

Tactical Adjudication: How the Constitutional Court of South Africa Survived its First Decade

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1. Introduction

In his review of Nicola Lacey's biography of H.L.A. Hart,¹ Frederick Schauer lists as one of the achievements of Lacey's account its sensitivity to the advantages and disadvantages of the philosophical turn in Anglo-American jurisprudence.² On the one hand, the publication of the first edition of *The Concept of Law*³ in 1961 ushered in a golden age in which our understanding of such issues as the relationship between law and morality and the nature of law's claim to authority has become considerably more sophisticated. On the other hand, the ensuing Dworkinian assault on legal positivism, and its protracted defence by Joseph Raz and others, has tended to drown out other fields of jurisprudential inquiry less compatible with a purely philosophical approach to law. Although the same period saw the rise of Critical Legal Studies (CLS), with its more empirical bent, this line of inquiry is now generally regarded as having been exhausted, or at least as having bifurcated into the more specific concerns of critical race theory and feminist legal studies.⁴

In the result, the field of jurisprudence as it exists today is preoccupied with a fairly limited set of concerns, most of which have little relevance to the study of actual legal systems.⁵ Indeed, to suggest that jurisprudence *should* be concerned with the study of actual legal systems is a proposition that now requires some defending. For many scholars in the field, the proper role of jurisprudence is to stand above such matters to reflect on the context-independent, essential nature of law. Jurisprudence post-CLS is in this sense both an *isolated* and *isolationist* discipline. Isolated because the philosophical

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¹ '(Re)taking Hart' (2006) 119 *Harvard Law Review* 852, reviewing Nicola Lacey *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford UP, 2004).

² *Ibid* at 882.

³ First edition 1961, second edition (Oxford: Clarendon Press, 1994).

⁴ See Brian Bix *Jurisprudence: Theory and Context* (London: Sweet & Maxwell, 1996) 182; Denise Meyerson *Understanding Jurisprudence* (Routledge-Cavendish, 2007) 102.

⁵ For a comprehensive introduction, see Meyerson (*supra*).

turn has taken jurisprudence quite far away from the concerns of the other academic disciplines through which law has traditionally been analysed (sociology, political science, economics and anthropology), and isolationist because jurisprudence (or legal philosophy as many now prefer to call it⁶), deliberately seeks to remove itself from the practical study of law in action.

One of the consequences of jurisprudence's isolationist trajectory is that routine legal academic writing – by which I mean the systematizing, critically reflective kind of scholarship that is the bread and butter of most legal academics – has not shown a similar degree of theoretical development. It is thus very rare, for example, for a journal article in law to begin with a statement of the research methodology used. For most legal academics, it seems, such things are best left to inference – either from the way the law is presented, or from the standard methodology used in the journal in which the article is published.

In this essay I hope to demonstrate that it is possible to overcome the theory/practice divide in legal studies by treating jurisprudence as a theoretical field from which fresh legal research methodologies may be derived. As my title suggests, I intend to pursue this goal through an examination of the record of the South African Constitutional Court ('the CCSA'). The choice of this court as the object of study is mainly a matter of convenience. There are nevertheless two reasons why the record of the CCSA is particularly amenable to the type of project attempted in this essay: its commitment to reasoned adjudication, and its reputation as one of the most successful of the post-1990 constitutional courts.

The next section begins by trying to substantiate my point about the isolationist trajectory of contemporary jurisprudence. In brief, the argument is that the attack on legal positivism and its defence functions something like a black hole in legal studies, pulling its participants into an abstract discussion that sheds very little light on our understanding of actual legal systems. Although the methodological path cleared by CLS, and Duncan Kennedy in particular, promised to provide a way out, this approach's pursuit of the Holy Grail of ideological adjudication ultimately led to a dead end. Faced with this situation, what legal studies needs is the perspective offered by other academic disciplines, such as political science and sociology. It is only by appreciating the radically different premises about the nature of law and legal decision-making from which these disciplines depart that the distinct research methodologies open to legal academics can be thrown into stark relief.

⁶ Cf Meyerson (supra): 'Jurisprudence is a branch of philosophy – the branch which deals with philosophical questions about law' (at 1).

In section 3 of this essay I draw on this theoretical discussion to sketch an alternative research methodology for the study of courts in transitional societies, and new democracies in particular. One of the shortcomings of current legal theory, I argue, is that it has no way of accounting for long-term, goal-directed behaviour on the part of a court committed to the establishment of constitutional democracy. Although Posnerian pragmatism comes closest to explaining how a court with such a commitment behaves, Posner himself stops short of providing a fully fledged theory of adjudication, and his analysis is in any case focused on the US Supreme Court, with its quite different history and concerns. In the absence of grand theory, this section concludes, the analysis must necessarily proceed quite cautiously, paying close attention to the way the CCSA exploits doctrinal gaps in politically controversial decisions to manage its relationship with the political branches.

Section 4 applies this methodology in an analysis of the CCSA's record over the last ten years. I identify five adjudicative strategies in particular that the CCSA can be seen to have been deploying in different judgments across different areas of law. Each strategy, I argue, is related in some way to the CCSA's overriding goal of ensuring the establishment of constitutional democracy. I call the distinctive approach of the CCSA in pursuit of this goal 'tactical adjudication'.

2. 'The current state of jurisprudence'

The observation by Schauer with which this essay began is indicative of a certain frustration on his part about 'the current state of jurisprudence'.⁷ The substance of his concern is that the Hartian philosophical turn has made debates in jurisprudence relatively independent of the study of actual legal systems. Thus, when an inclusive positivist,⁸ say, concedes the point that a supreme-law constitution may make moral considerations part of the rules to be applied in a particular legal system, the nod in the direction of empiricism is just that – a temporary concession to 'the world out there' that need detain legal philosophers only momentarily in their search for the essential nature of law. Equally, the exclusive positivist's use of private international law as an analogy for what really happens (*pace* Dworkin and the inclusive positivists)

⁷ At 882.

⁸ On the difference between inclusive and exclusive positivism, see Jules Coleman *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford UP, 2001) 103-119.

when judges are required by a rule of recognition to apply moral considerations is presented as a single telling example sufficient in itself to rescue the 'separability thesis' in its strong form.⁹ Of course, the limited use of empirical examples in this way is the accepted methodology of philosophy. The point that Schauer makes, however, is not that jurisprudence conducted in this fashion is methodologically flawed, but that it is 'too narrowly focused on a certain kind of analytic philosophy'.¹⁰ For him, Lacey's book is a timely reminder that the philosophical turn in Anglo-American jurisprudence was largely a fortuitous matter, contingent on Hart's appointment to the Chair of Jurisprudence at the University of Oxford. Hart's achievement was to bring to the study of jurisprudence the sort of analytic rigour that he admired in the ordinary language philosophy of his colleague J. L. Austin. But there was no necessary reason for the path taken by jurisprudence after this point. Rather, what happened, as Lacey's study demonstrates, was a classic case of an elite institution reproducing itself.¹¹

Standing apart from, and in many ways reacting against, the trajectory of Anglo-American jurisprudence after 1961 was the Critical Legal Studies movement, with its mainly American centre of gravity.¹² In contrast to analytic legal philosophy, the primary concern of this group of scholars was the role of ideology in adjudication – the role, that is, of totalising narratives about social relations, presented or intuited as incontestably true but in reality based on the judge's class, gender or race interests.¹³ At its zenith, in Duncan Kennedy's *A Critique of Adjudication (Fin de Siècle)*,¹⁴ the CLS notion of ideology is defined as 'a universalization project of an ideological intelligentsia that sees itself as acting "for" a group with interests in conflict with those of other groups'.¹⁵

⁹ See Joseph Raz *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 37-52. Coleman (supra) 152.

¹⁰ Schauer (supra) 882.

¹¹ The inner circle of Dworkin and Raz were respectively Hart's successors to the Chair of Jurisprudence. Among the outer circle, Neil MacCormick, Brian Barry, John Finnis and Wil Waluchow were all either undergraduate or postgraduate students of Hart. See Lacey (supra) 158. See further Scott Veitch 'Ronald Dworkin and the Power of Ideas' in Francois du Bois (ed) *The Practice of Integrity: Reflections on Ronald Dworkin and South African Law* (Cape Town: Juta: 2004) 44.

