PUBLIC LAW CONFERENCE

Public Law and the Future of Constitutional Democracy

University of Cape Town

1 – 4 July 2026

Wednesday 1 July 2026

14:30 – 16:30 – Registration at Wilfred and Jules Kramer Building, Middle Campus, UCT

17:00 – 18:30 – Opening Keynote Plenary

Venue: Lecture Theatre 1, Wilfred and Jules Kramer Building

Chair with Opening Remarks: Justice Steven Majiedt (Constitutional Court of South Africa)

Welcome: Prof Mohamed Paleker (Dean of the Faculty of Law, University of Cape Town)

Prof Mosa Moshabela (Vice-Chancellor, University of Cape Town)

Keynote Address: Chief Justice Mandisa Maya (Constitutional Court of South Africa) (online)

Judicial Leadership in a Constitutional Democracy

With comments from Deputy Chief Justice Dunstan Mlambo (Constitutional Court of South Africa)

Vote of thanks: Justice Albie Sachs (Constitutional Court of South Africa)

18:30 – 20:00 – Welcome Reception in the Pius Langa Quad

Thursday 2 July 2026

9:00 - 10:30 – Session 1 Parallel Panels

The Judicial Role Today Venue: Lecture Theatre 1	Administrative Justice Venue: Lecture Theatre 2	Contemporary Issues in Constitutional Democracy Venue: Lecture Theatre 3

Chair: Dr Sanya Samtani (University of Cape Town)	Chair: Mr Mitchell de Beer (University of Cape Town & Cape Bar)	Chair: Prof John Golden (The University of Texas, School of Law)
Judge Benjamin Zipser (Federal Circuit and Family Court of Australia) The role of the judicial branch of government in the Australian constitutional democracy Justice Colin C J Feasby (Court of King's Bench of Alberta, Canada) *Judicial Reasons and Democracy in the Age of Misinformation and AI* Prof Preston Jordan Lim (Queen's University Canada) *Judicial Diplomacy*	Prof Geo Quinot (Stellenbosch University) *An indigenous reimagination of administrative justice to craft fit-for-purpose democratic governance in Africa* Dr Narelle Bedford (Bond University, Australia) *Responsive Justice: Why Tribunals Must Matter for the Future of Public Law* A/Prof Hanna Wilberg (University of Auckland) *The legal effect of administrative tribunal decisions: promoting access to justice, the rule of law and socio-economic rights*	Dr Aurelie M Spinola and Dr Kalpana Sivabalah (Middlesex University, Mauritius) *Evaluating Constitutional Resilience to Contemporary Populism: The Role of Constitutional Mechanisms in the United Kingdom and the French Fifth Republic.* Dr Nick Friedman (University of Cambridge) *Constitutional Democracy at Scale* Ms Nurina Ally and Ms Tatiana Kazim (University of Cape Town) *Apology as a Public Law Remedy: Securing Accountability for Breaches of Public Law Duties in South Africa*

10:30 – 11:00 – Coffee Break

11:00 – 12:30 – Session 2 Parallel Panels

Roundtable on Dyzenhaus, *The War Against Law* Venue: Lecture Theatre 1 Moderator: Prof Geneviève Cartier (University of Sherbrooke)	Public, Criminal Law and Detention Venue: Lecture Theatre 2 Chair: A/Prof Jameela Omar (University of Cape Town)	Judicial Appointments and Administration Venue: Lecture Theatre 3 Chair: Justice Adedotun Adedamola Grace Onibokun (High Court, Osun State, Nigeria)
Discussants: Prof David Dyzenhaus (University of Toronto) Prof Hugh Corder (University of Cape Town) Judge President/Prof Dennis Davis (University of Cape Town; Competition Appeal Court of South Africa)	A/Prof Gerard J Kennedy (University of Alberta) *An Exception that Proves the Rule: Criminal Law and the Administrative-Legislative Paradox* Prof Charles Tyler (University of California) *Discriminatory Legalism and Selective Prosecution*	Mr John H Jeffery (Independent, Cape Town) *Court Administration in South Africa – the Principles and the Practicalities* Mx Dimakatso Nchodu, Ms Alison Tilley, Ms Genevieve Maujean and Mr Mbekezeli Benjamin (Judges Matter, Democratic Governance and Rights Unit, South Africa) *Enhancing Judicial Appointment*

Mr Dan Mafora (University of Cape Town)	Dr Duncan Wallace (University of Melbourne) *An Australian Fiction of Detention and Punishment*	*Transparency: Monitoring the Judicial Service Commission through a Score Card Approach* Dr Benjamin Perryman (University of New Brunswick) *The Overlapping Powers Doctrine*

