, 2015), <http://mg.co.za/article/2015-02-09-zuma-spy-tapes-corruption-case-to-go-back-to-court>.

111. Adam Liptak, *How Activist is the Supreme Court?*, N.Y. TIMES, Oct. 13, 2013, at SR4.

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Hlophe controversy.¹¹² There are also disputes about the money that Zuma has spent “renovating” his mansion¹¹³ and allegations of a cover-up following the Marikana massacre,¹¹⁴ in which police tragically killed thirty-four miners during a “wildcat” strike.¹¹⁵ In the United States, the death of the Independent Counsel Act shows that the American legal system is also struggling to figure out how to deal with high-level corruption, though international law is far less relevant there and the problem is far less serious. U.S. courts are nonetheless often criticized as being undemocratic.¹¹⁶ But in South Africa, the Constitutional Court is key to promoting real democracy and negating corruption by limiting the dominant party.

112. Rabkin, *supra* note 103.

113. Thulani Gqirana, *Zuma Doesn't Have to Pay Back a Cent – Report*, MAIL & GUARDIAN (May 29, 2015), <http://mg.co.za/article/2015-05-29-zuma-doesnt-have-to-pay-back-a-cent-report>.

114. Niren Tolsi, *SAPS Rot Runs Deep in Marikana Cover-up*, MAIL & GUARDIAN (July 2, 2015), <http://mg.co.za/article/2015-07-02-saps-rot-runs-deep-in-marikana-cover-up>.

115. Charlayne Hunter-Gault, *A Massacre and A Test for South Africa*, THE NEW YORKER (Aug. 21, 2012), <http://www.newyorker.com/news/news-desk/a-massacre-and-a-test-for-south-africa>.

116. *See, e.g.*, Larry Kramer, *The Supreme Court's Power Has Become Excessive*, N.Y. TIMES: THE OPINION PAGES ROOM FOR DEBATE, <http://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-courts-power-has-become-excessive> (last updated July 6, 2015 5:05 PM).