¹² Alan Hunt *Explorations in Law and Society: Towards a Constitutive Theory of Law* (New York: Routledge, 1993) 211-226.

¹³ The influence of judicial world view on adjudication is not something that is entirely missing from liberal legal theory, but rather something that is differently theorised. Hartian positivism, for example, takes account of the role of judicial world view and policy preferences at the point at which the law 'runs out' (Hart (supra) 121-144). However, in legal liberalism, the influence of judicial world view and policy preferences is assumed to be relatively dispersed, and never theorised as a collective or group world view (ideology) capable of exercising a determinate, interest-based influence on the development of legal rules over time.

¹⁴ Cambridge, MA: Harvard UP, 1997.

¹⁵ Ibid at 39.

American appellate judges, in Kennedy's view, are either liberal or conservative ideologues in this sense, and 'work' with varying degrees of commitment and skill to mould the legal materials to reach an ideologically preferred result.¹⁶

That rule-sceptical view of adjudication, of course, can be related to one of the principal debates in analytic legal philosophy over the way judges decide 'hard cases'.¹⁷ But Kennedy's approach is methodologically quite different from that of analytic legal philosophy. Unlike Dworkin, it is not Kennedy's project to assert that judges *should* adjudicate in a particular way, and unlike Hart (in his very tangential consideration of adjudication) Kennedy does not argue that it is an inescapable conceptual fact about law – about legal systems everywhere – that judges adjudicate in the way he describes. Rather, Kennedy's project is to convince his readers, by reference to case law and to commonly known features of the American legal system, that his characterisation of the way judges in appellate courts in the United States behave is descriptively accurate. Methodologically, therefore, Kennedy cannot (and does not attempt to) confront either of the two dominant schools in liberal legalism head on. Rather, his project is to shift the terrain of inquiry away from analytic legal philosophy towards a distinctively legal (and lawyerly) investigation of the work that judges of a particular rank in a particular jurisdiction actually do.

There is something quite ironic about this difference in methodological approach since it is the decidedly more rule-sceptical members of the CLS movement who end up staking out judicial rule-making as their chosen terrain.¹⁸ Nevertheless, the distinguishing characteristic of all CLS scholars – despite their many differences – is their close attention to the rhetoric of legal texts. It is not surprising, therefore, that CLS should have an affinity with literary theory, and particularly the Derridean, deconstructive turn in

¹⁶ *Ibid* at 157-179.

¹⁷ Dworkin's assault on legal positivism began, after all, with an assault on Hart's conception of rules. See Dworkin 'The Model of Rules I' in *Taking Rights Seriously* (Cambridge, MA: Harvard UP, 1977) (essay first published in 1967). Not just this, but one of the enduring points of conflict between the Dworkinian approach and legal positivism has been over the very definition of jurisprudence, with Dworkin contending that jurisprudence is an interpretive enterprise that can be modelled on how judges interpret legal texts, and Joseph Raz equally forcefully contending that Dworkin's project is limited, and does not provide a theory of law at all. See Joseph Raz 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in Jules Coleman (ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* Oxford UP, 2001) 1, 37.

¹⁸ 'Ironic' but not contradictory because, of course, in order to show that rules don't really bind one has to show them not binding.

continental philosophy.¹⁹ It is also not surprising that, on the whole, members of the CLS movement were not professional legal philosophers, but law professors, who plied their trade teaching students to understand the rules of the legal systems they elsewhere argued were ideologically constructed.²⁰

Although CLS is now generally taken to have run its course, it has left behind an approach to law that stands apart from the methodology of analytic legal philosophy.²¹ The enduring achievement of this movement, for all the derision now heaped upon it, is that it demonstrated that jurisprudence could be empirical, not just in the sociological sense of that term, but in a specifically legal sense, i.e. by treating legal texts, and in particular reasoned judgments, as the raw material from which to construct a theory of adjudication. To the extent that the objectivity of this methodology has been called into question by Dworkin's interpretive approach, the retort must be that CLS's descriptive account of judges in action is by some degree of magnitude more accurate than Dworkin's normative theorising about a hypothetical judicial Hercules.

The great failing of CLS, of course, as a purportedly empirical project, was its pre-commitment to discovering the role of ideology in adjudication. Rather than hypothesizing the liberal legal proposition that ideology is relevant to adjudication only at the margins, and then seeking to disprove it, CLS set out to make a positive case for ideological adjudication by the not very scientific method of piling up examples. When coupled with the charge of interpretive bias, CLS proved incapable of convincing the sceptics of the correctness of its view. To the extent that it survives at all, the CLS approach is today identified with a certain knee-jerk anti-establishmentarianism, a view that is compounded by some of its remaining adherents' seemingly uncritical, sexier-than-thou embrace of continental philosophy.

All of this leaves legal studies, seen as an umbrella field encompassing both legal philosophy and the study of actual legal systems, at something of an impasse. On the one hand, the abstract theoretical work of professional legal philosophers, whether in the analytic or continental tradition, proceeds apace, with each passing year filling the pages of specialist journals with ever more inaccessible musings on the essential nature of law. On the other hand, mainstream legal scholarship, whose function it is to systematise and process the massive primary-rule output of modern legal systems, proceeds more or

¹⁹ See Stanley Fish 'Working on the Chain Gang: Interpretation in Law and Literature' (1982) 60 *Texas LR* 551, Jane B Baron and Julia Epstein 'Language and the Law: Literature, Narrative, and Legal Theory' in Kairys (supra) 662.

²⁰ The classic article is Duncan Kennedy 'Legal Education as Training for Hierarchy' in David Kairys (ed) *The Politics of Law: A Progressive Critique* 3ed (Basic Books, 1998) 54.

²¹ Which is not to suggest that there is not considerable disagreement over the latter, see Coleman (supra).

less 'atheoretically' (if not anti-theoretically) to do its work. In this literature, to be sure, some crude form of legal positivism reigns supreme, with the law discovered according to its authoritative source and statements of what the law *is* carefully distinguished from what the author, very respectfully, submits it *ought* to be. But rather than the impression of an academic calling being pursued, one is left with the image of an army of ants pushing grains of sand up a hill. Is it really the case that sophisticated theorising about law is the preserve of other disciplines? And if so, why should the term 'jurisprudence' be confined to legal philosophy and not extended to the other academic disciplines through which law has traditionally been analysed?

Before Hart, as Schauer notes,²² jurisprudence was the preserve of not particularly philosophically minded lawyers writing in general terms about the practical discipline they knew best. Hart's predecessor in the Chair of Jurisprudence, Arthur Goodhart, and his early protagonist in the debate over law and morality, Lon Fuller, are both described in Lacey's book (and Schauer's review) in such terms.²³ If the philosophical turn in Anglo-American jurisprudence has taught us one thing, it is that this sort of homespun theorising about law won't do. The discipline of legal studies does need to become methodologically more rigorous, but it remains an open question whether the route suggested by analytic legal philosophy is the best way of achieving this.

There are two obvious places – apart from analytic philosophy – to begin looking for greater methodological rigour in legal studies: the first, as I have intimated, is the methodology of CLS, albeit stripped of its concern to make out a positive case for ideological adjudication. The second is the other main academic discipline through which judicial behaviour has traditionally been analysed – political science. What distinguishes the methods employed by this discipline is their outsider perspective, i.e. the fact that, generally speaking, scholars in political science are not trained lawyers. Instead, political scientists come to the study of law like unreconstructed anthropologists – with a curiosity to understand lawyers' strange tribal practices. This outsider perspective frees political scientists from the parochial nature of lawyers' in-house concerns, but at the same time inhibits their ability to understand the functioning of legal rules on their own terms.

In the United States, there is a long tradition in political science of studying the behaviour of courts, particularly the US Supreme Court. In recent years, this literature has turned its attention to the role of courts in

²² Schauer (supra) 866-68.

²³ Lacey (supra) 149; Schauer (supra) 866-68.

transitional societies and, in particular, their role in the consolidation of democracy.²⁴ At its most elaborate, this type of study assesses the decisions of a single court with the aim of showing how the court – viewed as a political actor – pursues a determinate strategy over time. Typically, that strategy is seen as being the enforcement of the court’s own policy preferences.²⁵ The sophistication of the approach comes in its theorisation of how courts sacrifice the enforcement of certain of their own policy preferences in the short term so as to build the institutional legitimacy to enforce other policy preferences over the longer term.²⁶ Thus, each decision is analysed according to whether the policy preference of the court fell within the ‘tolerance interval’ of the political branches and, if not, whether the policy preference was nevertheless enforced and what the consequences of this were.