12:30 – 13:30 – Lunch in the Pius Langa Quad

12:45 – 13:30 – Doctoral Panel A

Conceptualising the State, State Action and State Power: Contemporary Challenges Venue: Lecture Theatre 1 Chair: Prof Geo Quinot (Stellenbosch University)	Law and Change Venue: Lecture Theatre 2 Chair: Dr Jason Brickhill (Johannesburg Bar & University of Cape Town)	Legislation, Interpretation and Legal Plurality Venue: Lecture Theatre 3 Chair: Dr Megan Finn (University of Johannesburg)
Ms Raisa N Cachalia (Stellenbosch University) *Distinguishing State Power under the South African Constitution: From Functional Classification to Institutional Identity* Mr Nakul Nayak (LSE) *Between Citizen, Capital, and State: Law and Politics of Digital Public Infrastructures* Mr James Monaghan (LSE) *Between the Minister and the law? The Civil Service and the Rwanda asylum plan in R (FDA) v Minister for the Cabinet Office [2024] EWHC 1729 (Admin), [2025] KB 269*	Ms Ropafadzo Maphosa (University of Johannesburg) *Courts as Political Battlegrounds: Strategic Litigation and the Future of Constitutional Democracy in South Africa* Mr Pascual Cortés (LSE) *'We would have remained the same': On the Chilean Carabineros' constitutional embeddedness* Ms Arshia Sana (O P Jindal Global University) *Legal Discrimination and Democratic Backsliding in India: Use, Misuse, Abuse of Law to Marginalise Minorities*	Ms Ariella C Gordon (University of Cambridge) *The Dialogue around Disguised Legislation in the United Kingdom and Australia* Mr Konstantinos Sioufas (LSE) *The Impact of Constitutionalism on Statutory Interpretation* Mr James Gaetani (Australian National University) *Recognition in the age of statutes: Statute law and legal plurality in Australia*

13:30 – 15:00 – Keynote Plenary: Judicial Independence and Accountability

Venue: Lecture Theatre 1

Chair: Prof Hugh Corder (University of Cape Town)

Chief Justice Mumba Malila SC (Supreme Court of Zambia)

Prof Paul Daly (University of Ottawa)

Prof Ben Sihanya (University of Nairobi)

15:00 – 15:20 – Coffee Break

15:20 – 16:50 – Parallel Panels – Session 3

Human Rights, Proportionality and Punishment Venue: Lecture Theatre 1 Chair: Ms Carol Selepe (Law Society of South Africa)	Transformation, Authoritarianism and Populism Venue: Lecture Theatre 2 Chair: Justice Seena Yacoob (High Court of South Africa)	Accountability Beyond Courts Venue: Lecture Theatre 3 Chair: Mr Mashudu Kutama (Law Society of South Africa)
Prof Natasa Mavronicola (University of Birmingham) and Dr Mattia Pinto (University of York) *Rethinking the penal accountability paradigm for serious human rights violations* Mr Daniel Adjin Odonkor and Dr Nicola Palmer (University of Cape Town) *Navigating Criminalisation in African Human Rights Law* Dr Bruce Chen (Deakin Law School) *Proportionality Testing under the South African Bill of Rights and Australian Human Rights Acts: Strange Bedfellows?*	Prof Olaf Zenker (Martin Luther University, Germany) *Reclaiming Transformative Constitutionalism: Postliberal Affordances between Southern-Decolonial Critique and Northern Authoritarianism* Mr Denin O Omondi (Moi University, Kenya) *Populism, Nationalism, and Fundamentalism: Reassessing Constitutionalism Thirty Years After South Africa's 1996 Constitution* Dr Justice Alfred Mavedzenge (Democratic Governance and Rights Unit, University of Cape Town) *Competitive Authoritarianism and the subversion of judicial autonomy in Africa*	Dr Molefhi M Phorego (Nelson Mandela University) *Presidential Commissions of Inquiry as a Mechanism to Effect Constitutional Review: Perspectives from Botswana and Comparable Jurisdictions* Prof Dean R Knight (Victoria University of Wellington) *Conceptualising an integrity or fourth branch of government in Aotearoa New Zealand: promoting probity in governance and safeguarding constitutional democracy* Ms Monica de Souza-Louw (University of Cape Town) *Promoting accountability and going 'back to basics' in South African traditional governance*

16:50 – 17:30 – Transfer to Dinner venue from Kramer Law Building

17:30 – 22:00 – Gala Dinner at the Norval Foundation Art Gallery

Dinner speaker: Judge President/Prof Dennis Davis (University of Cape Town/Competition Appeal Court of South Africa)

Building Constitutional Jurisprudence from Nothing: 30 years of the Constitutional Court

