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Safeguarding the Constitution and the Rule of Law

By Edwin Cameron, Constitutional Court of South Africa

1. It is a great honour to be able to address a plenary session of this conference.
2. It is customary, if not obligatory, to start off with a funny story. Fortunately I know one. Only one. The only legal joke I know is a funny one that has worked on occasions until now. I hope it pleases you. [Alcoholics Anonymous – special guest – special joke – drunk-driving accused – judge asks *how drunk were you*? – "I was as **drunk as a judge**" – "the expression, accused, is *drunk as a lord!*" – "**yes my lord!**"].
3. My theme of safeguarding constitutionalism and the rule of law comes at a fragile time on our continent and in the rest of world.
4. The post-war consensus on democratic values and constitutional protection of human rights seems to be under threat in the United States and Europe.

5. In our own continent, our precious ventures into constitutionalism still have the buds of youth upon them. Many of them could be all too easily bruised or even crushed.
6. At this heavy time, I do not propose to talk in abstractions or generalities. There are paragraphs and reams and pages and books and tomes of generalities and abstractions on constitutionalism and the rule of law.
7. Instead, I am going to tell you some stories. Four stories. And then I'm going to reflect, very briefly, on their meaning for us in this conference.

Albutt v Centre for the Study of Violence and Reconciliation *(2010)*

8. The first is a story about a president with good intentions. That President was President Thabo Mbeki. He succeeded President Nelson Mandela in 1999 and served as President until 2008. His

intention was to pardon persons convicted of committing politically-motivated crimes.

9. As you know, my country came from a tortured past. During apartheid, white supremacist power was used to subordinate the majority of our people, to deprive them of rights and opportunities and to degrade their humanity. We are still living, today, with the consequences of those long decades and centuries of racial oppression.

10. We dealt with them, very partially, and very incompletely, through the Truth and Reconciliation Commission, which Archbishop Desmond Tutu, another hero of our continent chaired.

11. The TRC legislation granted immunity from criminal and civil prosecution for those who applied for and received amnesty.[1]

12. *But an integral and essential part of the TRC process was that the families of the victims of the crimes were closely involved*. They

[1] Chapter Four of the TRC's founding statute outlined the mechanisms and procedures of the amnesty process. These provided for the establishment of an Amnesty Committee and empowered it to consider and decide on applications for amnesty. The Committee could grant amnesty where satisfied that the application complied with formal requirements; that the incident took place within specific time frames; that it constituted an act associated with a political objective; that the applicant had made full disclosure of all the facts; and that the nature of the violation was proportionate to the objective sought. *Remorse and contrition were not requirements*.

were consulted. They were heard. Their testimonies were recorded. Their views and feelings were taken into account.

13. Then, years later, long after the TRC had finished its work, President Mbeki made an announcement. He said that he was using his presidential powers[2] to pardon "many South Africans who had not participated in the TRC process".[3]

14. To do this, President Mbeki announced a special dispensation for those convicted of crimes who claimed that their offences had been politically motivated.

15. He did so without consulting the families of those injured or killed by those whom he proposed to pardon.

16. The families objected. They complained that they were not afforded an opportunity to participate in the dispensation process.

[2] South Africa's TRC was the only truth commission to have been given powers of amnesty (http://truth.wwl.wits.ac.za/cat_descr.php?cat=3).

[3] President Mbeki was acting pursuant to section 84(2)(j) of the Constitution, which provides that:

> "The President is responsible for-
> (j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures".

17. After unsuccessful attempts by their organisations to ensure that victims participated and were heard, the families turned to the courts.

18. And the Constitutional Court intervened. The Court held that, to pass constitutional muster, the President's decision to grant these new pardons "must be rationally related to the achievement of the objectives of the process."

19. The Court pointed out that President Mbeki's special dispensation process had the same objectives as the TRC. These he had publicly stated were *nation-building and national reconciliation*. The TRC sought to achieve these through conferring amnesty – President Mbeki by granting presidential pardons.