For the academic lawyer, the first thing that strikes one about this account of adjudication is its extreme rule-scepticism.²⁷ The method assumes the non-bindingness of legal rules, and thereafter seeks to test various hypotheses about how courts manoeuvre to achieve their political goals. Even the most rule-sceptical member of the CLS movement, by contrast, conceded that legal rules were part of the game, and as such part of the raw material that had to be manipulated to achieve determinate results. Political science accounts of adjudication do not in the end, therefore, present their truth claims in a form that is capable of persuading an academic lawyer. Nevertheless, what endures from such accounts is their conception of courts as strategic actors, not in the CLS sense of attempting to further the ‘universalization project of an ideological intelligentsia’, but in the political science sense of courts as political institutions capable of pursuing a strategic objective over time. It is this idea that I seek to utilise in the methodology introduced in the next section.

²⁴ Lee Epstein, Olga Shvetsova and Jack Knight, ‘The Role of Constitutional Courts in the Establishment of Democratic Systems of Government’ (2001) 35 *Law and Society Review* 117; Siri Gloppen, Roberto Gargarella & Elin Skaar (eds) *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (2004).

²⁵ See Jack Knight and Lee Epstein ‘On the Struggle for Judicial Supremacy’ (1996) 30 *Law & Society Review* 87;

²⁶ Once again there are similarities between this approach and the concerns of CLS, particularly in respect of strategic behaviour, with the main difference being that political science (in this case) takes as its unit of analysis the court as a whole, rather than individual judges.

²⁷ I have read one, well-respected political science PhD on the work of the CCSA that used the media summaries provided of its judgments as the sole source of information on the cases discussed.

3. Methodology

The chosen subject matter for this study is the Constitutional Court of South Africa ('the CCSA'). The immediate reasons for this choice, as I have said, are largely circumstantial. Nevertheless, for the legal scholar interested in understanding judicial behaviour, the CCSA is a compelling object of study, for two main reasons. First, the CCSA – unlike some other courts in new democracies – is outwardly committed to an ethic of reasoned adjudication. Since Anglo-American legal theory has mostly developed in an attempt to understand the way courts with such an ethic behave, it is important that this study – which seeks to point out some of the deficiencies in that tradition – focus on a court with a similar ethic. The second advantage of using the CCSA as the subject matter of this study is that it is a constitutional court in a new democracy. This renders relevant the political science literature to which reference was made in the previous section. As political scientists have recognized, there is something special about the operation of constitutional courts in new democracies. Like all constitutional courts, such courts deal with matters of great political moment and hence need to negotiate the law/politics divide with considerable skill. In new democracies, however, constitutional courts – by definition – cannot be assured of their institutional legitimacy. In addition to the usual challenges facing constitutional courts in mature democracies, therefore, constitutional courts in new democracies have the added burden of having to build their institutional legitimacy even as they exercise their power of judicial review.

At the surface level of legal rhetoric, of course, a court committed to reasoned adjudication will try to get around this problem by repeated assertions that what it is doing is applying the law. At a deeper level, however, particularly for a court in quite a formalist legal culture, like South Africa's, the court will constantly be aware of the way law drives up against politics, sometimes putting it on a path of confrontation with the political branches. This is particularly true where the legal materials seem to dictate an outcome that is politically awkward for the court, in the political science sense of being outside the political branches' 'tolerance interval'. Here, a constitutional court committed to reasoned adjudication is often faced with a dilemma: enforce the law in the manner that the legal materials seem to suggest, at the risk of endangering its institutional legitimacy, or work with the legal materials to produce a result less offensive to the political branches, at the risk of abandoning its ethic of reasoned adjudication.

Neither of the mainstream theories of adjudication is particularly suited to explaining this type of behaviour. Legal positivism, which of course hardly offers a theory of adjudication at all, does not account for the possibility that courts, when faced with doctrinal gaps (Hart's law running out) might use such opportunities to manage their relationship with the political branches. Dworkin is of course very interested in constitutional courts, with the US Supreme Court being a model for much of his writing. But Dworkin has rarely extended his concern to the situation of courts in new democracies, and has certainly not given detailed attention to whether his theory of constructive interpretation applies in this setting. We consequently do not know what he would say about a situation where the best interpretation of the legal materials puts a court in a new democracy on a confrontation course with the political branches. One suspects that he would advise the court to give the answer mandated by the best interpretation, on the assumption that this was the only way of deciding the case legally. His 'one right answer thesis' certainly would not permit the court to take pragmatic considerations into account.

CLS accounts of adjudication, by contrast, are methodologically quite well suited to describing what a court in a new democracy might do when confronted with a politically awkward case. Although CLS's primary concern was to show how judges worked with the legal materials to achieve ideological ends, the close-reading techniques developed by this school can be used to analyse the way in which courts in new democracies strive to bring their decisions within the particular 'tolerance interval' for the case.

Outside of the mainstream theories, Posnerian pragmatism also provides useful methodological tools for understanding how a constitutional court in a new democracy might rise to the challenge of its institutional position. In his book, *Law, Pragmatism, and Democracy*, Posner argues that many of the great US Supreme Court judges have been pragmatists, and proceeds to set out the characteristic features of this mode of adjudication.²⁸ Distinguishing everyday pragmatism from philosophical pragmatism, Posner argues that judges in the pragmatic mode are principally concerned about the consequences of their decisions, without being 'consequentialist' in the philosophical sense.²⁹ This approach sometimes requires resort to the rhetoric of legal formalism, where the positive effects of adhering to the rules laid down outweigh the adverse consequences that might flow from deciding the case on the basis of past precedent. In other cases, however, judges may be justified in departing from precedent to avoid deciding a case in a way that

²⁸ (Cambridge, MA: Harvard UP, 2005) 57-96.

²⁹ *Ibid* at 65.

would have adverse long-term consequences.³⁰ Posner's primary example of such a case is the US Supreme Court's decision in *Bush v Gore*,³¹ which he argues was pragmatically justified on the grounds that the outcome averted a constitutional crisis.³²

The weakness of Posner's approach is that he fails to provide – perhaps because this is impossible for a mature democracy like the United States – an uncontroversial conception of the socially beneficial effects that pragmatic adjudication is expected to produce. Not every case can be conceptualised as a choice between rule-based adjudication and the aversion of a constitutional crisis, and hence the pragmatic approach often collapses back into ad hocism, i.e. judges deciding cases according to their view of the immediate consequences.

In a new democracy, however, there is one consequence that could fairly uncontroversially be said to be of overriding importance in every case, i.e. the contribution the decision makes to building the court's institutional legitimacy. There are few theorists who would argue that their normative prescriptions for how judges should decide hard cases should be pursued at the expense of institutional survival. Institutional survival is in this sense an absolute parameter that frames all accounts of adjudication in new democracies. Any theory that mandated judges to ignore this parameter, or ignored its influence on adjudication, would be open to the charge of under-theorising the constraints on adjudication in this setting.

In the discussion of the CCSA's record that follows, I try to incorporate these insights in arguing that the CCSA is a political actor pursuing a determinate strategic objective: the establishment of constitutional democracy. My claim can be understood as a combination of two hypotheses: a positive hypothesis that the CCSA, in politically awkward cases, works with the legal materials to avoid confrontation with the political branches, whilst enforcing the Constitution to the extent possible, and a negative hypothesis that none of the mainstream theories of adjudication is capable of explaining how the CCSA behaves in such situations. I try to establish the positive hypothesis by the CLS method of getting behind the rhetoric of the CCSA's decisions to examine how it works with the legal materials, and the negative hypothesis by showing how the mainstream theories, particularly constructive interpretation, are incapable of accurately describing the reasons for decision.

³⁰ Ibid at 60-64.

³¹ 531 US 98 (2000).

³² Posner (supra) at 322-356.