Dress: Smart casual

Friday 3 July 2026

9:00 – 10:30 – Parallel Panels – Session 4

Control of Discretionary Power Venue: Lecture Theatre 1 Chair: Prof David Dyzenhaus (University of Toronto)	Constitutional Challenge and Change in Africa Venue: Lecture Theatre 2 Chair: Mr Frankl Weber (Law Society of South Africa)	Equality: Wealth, Education, Identity Venue: Lecture Theatre 3 Chair: Ms Zenobia Du Toit (Miller du Toit Cloete Inc)
Prof Genevieve Cartier (University of Sherbrooke) *Discretion, Prerogative Power and Constitutional Democracy* Dr Edward Clark (Te Herenga Waka | Victoria University of Wellington) *The Shared Burden of Justification and the Separation of Powers: A Dynamic Equilibrium?* Dr Isabeau Steytler (Stellenbosch University) *The procedural fairness gap in the review of non-administrative actions in South Africa*	Dr Musa Kika (Institute for Human Rights and Development in Africa, Gambia) *Jurisprudence of Coups: Trends in Constitutional Adjudication of Coups in Africa* A/Prof Jameelah Omar (University of Cape Town) *The discriminatory component of consent: an analysis of sexual assault in South Africa* Dr Ibrahim Harun (University of the Western Cape) *From Balance to Domination: Executive Power and Democratic Accountability in Post-2010 Kenya*	A/Prof Jason Brickhill (University of Cape Town/Johannesburg Bar) *The Constitutional Imperative to Regulate Extreme Wealth* Dr Lisa Draga (University of the Western Cape) *Language in education: Access to education versus recognition of diversity* Ms Jessica Waldman (University of Cape Town) *A denial of common humanity? Unsolved murders, impunity and the right to a dignified death investigation*

10:30 – 11:00 – Coffee Break

11:00 – 12:30 – Keynote Plenary: Reconceiving Public International Law

Venue: Lecture Theatre 1

Chair: Dr Nicola Palmer (University of Cape Town)

Justice Richard Goldstone (Constitutional Court of South Africa)

Prof Antony Anghie (National University of Singapore)

Ms Tafadzwa Pasipanodya (Partner and Chair, Africa Practice, Foley Hoag LLP, Washington DC)

Emeritus Prof John Dugard SC (Leiden University/University of the Witwatersrand) (online)

12:30 – 13:30 – Lunch in the Pius Langa Quad

12:45 – 13:30 – Doctoral Panel B

Law, Society and Equality Venue: Lecture Theatre 1 Chair: Prof Nico Steytler (University of the Western Cape)	Accountability, Relief and Public Law Venue: Lecture Theatre 2 Chair: Mr John Jeffery (Independent, South Africa)	Testing Democratic Resilience Venue: Lecture Theatre 3 Chair: Mr Jonathan Mort (Jonathan Mort Inc)
Ms Sinethemba Memela (University of New South Wales) *The Interpretation of Constitutional Labour Rights and material inequality in South Africa* Mr Douglas McDonald-Norman (University of Technology Sydney; UNSW) *The Canary: Tribunals and Democracy in India*	Mr Nathaniel Reilly (University of Oxford) *Damaging Good Governance: A Game-Theoretic Perspective* Mr Benjamin Christy (University of Auckland) *A New [Zealand] Parliamentary Sovereignty: Can sovereign parliaments be liable for human rights violations?* Dra Anne Bombay (KU Leuven) *Courts and the Vacant Seat of the Legislator: Judicial Remedies for Unlawful Legislative Inaction in Constitutional Democracies*	Ms Lisa de Waal (Stellenbosch University) *Accountability in South Africa's International Law Participation: Measuring the Health of its Constitutional Democracy* Ms Lisa Marië Leibniz (University Hannover) *Right-Wing Extremism and Democratic Erosion: A Comparative Analysis of Institutional Resilience in Germany and South Africa*

13:30 – 15:00 – Parallel Panels – Session 5

Distribution of Power within Constitutional Systems Venue: Lecture Theatre 1 Chair: Justice Colin Feasby (Court of King's Bench of Alberta)	Unwritten Norms Venue: Lecture Theatre 2 Chair: Justice Steven Majiedt (Constitutional Court, South Africa)	Speech, Protest and Struggle Venue: Lecture Theatre 3 Chair: Prof Bradley Slade (Stellenbosch University)
Mr Dan Mafora (University of Cape Town) *Executive Authority under the Constitution: Doctrine in Search of a Theory* Prof John Golden (University of Texas at Austin) *Madison's Separation-of-Powers Oversight? Correcting for the*	Hon Justice Adedotun Onibokun (Nigerian High Court/Redeemer's University) *Identifying and Upholding the Unwritten Norms, Values and Cultures that Sustain Democracy in Nigeria*	Ms Celia G Winnett (Sixth Floor Selborne Wentworth Chambers, Australia) *Anonymous Political Speech in a Constitutional Democracy* Dr Tanveer R Jeewa (Stellenbosch University) *The*