20. But victim participation was essential to satisfy the objectives of the TRC amnesty process. So it followed that it was equally important in the presidential pardon process.[4]

[4] Ngcobo CJ noted on behalf of the Court that "excluding victims from participation keeps victims and their dependents ignorant about what precisely happened to their loved ones; it leaves their yearning for truth effectively unassuaged; and perpetuates their legitimate sense of resentment and grief. These results are not conducive to national-building and national reconciliation…As with the TRC process, the participation of victims and their dependents is fundamental to the special dispensation process."

21. The Court ruled that the President could not use the pardon power in the way he sought. He could not do so without affording victims the opportunity to be heard.

22. It was irrational for him to seek to pursue his stated aim of securing national unity and reconciliation without embracing an indispensable component of attaining that aim – which was to consult with and involve the families of the victims.

23. This proved to be a path-breaking decision. It introduced into South African constitutional law the doctrine of "process irrationality".

24. The doctrine requires that those holding public power may exercise it in order to achieve stated objectives only while employing methods that are rationally related to those objectives.

25. What was notable about the new doctrine was its profound constitutional grounding. The Constitution is supreme. It governs all public exercises of power. The Court in 1999 ruled that under

the Constitution all exercise of public power – all decision-making – has to be rational.[5]

26. The case in which this doctrine was laid down was friendly to the then-President, President Mandela. This was because he acknowledged that he had made a mistake in promulgating a statute before it was ready to take effect. He wanted his own action in bringing the statute into force to be annulled.

27. So the Court helped him. It ruled that his action, though taken with the best intentions and in good faith, was irrational.

28. This laid the groundwork for the later decision in *Albutt*, and for further decisions refining of the doctrine of public power. The doctrine has since played a fundamental part in reviewing many exercises of public power.[6]

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[5] See *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC), at para 20, where Chaskalson P said the following:

> "The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted intra vires or ultra vires in bringing the Act into force when he did, is accordingly a constitutional matter. The finding that he acted ultra vires is a finding that he acted in a manner that was inconsistent with the Constitution."

The Court emphasised that "where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved."

[6] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).

Glenister v President *(2011)*

29. The second story I have to tell is about an intense political contest within the country's political elite – but one that had and has profound implications not just for the elite for our entire democracy.

30. It concerned the powers of a police unit that President Mbeki set up while in office to exercise special powers of investigation and prosecution.

31. The unit was to target corruption. This was in accordance with South Africa's obligations under the UN Treaty on Corruption. More pertinently, even, it was in accordance with this country's obligations under the African Union Convention. It also accorded with a splendid anti-corruption statute Parliament here in Cape Town adopted in 2004, namely the Prevention and Combating of Corrupt Activities Act.[7]

[7] Act 12 of 2004.

32. When President Mbeki was recalled from office, amongst the first items on the priority list of his successors was to abolish the special unit.

33. In its place Parliament created a new unit – but it had none of the impressive powers its predecessor had. The new unit was, in fact, toothless.

34. Mr Glenister was a crusading businessman. He took what seemed a hopeless crusade to the courts. He said the creation of the toothless unit was a violation of the Constitution. He lost in the first-instance court.

35. But, to everyone's surprise, including Mr Glenister's, he won in the Constitutional Court.

36. The Court held that government is under a constitutional duty to create a unit that is not toothless. The unit must be sufficiently independent. This was an admitted requirement of international

law.[8] But it was also an obligation under South Africa's Bill of Rights.

37. The Court sat 9. Its members split 5 – 4. The minority took the approach that the signing and ratification of a treaty without local incorporation was binding on South African only in the international sphere.[9]

38. But the majority held took the Constitution's bold recognition of international law at face value. It held the Constitution required a more robust approach to incorporation of international law obligations South Africa had formally ratified and accepted.

39. The Constitution required Parliament to pay heed to South Africa's international obligations when drafting legislation.[10] And the rule of law required that the executive's promises in the international sphere be consistent with its approach in the domestic arena.

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[8] United Nations Convention against Corruption; African Union Convention; Southern African Development Community Protocol against Corruption.

[9] This view had been largely accepted by scholars even after adoption of the Constitution.

[10] "Section 39(1)(b) states that when interpreting the Bill of Rights a court "must consider international law". The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law.