This methodology is open to the charge that its truth claims are only as strong as the interpretation of the cases offered. In this respect, Dworkin's point about the impossibility of presenting legal doctrine without at the same time interpreting it is well taken. But the point need not be fatal. Although the claim that the CCSA is a political actor strategically pursuing the establishment of constitutional democracy cannot be objectively verified, it can be more or less persuasively presented. In the end what matters is how convincing the interpretations offered here are to those in a position to understand them, i.e. legally trained readers familiar with the record of the CCSA and the social and political conditions prevailing in South Africa.

4. Tactical adjudication on the CCSA

Since its establishment in 1994, and the hearing of its first case in 1995, the CCSA has handed down approximately 300 decisions. It is impossible to analyse all of these cases in the space of a short essay, but I hope to mention enough decisions to convince the reader that the description offered here of what the CCSA has been doing is broadly representative of its record. In what follows I identify five strategies that I argue have enabled the CCSA to accomplish its most important task: staying in business long enough to give meaningful effect to constitutional rights. The list is not meant to be exhaustive, and is also not meant to exclude consideration of more detailed techniques of legal reasoning, such as deduction from clear rules, distinguishing cases on their facts, policy reasoning, and so on. Indeed, many of these detailed techniques, I hope to show, have been enlisted by the CCSA in support of the five strategies I describe.³³

4.1 The use of doctrinally redundant language to set the tone of a judgment

In analytic legal philosophy, as noted in section 2, there is a general disinclination to refer to judicial decisions as the raw empirical data for analysis. Where this occurs at all, as in the famous example of Dworkin's use

³³ There is some overlap between the strategies I describe here and the doctrines of judicial restraint identified by other scholars. See John Daley 'Defining Judicial Restraint' in Tom Campbell & Jeffrey Goldsworthy (eds) *Judicial Power, Democracy and Legal Positivism* (Ashgate, 2000) 279.

of *Riggs v Palmer*,³⁴ the precise wording of the decision is rarely discussed. Rather, case examples come pre-interpreted, with their facts and contending rules reduced to their bare essentials. Whilst serving the purposes of analytic legal philosophy, this approach excludes from analysis much that is important about the behaviour of courts, and draws an artificial distinction between strictly legal language (everything to do with the articulation of the rule) and other, scene-setting language that courts use to frame their decisions. And yet the tone or register in which a judgment is expressed is often as important as the strictly legal reasoning used to justify the outcome.

In the jurisprudence of the CCSA, scene-setting language plays a particularly important role. This is partly a matter of opportunity: the CCSA has a comparatively low caseload and is thus able to invest a tremendous amount of rhetorical energy into getting the tone of its judgments right. But it is also partly a function of the stage of democratic consolidation that South Africa has reached, and the CCSA's understanding of its institutional role. The CCSA is all too aware of the delicacy of its position, of the absurdity almost of the power that it has been given to negate majoritarian wishes. Unsurprisingly, therefore, one of the overriding features of the CCSA's record has been its repeated attempts rhetorically to align itself with the political branches' transformation efforts. The CCSA will, for example, quite often begin a judgment in which it ultimately finds against the state by indicating its general agreement with the policy being pursued. In other cases, when finding in favour of the state, it will resoundingly endorse the policy in question, often going quite far beyond what is necessary for purposes of making its decision.

I have written about these features of the CCSA's record at length elsewhere.³⁵ Here I want to concentrate purely on the issue of tone and register, using as my first example the opening paragraph of the *TAC* judgment (footnotes omitted):

The HIV/AIDS pandemic in South Africa has been described as 'an incomprehensible calamity' and 'the most important challenge facing South Africa since the birth of our new democracy' and government's fight against 'this scourge' as 'a top priority'. It

³⁴ 115 NY 506 (1889) discussed by Dworkin in *Taking Rights Seriously* (1977) 23 and again in *Law's Empire* (1986) 15ff and responded to and reconceived by Hart in his 1994 Postscript (at 262).

³⁵ See Theunis Roux 'Legitimizing Transformation: Political Resource Allocation on the South African Constitutional Court' (2003) 10 *Democratization* 92 and Jackie Dugard and Theunis Roux 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995-2004' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Dartmouth: Ashgate, 2006) 107.

'has claimed millions of lives, inflicting pain and grief, causing fear and uncertainty, and threatening the economy'. These are not the words of alarmists but are taken from a Department of Health publication in 2000 and a ministerial foreword to an earlier publication.³⁶

As legal doctrine, this passage is entirely redundant: nothing in this opening paragraph is essential to justifying the decision handed down in the *TAC* case. As legal rhetoric, however, the passage is masterful, and entirely necessary to the long-term strategy the CCSA is pursuing. The punch-line – the revelation that the quoted words are in fact taken from official government documents – is cleverly withheld until the last sentence, maximising its effect and setting up at an emotional level the doctrinal argument that follows, viz. that where government has already committed itself to providing medical treatment to a certain section of the population, it is unreasonable to deny other similarly situated sections of the population the same treatment. 'These are your own words, this is your own policy', the opening paragraph intones, 'how can there be any objection to our helping you to implement it properly?' Lest there be any doubt about the effect of these remarks, the fourth paragraph continues the assault, calling government's MTCT programme 'part of a *formidable* array of responses to the pandemic' (emphasis added).³⁷ None of this is high-flown moral and political theory. All of it is rhetorical craftsmanship – the careful packaging of a decision so as to make it more palatable to those who must obey it.

The foremost exponent on the CCSA of this style of adjudication is, of course, Sachs J. His judgment for a unanimous court in *Port Elizabeth Municipality v Various Occupiers* may be taken as a representative example.³⁸ The case concerned an application by a municipality for leave to appeal against a decision of the Supreme Court of Appeal overturning a High Court decision to grant an order for eviction against the respondent. After setting out the nature of the case in the first seven paragraphs, the next 40 paragraphs are devoted to describing '[t]he constitutional and statutory context',³⁹ the structure of the eviction statute in question,⁴⁰ and an excursus on the value of mediated settlements.⁴¹ It is with something of a jar, then, that paragraph 48 of the judgment begins: 'It is necessary now to consider whether the application for leave to appeal should be granted.' This was, after all, the

³⁶ *Minister of Health and others v Treatment Action Campaign and others (No 2)* 2002 (5) SA 721 (CC) para 1.

³⁷ *Ibid* para 4.

³⁸ 2005 (1) SA 217 (CC).

³⁹ *Ibid* paras 8-23.

⁴⁰ *Ibid* paras 24-38.

⁴¹ *Ibid* paras 39-47.

sole issue for determination in the case. To be sure, the judgment then proceeds to analyse the facts of the case in relation to the principles set out in the preceding paragraphs, but hardly in a way that justifies the length of that exposition.

It would be instructive to list and scrutinise all the doctrinally redundant passages in this judgment, but one must suffice. In paragraph 41, Sachs J writes:

Thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time, those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of moral agency.

There's nothing in this passage with which one could possibly disagree. Doctrinally speaking, however, the entire passage is question-begging. Did the landowner in this particular case 'rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances'? Or did the (for argument's sake, black) landowner wake up one day to find that the fruits of her labour had been destroyed by a well-orchestrated land invasion? Were the occupiers in this case 'compelled by poverty and landlessness to live in shacks on the land of others'? Or did they cynically invade the land because they had heard that it was about to be designated for a low-income housing project? These are all factual questions going to the equities of the matter that Sachs J eventually goes on to decide in the last fourteen paragraphs of the judgment. And, as it turns out, the members of the respondent community were not 'queue jumpers' but people who genuinely believed that they had been given permission to stay on the land in question by someone duly authorised to give them that permission.⁴² This factual finding, however, could have been reached 40 paragraphs earlier, with no weakening, from a strictly doctrinal point of view, in the justificatory force of the judgment. So why did Sachs J, and the entire CCSA in signing on to this judgment, think that the above passage and others like it were necessary? Is it just, as a former South African Minister of Justice once alleged, that the judges of the CCSA have too much time on their hands?

The answer, once one broadens one's definition of the proper subject matter of jurisprudence, is clear: these passages *are* necessary, not in a

⁴² Ibid para 55.

strictly doctrinal sense, not because they constitute rigorous moral reasoning, but because they express an attitude, an ethic of compassion if you like, that the CCSA is very seriously saying is part of South Africa's new constitutional order. The moral message of the Constitution, these passages imply, is not always – perhaps never – best communicated through abstract moral reasoning, but is rather something to be intuited at an emotional level. That's not a conclusion that a Dworkinian or Hartian positivist would find particularly appealing, or worthy of philosophical concern. But it is nevertheless a more accurate description of the judicial work that is being done in these passages. It is also arguably a more realistic conception on the part of the CCSA of what its job entails. Even in the United States, with its more sophisticated public sphere, the legitimacy of judicial review does not depend on the philosophical rigour of judicial reason-giving. Rather, it depends on the more intangible notion of judicial integrity, on the public's faith in the neutrality of adjudication, and judges' commitment to rule-governed adjudication. In South Africa, where the public has every reason to be suspicious about elite moralising, it matters even more that the CCSA should be seen to be deciding cases according to the spirit of the Constitution, rather than some or other elaborate moral framework that the judges purport to be developing philosophically from its underlying values.

4.2 *A preference for formulaic tests over substantive moral reasoning*

In a recent journal article, Murray Wesson and Max du Plessis argue that 'Dworkin's theory of constructive interpretation may have special relevance to the South African Constitution, largely because s 39 expressly requires law to be interpreted in light of the purpose of the Bill of Rights, which in turn requires a set of goals to be ascribed to that document'.⁴³ They seek to substantiate this point by discussing various decisions of the CCSA, including *Grootboom*,⁴⁴ *Pretoria City Council v Walker*,⁴⁵ *Mhlungu*,⁴⁶ and *Minister of*

⁴³ Murray Wesson and Max du Plessis 'Hart, Dworkin and the Nature of (South African) Legal Theory' (2006) 123 SALJ 700, 728. For other recent attempts to apply Dworkinian theory to an understanding of the South African Constitution or the record of the CCSA, see Dennis Davis 'Dworkin: A Viable Theory of Adjudication for the South African Constitutional Community?' in Dubois (supra) 96 and Anton Fagan 'Section 39(2) and Political Integrity' in Du Bois (supra) 117.

⁴⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

⁴⁵ 1998 (2) SA 363 (CC).

⁴⁶ *S v Mhlungu and Others* 1995 (3) SA 867 (SA).

Finance v Van Heerden.⁴⁷ None of these cases illustrates that the CCSA *itself* approaches its task in anything like the Herculean fashion Dworkin suggests should be the model for all adjudication. Rather, Wesson and Du Plessis's point seems to be that legal academics, in seeking to understand these decisions, should endeavour to interpret them in their best light, and that this may influence the way the courts later seek to understand their own precedents. This is certainly the thrust of Wesson and Du Plessis's discussion of *Grootboom*, in which the CCSA's reasons for decision are cursorily recorded as a prelude to the authors' real concern: 'How should this judgment be read?'⁴⁸ Of course, Dworkin is on record as saying that the constructive approach applies to all acts of legal interpretation, including those made by law professors and students.⁴⁹ So there is nothing wrong with Wesson and Du Plessis's enterprise or with their claim that Dworkin's theory has 'special relevance ... to our constitutional democracy', provided that what they mean by that is that the constructive approach to interpretation may help legal academics to reconstruct the CCSA's jurisprudence in its best light.⁵⁰ However, to the extent that Wesson and Du Plessis claim that Dworkin's theory of constructive interpretation provides a description of what the CCSA and other courts in South Africa actually do,⁵¹ that claim stands or falls by how accurate it is. And here the record of the CCSA, far from illustrating the relevance of Dworkin's theory, illustrates its practical irrelevance. In case after case, faced with the duty to give meaning to a hitherto unelaborated constitutional right – to fit the right into the grand constitutional design – the CCSA has eschewed substantive moral reasoning in favour of casuistry or the articulation of formulaic tests.

Reviewing the judgments handed down in its first year of operation, Alfred Cockrell argued that the CCSA had yet to devise a substantive, value-based

⁴⁷ 2004 (6) SA 121 (CC).

⁴⁸ *Ibid* at 709.

⁴⁹ See, for example, his informal remarks in his 'Keynote Address' to a conference held in his honour at the University of Cape Town (11-12 February 2002) published in Francois du Bois (*supra*) 1.

⁵⁰ *Ibid* 729.

⁵¹ In its early form, as set out in *Law's Empire* (*supra*), the constructive approach to interpretation is clearly part of a normative theory of adjudication. In Dworkin's more recent work, however, this understanding of the adjudicative task is reworked as a descriptive claim about how 'American lawyers and judges' in fact interpret the US Constitution. See Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard UP, 1996) 2 and 4. In the space of these two pages Dworkin moves from the fairly weak empirical claim that '[s]o far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading' (*ibid* at 2) to the much stronger claim that 'constitutional practice in the United States ... relies heavily on the moral reading of the Constitution' (*ibid* at 4).

reading of the (then applicable) Interim Constitution.⁵² Not much, I would venture to suggest, has changed since then. In response to one of the few attempts to give such a reading, Ackermann J's expansive reading of the right to freedom and security of the person in s 11(1) of the Interim Constitution,⁵³ the majority of the CCSA resorted to a conventional contextual interpretation of the right to head off what it saw to be the dangers of the expansive approach.⁵⁴ In an earlier judgment, *Coetzee*, the CCSA had declined to examine 'the philosophical foundation or the precise content of the [same] right' on the grounds that this was 'not necessary' for purposes of the decision in that case.⁵⁵

There are, of course, other rights in the Bill of Rights whose philosophical dimensions can't be sidestepped in this way, and which therefore appear to invite a more expansive, 'moral reading' of the Constitution.⁵⁶ To this extent, Wesson and Du Plessis are correct to focus their discussion on the right to equality. But the crucial step in the development of the CCSA's equality jurisprudence was not to fit this right into some broad vision of the substantive values underlying the South African Constitution. Rather, the CCSA moved very quickly, in its decision in *Harksen v Lane NO*,⁵⁷ to interpret the right to equality as mandating a step-by-step test for unfair discrimination. Within the application of this test, to be sure, the CCSA has engaged in what one may describe as interstitial moral reasoning – moral reasoning, that is, within the confines of the moral premises already built into its test. But this hardly amounts to constructive interpretation, however much the results may accord with Wesson and Du Plessis's own 'best interpretation of the equality clause'.⁵⁸

The closest the CCSA comes to giving a substantive moral reading of a right in the Bill of Rights is in its dignity jurisprudence.⁵⁹ The driving force behind this jurisprudence was Ackermann J, the author of the minority judgment in *Ferreira*. Ackermann J's approach to dignity, as Stuart Woolman

⁵² Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1.

⁵³ *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* 1996 (1) SA 984 (CC) paras 49-53.

⁵⁴ *Ibid* at paras 169-184 (per Chaskalson P).

⁵⁵ *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) para 10.

⁵⁶ See Dworkin *Freedom's Law* (supra).

⁵⁷ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 54. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 15 the CCSA held that the same test was applicable to s 9 of the Final Constitution.

⁵⁸ Wesson and Du Plessis (supra) 728.

⁵⁹ See the comprehensive exposition and reconstruction of the CCSA's dignity jurisprudence by Stuart Woolman 'Dignity' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Cape Town: Juta, 2005) chapter 36.

notes, is informed both by a profound meditation on the denial of dignity in South Africa's past, and on Kantian notions of the moral impermissibility of treating fellow human beings as means.⁶⁰ But the CCSA's dignity jurisprudence falls well short of being a fully worked out moral and political theory. Rather, it is essentially a lawyer's creation, casuistically developed in cases in which an infringement of the right has been alleged. This does not mean, of course, that the CCSA's jurisprudence cannot be reconstructed, in the manner Woolman attempts.⁶¹ But an academic lawyer's reconstruction of a body of jurisprudence is not the same thing as a descriptively accurate account of the way a court decides cases.