40. The decision was a far-going and dramatic importation of international law duties into domestic South African law. Its practical and jurisprudential consequences were far-reaching.

41. *Glenister* was controversial – as the split in the Court showed.

42. But in the years since decision was handed down in March 2011, a consensus has formed around it. The Constitutional Court has since unanimously endorsed and vigorously applied the *Glenister* doctrine.

43. *Glenister*, like *Albutt*, was a radical innovation. Like *Albutt*, it sought to mould public power in the public interest. It did so, like *Albutt*, on a narrow and deferential basis. It did not tell Parliament what unit it had to create. It simply said the unit had to be independent enough to be able to fulfil its function of busting corruption.

Treatment Action Campaign v Minister of Health *(2002)*

44. My third story is even more dramatic. It is a story in which I personally am deeply involved.

45. It concerns the AIDS epidemic that has ravaged our continent for the last thirty and more years.

46. The epidemic beset our country some years after it was already tragically familiar in many of your countries. The wave of infections washed over our country just as we were becoming a democracy, between 1990 and 1994.

47. AIDS, in well over 95% of cases, is a sexually-transmitted disease. This has caused a profound feeling a shame to settle over the disease and efforts to manage it.

48. That very sense of shame be-devilled our government's response to the AIDS epidemic.

49. When President Mbeki took office in 1999, anti-retroviral drugs (ARVs) had just become available. These drugs are not miracle cures. They stop the virus from replicating inside the body of the person infected by HIV. But they do not eliminate it. They nevertheless made HIV a chronic manageable infection.

50. When President Mbeki took office, I knew this from deep personal experience. I had become infected with HIV after coming out as a gay man in the mid-1980s. I kept my infection a long and deep and painful secret. I was affected profoundly by the shame about my infection with HIV that still afflicts so many of our families and communities.

51. But when I fell ill, twenty years ago, I had an extraordinary benefit – I was earning a judge's salary. President Mandela had appointed me a judge in 1994. I could afford to pay for ARV treatment for myself – when all across our continent, many tens of millions of Africans could not. They faced unspeakable suffering and death, their families unimaginable bereavement and grief.

52. But the ARV drugs could change all this.

53. President Mbeki refused to make them generally available. He disputed the origin of HIV, he challenged its virology and he queried the medical science of ARV therapy.

54. It was a profoundly tragic moment in our national history. At the end of the year in which President Mbeki took office, the annual

death toll from AIDS in South Africa was half a million – that's 500,000 human lives every year – 40,000 mothers, fathers, brothers sisters neighbours and loved ones dying *every month*. It was a national catastrophe. And the President refused to act.

55. Fortunately, an activist movement existed. The Treatment Action Campaign (TAC) had been founded to tackle the outrageous prices that the drug companies were demanding for life saving ARVs.

56. As someone whose life had been saved by ARV therapy, I joined this campaign.

57. That battle was won. The TAC and its allies forced the drug companies – it shamed them – into radically reducing the cost of ARVs in Africa.

58. But a worse nightmare than drug prices now threatened millions of lives. It was the nightmare of presidential scepticism and denial.

59. The TAC found itself reluctantly compelled to confront this new and unexpected foe – President Mbeki's refusal to allow South

Africans to get drugs that could save their lives through the health service.

60. The TAC exercised its rights under the new Constitution. It took to the streets. It held marches. It waged a massive public information and media campaign. It lobbied the governing party and its opponents. It brought in the churches and the trade unions. It used every right in the Bill of Rights – it used the right to protest,[11] freedom of movement,[12] freedom of speech and expression,[13] and freedom of access to information.[14]

61. President Mbeki was obdurate. He didn't budge.

62. Eventually, the TAC was forced to use the most important tool of all in the Bill of Rights – the right of access to courts.[15] It took President Mbeki's government to court.

63. It challenged the President's refusal to make ARVs available under section 27(2) of the Bill of Rights.[16] This provision obliges

[11] Section 17 of the Constitution.
[12] Section 21 of the Constitution.
[13] Section 16 of the Constitution.
[14] Section 32 of the Constitution.
[15] Section 34 of the Constitution.
[16] Section 27(2) of the Constitution provides:
"The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

government to take “reasonable legislative and other measures”, within its available resources, in order to give progressive realisation to the right to have access to health care services.