The CCSA's characteristic method for dealing with profound questions of moral and political theory can be illustrated by reference to its recent decision in *Doctors for Life*.⁶² In this case, the CCSA was asked to decide the meaning of the NCOP and provincial legislatures' constitutional duty to 'facilitate public involvement in their processes'. This task required the CCSA to reflect on the nature of South African democracy, and in particular the balance to be struck between its representative and participatory elements. Rather than working out a fully fledged theory of democracy, however, the CCSA settled for something less ambitious: a statement of the way in which the representative and participatory elements of the system could be reconciled in relation to the particular question presented for decision.⁶³ There is nothing surprising in this. Of course this is what a court would do. What is surprising is that anyone should expect a court to behave differently.⁶⁴

4.3 *The conversion of conceptual tests into discretionary standards*

Other rights in the Bill of Rights, rather than inviting expansive moral reasoning, seem to invite purely conceptual tests for the constitutionality of state action. In respect of these rights, the CCSA's strategy is to avoid conceptualism if at all possible, and to replace conceptual distinctions with a

⁶⁰ *Ibid* at 36—7.

⁶¹ *Ibid* at 36—7—17.

⁶² *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) (followed in *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (as yet unreported) CCT 73/05, decided on 18 August 2006).

⁶³ *Doctors for Life* (supra) paras 110-117.

⁶⁴ I have myself attempted a Dworkinian reading of the principle of democracy in South African constitutional law. See Theunis Roux 'Democracy' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Cape Town: Juta, 2006) chapter 10. I undertook this task as an academic lawyer precisely because I thought it unlikely that the CCSA itself would have the opportunity, or indeed, the inclination to do so.

discretionary standard of review. The best example of this strategy is the *First National Bank* case,⁶⁵ where the CCSA converted the Constitution's quite elaborate conceptual test for the constitutionality of state interferences with property into a sliding-scale test for 'arbitrariness'. I have written about the strategy employed in this judgment at length elsewhere,⁶⁶ but the main points bear repeating. On its face, s 25 of the Constitution invites at least six different conceptual distinctions, all of which could have been used to balance competing public and private interests in property.⁶⁷ The first conceptual distinction is that between interests that constitute property and those that do not – a threshold inquiry that has occupied courts in other jurisdictions for some time.⁶⁸ Another is the distinction between the deprivation of property and its expropriation, a distinction that in the United States has spawned a voluminous and largely incoherent body of doctrine.⁶⁹ Perhaps conscious of the dangers of conceptualism in this area, the CCSA in *FNB* held that the main issue to be decided in any constitutional property case is whether the challenged law provides 'sufficient reason for the particular deprivation in question or is procedurally unfair'.⁷⁰ The first part of this question, the CCSA continued, fell to be decided according to a number of factors, which it set out in paragraph 100 of the judgment. The whole paragraph is too long to quote, but here is a taste:

[D]eprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

⁶⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 100.

⁶⁶ Theunis Roux 'Property' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Cape Town: Juta, 2003) chapter 46.

⁶⁷ See Theunis Roux 'The Constitutional Property Vortex' in Michael Bishop et al (eds) *Constitutional Conversations* (Pretoria: Pretoria University Law Press, forthcoming 2007).

⁶⁸ See, for example, *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 (PC).

⁶⁹ *Pennsylvania Coal Co v Mahon* 260 US 393 (1922), *Penn Central Transportation Co v City of New York* 438 US 104 (1978), Richard A Epstein *Takings: Private Property and the Power of Eminent Domain* (Cambridge: MA, Harvard UP, 1985), Frank I Michelman 'Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 *Harvard LR* 1165.

⁷⁰ *FNB* (supra) para 100.

- (e) ...
- (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25.

Instead of giving definitions of key concepts, definitions that would perforce have excluded certain kinds of laws from constitutional scrutiny, the CCSA in this passage converts the conceptual test seemingly mandated by the constitutional property clause into a discretionary review standard. The distinct advantage of this strategy is that it will allow the CCSA to consider all possible challenges under s 25 without, however, pre-committing it to any particular position on the range of controversial questions that could potentially come before it. In one of the passages from paragraph 100 not quoted, for example, the CCSA says that '[g]enerally speaking, where the property in question is ownership of land ... a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different.'⁷¹ This statement would appear to require strict scrutiny of land reform legislation, since such legislation almost always interferes with the ownership of land. In the same paragraph, however, the CCSA stresses the importance of examining the purpose of the law in question,⁷² suggesting that a politically important law like a land reform statute might receive a fairly low level of scrutiny. Perhaps not. The point is that we do not know, and that this result is convenient for the CCSA.⁷³

Adjudicative moves like those discernible in *FNB* are not unconscious or whimsical. They are part of a deliberate strategy on the part of the CCSA to make the performance of its adjudicative function more context-sensitive. It is precisely in an area like constitutional property rights review that the CCSA needs to create maximum doctrinal space for itself. The distribution of wealth in South Africa, particularly in relation to land, is just too fraught an issue for the CCSA to risk defining its way into a corner. To appreciate this point, just imagine for a moment the consequences that would result from an attempt by the CCSA to read into s 25 a theory of property, i.e. a fully worked out moral justification for protecting certain interests in property but not others against state interference. Quite apart from the fact that this would needlessly bring it

⁷¹ Ibid para 100.

⁷² Ibid.

⁷³ The unpredictability of the *FNB* test for arbitrariness is illustrated by the fact that, in the next constitutional property rights case to come before the CCSA, the two High Courts had reached diametrically opposed results. See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (2) BCLR 150 (CC).

into confrontation with the political branches, whose approach to these matters might (and in fact does) swing wildly between neo-liberal and socialist approaches to property, the CCSA would by this form of adjudication be fettering its own discretion in later cases to arrive at what it thought was the constitutionally just result.

A similar strategy may be discerned in the CCSA's socio-economic rights jurisprudence. Here, one of the early issues was an argument on the part of the applicants in *Grootboom* and *TAC* that the CCSA should define the core content of the socio-economic rights at issue in those cases.⁷⁴ The CCSA once again eschewed the kind of conceptual test that would have been required to meet these demands in favour of a single, overarching review standard for reasonableness. Many legal academics were quite indignant about this strategy, which they argued amounted to an abdication of the CCSA's responsibility to give meaningful content to socio-economic rights.⁷⁵ As soon as one accepts, however, that the CCSA's concern in these cases may have been to devise a review standard that allowed it greater flexibility to manage its relationship with the political branches, much of the force of the criticism falls away. It is the proper function of legal academics, especially progressive, pro-poor legal academics, to try to convince the CCSA that its socio-economic rights jurisprudence falls short of the ideal. But it is equally the proper function of the CCSA to devise review standards that allow it to remain sensitive to the political nature of its role.⁷⁶

4.4 *Interpreting the constitutional text so as to ensure pragmatic outcomes*

The Constitutional Court has held on numerous occasions that the Bill of Rights must be interpreted in a 'generous' and 'purposive' way, in line with the

⁷⁴ *Grootboom* (supra) paras 31-33; *TAC* (supra) paras 26-39.

⁷⁵ See David Bilchitz 'Giving socio-economic rights teeth: the minimum core and its importance' (2002) 118 *SALJ* 484; David Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *SAJHR* 1; Danie Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "What are socio-economic rights for?"' in Henk Botha et al (eds) *Rights and Democracy in a Transformative Constitution* (Stellenbosch: SUN Press, 2003).

⁷⁶ See further *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as amicus curiae)* (as yet unreported) CCT 66/05 (judgment delivered on 15 December 2006) (CCSA holding that the test for deciding whether a concurrent creditor should be allowed to intervene in an application under s 26(6) of the Prevention of Organised Crime Act for legal expenses is a discretionary one based on a range of factors). In the same judgment the CCSA declined to give a conceptual distinction between constitutional and non-constitutional matters for purposes of s 167(3) of the Constitution, preferring to list the instances in which a constitutional matter had been found to be raised (at paras 35-47).

Constitution's underlying values.⁷⁷ Roughly the same approach is taken to the interpretation of other parts of the Constitution.⁷⁸ According to the purposive approach, any ambiguity in the constitutional text must be resolved in favour of the interpretation that would best give effect to the purposes and values underlying the new constitutional order.

Taken at face value, this understanding of the CCSA's interpretive task would appear to favour a Dworkinian, 'moral reading' of the Constitution in every case.⁷⁹ And yet, in at least one case, the CCSA not only declined to give a moral reading of the Constitution. It used an excessively literal interpretation of the text to achieve a pragmatic result. In another case, when confronted with an awkward literal meaning, it resorted to technical manipulation of the legal materials to the same end.

The case in which the latter strategy was employed is *Mhlungu*, where a majority of the CCSA held that s 241(8) of the Interim Constitution, which dealt with the application of that constitution to pending proceedings, was intended 'to preserve the authority of pre-Constitution courts to continue to function as courts for the purpose of adjudication in pending cases'.⁸⁰ A four-judge minority of the CCSA, on the other hand, held that the ordinary meaning of the provision was that the Interim Constitution did not apply to any matter that was pending at the time of its commencement. At stake was the fact that, under the first interpretation, the presumption in s 217(1)(b)(ii) of the Criminal Procedure Act in favour of the veracity of a confession recorded in writing by a magistrate was rendered inapplicable to the matter, that provision having been struck down in the contemporaneously decided *Zuma* case.⁸¹ The consequence of this result in turn, was that the criminal prosecutions of three of the accused in the *Mhlungu* case, all of which relied on s 217(1)(b)(ii), would almost certainly collapse.

⁷⁷ See, for example, *S v Zuma* 1995 (2) SA 642 (CC) paras 13-18, and *S v Makwanyane* 1995 (3) SA 391 (CC) paras 9-10.

⁷⁸ See *S v Mhlungu and Others* 1995 (3) SA 867 (SA) para 63 (minority judgment of Kentridge AJ), *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) para 100, *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 17, *Mshavha v President of the Republic of South Africa* 2005 (2) SA 476 (CC) para 32.

⁷⁹ Cf Murray and Wesson (supra) 728. Dworkin himself has gone on record as saying that the CCSA's socio-economic rights jurisprudence corresponds to the jurisprudence that would have been suggested by his moral reading. Ronald Dworkin 'Response to Overseas Commentators' (2003) 1 *International Journal of Constitutional Law* 651, 652-3 (replying to Arthur Chaskalson 'From Wickedness to Equality: The Moral Transformation of South African Law' (2003) 1 *International Journal of Constitutional Law* 590).

⁸⁰ 1995 (3) SA 867 (CC) para 24.

⁸¹ *S v Zuma* 1995 (2) SA 642 (CC).

The merits and demerits of the judgments in *Mhlungu* were the subject of a heated debate between Eduard Fagan and Dennis Davis in the South African Journal on Human Rights.⁸² Here is not the place to revisit that debate in its entirety. For my purposes, the point that needs to be made is that, in jurisprudential terms, the contending parties to this debate had more in common than they perhaps realized. For Fagan, the majority judgment was *wrong in law* because it was so out of kilter with the ordinary meaning of the constitutional text that not even a purposive approach to interpretation could save it. For Davis, on the other hand, the majority judgment was *right in law* because it resolved an evident ambiguity in s 241(8) by resort to the values underlying the new constitutional order. What distinguishes the two approaches is their allegiance to one or the other camp in the Hart-Dworkin debate, with Fagan favouring a Hartian approach to the judicial task and Davis a Dworkinian one. What unites the two approaches, however, is their overriding concern to show that the debate over the meaning of s 241(8) had to be resolved by some or other form of objective legal reasoning, such that the outcome of the case either way could be described as incontestably ‘right’. Thus, for Fagan (and Kentridge AJ for the minority), the issue at stake in *Mhlungu* was nothing less than the preservation of the rule of law. Faced by provisions like s 241(8), the ordinary meaning of which produces awkward consequences, what judges need to do, above all is, is to be tough-minded. To factor into the assessment the consequences that might flow from a non-literal interpretation of s 241(8) is for Fagan and Kentridge AJ to take the first step down the slippery slope of ad hocism, of making up the law as you go along. For Davis, the issue is equally the preservation of the rule of law – but not the rule of *any* law, rather the rule of the new *constitutional* law that it is the judge’s institutional duty to advance. It is thus vitally important for Davis that, whatever his postmodernist concerns about the ability of language to convey meaning, the Interim Constitution should be seen to be capable of accomplishing its transformative task by transparently legal means. And this is precisely what the Dworkinian approach – with its ‘one right answer’ thesis – provides: a theorisation of how judges may enforce a supreme-law constitution, with all the acknowledged ambiguities of its abstract provisions, in a way that is nevertheless strictly speaking legal.

⁸² See Eduard Fagan ‘The Longest Erratum Note in History’ (1996) 12 *SAJHR* 79, Dennis Davis ‘The Twist of Language and the Two Fagans: Please, Sir, May We Have Some More Literalism!’ (1996) 12 *SAJHR* 504, Eduard Fagan ‘The Ordinary Meaning of Language – A Response to Professor Davis’ (1997) 13 *SAJHR* 174, Dennis Davis ‘Of Closure, the Death of Ideology and Academic Sand Castles – A Reply to Dr Fagan’ (1997) 13 *SAJHR* 178.

With their horns locked in this way, the awful, ghastly possibility that neither Fagan nor Davis was prepared to countenance was that the majority in *Mhlungu* might simply have been acting pragmatically. And yet this is descriptively the most accurate explanation for what these judges were doing. Far from giving a Dworkinian reading of s 241(8),⁸³ what Mahomed J's judgment for the majority does is to use every technical legal device in the book to read s 241(8) so as to produce what he and his fellows judges evidently regarded to be the required result. Many of these devices are brilliantly analysed by Fagan as he shows Mahomed J bending the rules of statutory interpretation to suit his purposes, and eliding crucial parts of the text to make s 241(8) appear more ambiguous than it really was.⁸⁴ For Fagan, the conclusion to be drawn from this is that the majority was wrong, and dangerously so. For Davis, the majority's resort to these technical devices was legitimated by their enlistment in support of the evolving South African constitutional project. For the legal scholar concerned to describe what judges actually do, the conclusion to be drawn from the majority judgment is that judges sometimes decide cases pragmatically, and that this is not necessarily a bad thing. It is an impossible counterfactual to attempt to imagine now what the effect on the legitimacy of constitutional review in South Africa would have been had Kentridge AJ's minority judgment carried the day in *Mhlungu*. What we can say with a measure of confidence, however, is that the majority's non-Hartian, (in Fagan's view) cavalier disregard for the ordinary meaning of language did not seriously undermine it.

If *Mhlungu* was a case in which the CCSA used all its technical skills to avoid a literal reading of the constitutional text that would have produced an awkward result, *Kaunda* is a case in which the CCSA latched on to a literal reading to avoid a more value-laden, purposive reading that would have brought it into confrontation with the political branches. The 69 applicants in *Kaunda* had been arrested in Zimbabwe on charges of participating in an attempted coup against the President of Equatorial Guinea.⁸⁵ Amidst allegations of poor treatment and threatened extradition to Equatorial Guinea, they launched an urgent application demanding that the South African

⁸³ For Davis's reading of *Mhlungu* to succeed, what he needed to show was that the interpretation favoured by the majority was the best interpretation of the Interim Constitution, in the sense that it fitted the legal materials whilst making the constitutional project the best that it could be. To his credit, he nowhere attempted to establish this, preferring to rely on the assumption that his readers would find reasonable his back-to-front syllogism that the Interim Constitution was a just constitution, and therefore that the just result enforced by the majority in *Mhlungu* must have been the constitutionally required result.

⁸⁴ Fagan 84-88.

⁸⁵ *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) para 37.

government seek their release and/or extradition to South Africa. The key constitutional provision to be interpreted was s 7(1), which provides that the Bill of Rights 'enshrines the rights of all people in our country'. Over a strong dissent from O'Regan J, the majority held that this provision should be interpreted literally to mean that South Africans only enjoy the protection of the Bill of Rights when they are physically *in* South Africa, and hence that the Bill of Rights has no extra-territorial application.⁸⁶ The majority presents this reading in two sentences as though no other interpretation were even remotely possible: 'The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application, beyond our borders.' Nothing, that is, other than the purposive, contextual interpretation of the Constitution O'Regan J gives to arrive at the diametrically opposed result.⁸⁷

What both *Mhlungu* and *Kaunda* illustrate is the old-fashioned realist insight that legal rules can be quite plastic. Rather than responding to this evidence in the manner of CLS, however, by attributing ideological motivations to the judges, the legal scholar concerned to describe as accurately as possible what judges do must attribute to the judges the most plausible motivation that fits the facts. Neither *Mhlungu* nor *Kaunda* was a case in which the class, race or gender stakes can be said to have been terribly high. What they were, were cases in which one of the two legal outcomes contended for was decidedly awkward. In *Mhlungu*, the awkwardness stemmed from the fact that a decision based on the literal meaning of s 241(8) would have seemed like an overly technical decision to deny the benefits of the new constitutional order to accused persons. This was not an impression of their adjudicative role that the majority of the CCSA felt they could afford to give so early in the court's life. The 'tolerance interval', in political science terms, that would have accommodated such a decision had not as yet been established. Likewise, in *Kaunda*, interfering with an executive decision in relation to the conduct of foreign relations was judged by the majority to be too risky a venture. In this instance, however, the value-laden, contextual reading of the Constitution pointed towards precisely this result. Thus it was that the CCSA, in the face of a string of its own precedents holding that the Constitution had to be interpreted purposively, allowed the outcome of the case to turn on a single preposition.