64. The High Court ruled that President Mbeki’s policy on the AIDS drugs was not reasonable. It ordered him to start making the drugs available.

65. President Mbeki appealed. The Constitutional Court [I was not yet a member] heard the appeal in dramatic circumstances. At stake was a kingpin of the President’s intellectual and policy legacy.

66. The Court ruled against him. It held his policy on AIDS drugs not reasonable. It ordered him to start making the drugs available.

67. For some terrible moments, it seemed uncertain whether President Mbeki’s government would obey the court order. In South Africa’s neighbours in the years immediately preceding the Court’s ruling, government had flagrantly defied court orders that sought to safeguard freedom of speech, expression, protest, and property.

68. Would President Mbeki do the same? No. He did not. President Mbeki bowed his head before the rule of law. Within months, government had committed to providing large-scale, free public provision of ARVs. The process in some provinces was halting, grudging and even hesitant.[17] But, AIDS drugs became available. The death toll fell. Sickness and suffering and disablement diminished dramatically.

69. Today, I am proud to say, South Africa has the largest publicly provided AIDS treatment program in the world. Over 3.6 million people in this country, like myself, receive drugs that enable them to live healthy, vigorous, productive and joyful lives.

Nkandla – EFF v President of the Republic of South Africa (2016)

70. My fourth and last story is about a President whose private residence was vastly improved, at the cost to the public purse of hundreds of millions.

[17] Geffen and Cameron (2009), available at https://open.uct.ac.za/bitstream/handle/11427/19825/Geffen_deadly_hand_denial_2009.pdf;sequence=1.

71. This gave rise to great controversy. The Public Protector was asked to investigate. She holds office under the Constitution as an independent state institution supporting constitutional democracy.

72. She has the power to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice.[18]

73. More importantly, the Constitution gives her power, when she finds impropriety or prejudice, "to take appropriate remedial action".[19]

74. After investigating the expenditures on the President's home at Nkandla, the Public Protector exercised her remedial powers. She required the President to pay back a portion of the money spent on his private residence. That portion was to be worked out by

[18] Section 181(1)(a) of the Constitution.
[19] Section 181(1)(b) of the Constitution.

certain state functionaries and was to be proportionate to the undue benefit he and his family had received.[20]

75. The President failed to implement this remedial action. And Parliament failed to hold him to account.

76. Two opposition parties, the Economic Freedom Fighters and the Democratic Alliance, sought direct access to the Constitutional Court to hold the President to account. They claimed that the President had failed to fulfil a constitutional obligation – and that this meant that only the Constitutional Court could hear the case.

77. The Court agreed that it had exclusive jurisdiction. In a judgment Chief Justice Mogoeng wrote on behalf of a unanimous court, it held that the Public Protector's remedial power could not be ignored or second-guessed.

78. When the Public Protector's remedial action is binding, compliance is obligatory. The constitutional order, the Court found, affirming an earlier finding by the Supreme Court of Appeal, hinges on the rule of law. This obliges everyone to obey

[20] In addition, the Public Protector ordered the President to reprimand the cabinet ministers involved for specified improprieties.

decisions of those clothed with legal authority to make them – or otherwise they must approach the courts to have them set aside.

79. The Court held that the President's failure to comply with the Public Protector's remedial action was inconsistent with his duty under the Constitution to uphold, defend, and respect the Constitution.[21]

80. The Court's decision was momentous. It was broadcast live on all national channels, both public and private.

81. Chief Justice Mogoeng Mogoeng broke with the Court's usual practice of reading out only a short formal synopsis of its decision.

82. Instead, he read out a fully expansive summary of the Court's judgment. In ringing tones the Chief Justice proclaimed the duties of the President:

> "The President is the Head of State and Head of the national Executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our

[21] The Court also held that the National Assembly's conduct in failing to hold the President to account was contrary to its constitutional obligations to scrutinize and oversee executive action.

democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted."

83. The Chief Justice proclaimed that Parliament –

"is the embodiment of the centuries-old dreams and legitimate aspirations of all our people".

It is, he said –

"the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed.