⁸⁶ Ibid para 37.

⁸⁷ Ibid paras 212-271.

4.5 Framing certain issues as political questions to avoid deciding them

In the United States, of course, a politically awkward case like *Kaunda* could simply have been avoided from the outset on the basis that it posed a non-justiciable political question.⁸⁸ This doctrine is not available to the CCSA, owing to the very expansive way in which its jurisdiction is defined.⁸⁹ Nevertheless the phrase ‘political question’ does figure in the CCSA’s jurisprudence, in sometimes contradictory ways.

In *President of the RSA v SARFU*, the CCSA held that one of its functions was to exercise exclusive jurisdiction ‘in a number of crucial political areas ... in respect of issues which would inevitably have important political consequences.’⁹⁰ And in *King v Attorneys Fidelity Fund Board of Control*, the SCA endorsed the CCSA’s approach to its exclusive jurisdiction in s 167(4) by holding that the invalidation of an Act of Parliament for breach of the National Assembly’s duty to facilitate public involvement in its processes ‘would be pre-eminently a “crucial political” question’, which the Constitution reserved for the CCSA to decide.⁹¹

By contrast, the CCSA has on two occasions used the phrase ‘political question’ to declare certain issues to be non-justiciable, and in this way to avoid deciding them. In *Ferreira v Levin NO and Others* the CCSA thus held that: ‘Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the Legislature and not the Court.’⁹² And in *UDM v President of the RSA (No 2)*, one of the most politically controversial cases to come before the CCSA, the court unanimously held that the case was ‘not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court.’⁹³

⁸⁸ See *Baker v Carr* 369 US 186 (1962), *Powell v McCormack* 395 US 486 (1969), *Gilligan v Morgan* 413 US 1 (1973), *Nixon v United States* 506 US 224 (1993). The academic literature includes: Herbert Wechsler ‘Toward Neutral Principles of Constitutional Law’ (1959) 73 *Harvard LR* 1, 7-10; Charles L Black Jr *The People and the Court: Judicial Review in a Democracy* (New York: Macmillan, 1960) 28-30, Louis Henkin ‘Is There a “Political Question” Doctrine?’ (1976) 85 *Yale LJ* 597; Alexander M. Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2ed (Yale UP, 1986). Despite the controversy in the literature about the proper application of the political question doctrine, matters of foreign policy like those presented in *Kaunda* have always been held to fall within the ambit of this doctrine.

⁸⁹ See s 167(3), (4), (5) and (7) of the Constitution of the Republic of South Africa, 1996.

⁹⁰ 1999 (4) SA 147 (CC) paras 72-73.

⁹¹ 2006 (1) SA 474 (SCA) para 23 (citing *President of the RSA v SARFU* (supra) para 72).

⁹² 1996 (1) SA 984 (CC) para 180.

⁹³ 2003 (1) SA 495 (CC) para 11.

What are we to make of this anomaly, i.e. that on certain occasions the fact that a question presented for decision is political is precisely the basis on which the CCSA assumes exclusive jurisdiction over the case, and in others this fact is held to be a reason for not deciding the issue? The answer must be that, although its jurisdictional rules prevent the development of a full-blooded political question doctrine on the US model, the CCSA nevertheless finds it rhetorically useful to classify certain questions as political for purposes of managing its relationship with the political branches.

This strategy is most clearly discernible in the *UDM* case, where the CCSA was asked, inter alia, to decide whether a provision for floor-crossing in a system of proportional representation infringed the principle of multi-party democracy in s 1(d) of the Constitution.⁹⁴ For the Dworkinian judge, deciding the *UDM* case in favour of the applicant might well have been the best moral reading of the South African Constitution. There is certainly much in the Constitution to suggest that a system of proportional representation with floor-crossing falls short of the democratic ideal.⁹⁵ At the time that the *UDM* decision was handed down, however, a decision to this effect may actually have been counterproductive from the point of view of the development of South Africa's constitutional democracy. There was thus a sense in which the CCSA in *UDM* decided to let the political branches learn from their own mistakes, judging that this would be in the long-term interests of democratic consolidation.⁹⁶

There are elements in this reading of *UDM* of the political science account of adjudication (going against the state in *UDM* would have been outside the political branches 'tolerance interval') and of the pragmatist account (the consequences of going against the state in *UDM* would not have been optimal, trading off the gains to be made by asserting the principle of multi-party democracy in its strong form against the costs of confronting the political branches at this point). But in the end the best descriptive account of *UDM* is that the CCSA's resort to the political question doctrine was a way not only to avoid confronting the political branches over the floor-crossing issue, but also to build constitutional democracy by allowing the political branches to experiment with the design of South Africa's electoral system.

⁹⁴ *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC).

⁹⁵ See Theunis Roux 'Democracy' in Stuart Woolman (ed) *Constitutional Law of South Africa* 2ed (Cape Town: Juta, 2006) chapter 10.

⁹⁶ The CCSA's comment in *UDM* (supra) para 11 that its function was not to comment on 'the merits or demerits' of the floor-crossing legislation can thus be read as a strong message that it thought the legislative package was unwise.

5. Conclusion

I have suggested in this essay that the uniqueness of the South African contribution to legal theory lies in our being witness to a constitutional court that is self-consciously engaged in the establishment of constitutional democracy. Whatever the US Supreme Court may be said to have been doing in *Bush v Gore*,⁹⁷ it was not self-consciously pursuing this goal.⁹⁸ In South Africa, by contrast, in virtually every decision, the CCSA is both deciding a particular controversy, and working out its institutional role in the South African political system. There are other courts in new democracies that are in much the same situation. What makes the record of the CCSA especially compelling, however, is that it is committed to an ethic of reasoned adjudication, which makes it amenable to examination within the traditions of Anglo-American legal theory.

The negative hypothesis tested in this essay has been that none of the mainstream theories of adjudication adequately explains the CCSA's record. Hartian positivism does not explain cases like *Mhlungu* except as grave mistakes, and Dworkin's theory of constructive interpretation has no explanation for what a court must do when its best interpretation of the legal materials produces a result that threatens its institutional survival. Although CLS provides a methodology for examining what courts do in such situations, and Posnerian pragmatism an account of how courts sometimes sacrifice doctrinal purity for fear of the consequences, neither of these non-mainstream accounts of adjudication adequately theorises the objective that a court like the CCSA can be said to be pursuing. For that theorisation, this essay looked to political science and, in particular, the literature on the role of constitutional courts in democratic consolidation. There one finds an account of courts as political actors, pursuing their own policy preferences, but on occasion sacrificing this goal in the interests of long-term institutional survival. Although this account is in the end too rule-sceptical for the academic lawyer, its conception of courts as political actors capable of pursuing a determinate strategy over time provided the basis for this essay's positive hypothesis, i.e. that the CCSA's overriding concern in the first decade of its existence has been the establishment of constitutional democracy, and that it has pursued this goal strategically across a range of different areas of law.

Five strategies were identified in all. Under each heading various decisions were discussed with a view to showing how the CCSA worked with

⁹⁷ Supra.

⁹⁸ See Posner (supra) 322-356.

the legal materials to give meaningful effect to the Constitution whilst building its institutional legitimacy, either directly or indirectly, by creating doctrinal space for itself in later judgments to hand down context-sensitive judgments. It is in the pursuit of these strategies, and others like them, that the key to understanding the CCSA's remarkable record lies.