For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made".

84. The Chief Justice's declamation constituted a fundamental exposition of profound constitutional philosophy and elementary civic duty.

85. It had the clarity of a sermon, the simplicity of a great judgment, and the urgency and passion of an imperative call to national duty.

86. Viewers and listeners across the country were electrified. The judgment was an historic moment in the life of our democracy.

87. Judgment was delivered on Thursday 31 March 2016. The next night the President appeared on national television: he confirmed that he fully accepted the court's decision.

LESSONS

88. These stories show that the Constitutional Court faced enormous practical problems – problems South African judges had never faced before:

- how to confront the grief and injustice of a still-painful past in fidelity to our Constitution;
- how to create essential mechanisms and institutions to combat the destructive monster of corruption;
- how to ensure government saves lives in a mass epidemic of illness and death in conformity with scientific reason and in accordance with constitutional duties; and
- how to secure compliance with constitutional duties from the highest office in the state.

89. In each case, the Court employed constitutional principles and values to tackle these issues in a truthful and courageous way.

90. What do the four stories tell us about constitutionalism and the rule of law?

91. First, the *Treatment Action Campaign*'s victory was a direct consequence of three factors:

a) *First*, a supreme Constitution with a powerful Bill of Rights;

b) *Second*, an informed, assertive and angry citizenry that was willing to challenge power;

and, *third* – the point most relevant to this conference –

c) judges who felt obliged and were willing to do their constitutional duty truthfully and humbly.

92. For a constitution to be a living source of precepts, values and guidance in national life, it must be a living document – and the first duty to breathe life into constitutionalism falls on those whose task it is to interpret, apply and safeguard the Constitution.

93. For a constitution to live it needs live exposition by committed judges who are faithful to its values.

94. Of course judges alone cannot do everything. Their role is to expound, interpret, and delimit. They cannot implement.

95. In the TAC case, the Court did not give a supervisory order. It did not stand over government's shoulder, micromanaging its commitment to ARV provision. It left this crucial process to politicians, officials, and their vigilant critics in civil society,

including the millions of families who risked the terrible bereavement of AIDS. It was those families – and not the Court – that forced government, in the end, to roll out ARVs.

96. *Glenister* also showed the limits of the Court's power. The courts cannot ensure that politicians appoint people of vigour, honesty and truthful purpose to the corruption-busting unit. Right now, we are in the middle of a controversy about one appointment – that of the head of the corruption-busting unit. Yesterday, Police Minister Mbalula called General Ntlemeza, whom his predecessor had appointed to head the new unit a "scandal and an embarrassment". He accused him of "defying the law".

97. The dispute illustrates that courts have the power to draw the lines within which power is exercised – but not to exercise power itself.

98. So, besides the courts, the legislature and the executive, constitutionalism and the rule of law depend on an active, engaged, critical, informed, and sometimes angry citizenry.

99. Courts can give a constitution air and breath. The legislature and the executive can give it muscle. But its lifeblood depends on an active citizenry.

100. All four stories I have told show this. Our Constitution includes a very wide doctrine of legal standing. This means that public interest organisations like the TAC and the CSVR – but also a lone businessman like Mr Glenister – and even opposition political parties – crucially activate constitutional and democratic duties. An active citizenry alive to this possibility is indispensable to the development of our jurisprudence.

101. So courts cannot act alone. They require the engagement and participation of active citizens and – of course – politicians and public office-bearers who are willing to bow their heads before the law. Both Presidents Mbeki and Zuma bowed their heads before the rule of law.

102. But none of this would have happened without courageous and assertive and truthful judges.

103. In the balance between deference and over-eager energy, we must never make the mistake of erring on the side of timorousness and fear.

104. For with us lies the first duty of guarding the Constitution, instilling its values and expounding its meaning in practical instances.

105. Judges cannot enforce the conditions necessary for economic growth, for human flourishing and for the bounties of democracy.

106. The judiciary and the rule of law are conditions for democracy, not its guarantors. Freedom ultimately resides in the people.

107. But successful constitutionalism, and, with it, successful democracy, require from us, as judges, our resolve and integrity plus fidelity to the constitutional text and commitment to the common good.