Legislature's Long-Term Disadvantage Dr Andreas Karsten (CUQ Ulster University, Doha) *From Riots to Responsibility, the Role of "Sanctuary Cities" in a World of Increasing "Sanctuary" Risks and Perpetual Violence: A New Democratic Frontier*	A/Prof Marcelo B Rodriguez Ferrere (University of Auckland) *The weaponisation of comity in New Zealand* Dr Shreeya Smith (Western Sydney University) *Democracy under the Constitution: how democratic participation and accountability inform our understanding of the power of the Commonwealth in Australia*	*History of Mass Unlawful Occupation* Prof Mlungisi Ernest Tenza (University of KwaZulu-Natal) *An investigation into the justifiability of the use of struggle songs, slogans and apartheid symbols as modes of expression and heritage in a democratic South Africa*

15:00 – 15:20 – Coffee Break

15:20 – 16:50 – Parallel Panels – Session 6

The Public-Private Interface Venue: Lecture Theatre 1 Chair: Ms Pippa Reyburn (ENS Attorneys)	The Judicial Branch and Judicial Process Venue: Lecture Theatre 2 Chair: Prof Jason Varuhas (University of Melbourne)	The Efficacy of Constitutional Democracies Venue: Lecture Theatre 3 Chair: Prof Henk Botha (Stellenbosch University)
Prof Janina L Boughey (University of New South Wales) *Government Outsourcing of Expertise: Lawfulness and Legitimacy* Dr Meghan Finn (University of Johannesburg) *Revisiting the remedial repertoire in South Africa's horizontal constitutionalism* Ms Claire Rankin and Ms Margeaux Wassenaar (Legal Resources Centre, South Africa; Webber Wentzel, South Africa) *Crossing the divide: the diminishing returns of retaining siloed public, private and commercial legal sectors in judicial reasoning*	Justice Sheilah Martin (Supreme Court of Canada) and Chief Justice Glenn Joyal (Manitoba Court of King's Bench) The Modern Judicial Role and the Paradox of Judicial Independence Prof Ntombizozuko Dyani-Mhango (University of Pretoria) *The doctrine of stare decisis and judicial accountability in the South African Constitutional Court* Dr Sanya Samtani (University of Cape Town) and Prof Jonathan Klaaren (University of the Witwatersrand) *When 'force' and 'will' require 'mere judgment': Engaging the Constitutional Court through Presidential and Parliamentary Referrals*	Dr Robert J Craig (University of Bristol) *In defence of First Past The Post* Ms Ritwika Sharma (Jindal Global Law School) *Delimitation of Electoral Constituencies in India – Constitutional Expectations, Political Realities* Adv Benjamin Cronin (University of Cape Town) *State Capture from within: The technocratic threat to the rule of law*

17:00 – 18:30 – Keynote Plenary: 30 Years of South African Constitutionalism

Venue: Lecture Theatre 1

Chair: Dr Nomfundo Ramalekana (University of Cape Town)

Prof Joel Modiri (University of Pretoria)

Mr Dan Mafora (University of Cape Town)

Prof Cathi Albertyn (University of the Witwatersrand)

Ms Prelisha Singh (Webber Wentzel Attorneys)

Saturday 4 July 2026

9:00 – 10:30 – Keynote Plenary: Comparative Influences in National Jurisdictions

Venue: Lecture Theatre 1

Chair: Chief Justice Satiu Simativa Perese (Supreme Court of Samoa)

Lord Justice Rabinder Singh (English Court of Appeal)

Prof Charles Fombad (University of Pretoria) (online)

Prof Jason Varuhas (University of Melbourne)

10:30 – 11:00 – Coffee Break

11:00 – 12:30 – Parallel Panels – Session 7

The Interface between International Law and Constitutional Law Venue: Lecture Theatre 1 Chair: Dr Nicola Palmer (University of Cape Town)	Privacy, Surveillance and Technological Power Venue: Lecture Theatre 2 Chair: Dr Felicity Kalunga (University of Zambia)	Legislation and Legislatures Venue: Lecture Theatre 3 Chair: Mr Paul Hoffman SC (Accountability Now)
Dr Fiona Roughley (Banco Chambers, Australia) *International Law and Constitutional Democracy: Interconnection, Independence and Immunity* Dr Gus Waschefort (4-5 Gray's Inn Square Chambers) *A Practitioner's Perspective on the Domestication of Customary International Law: A comparison of English and South African Constitutional*	Dr Róisín Á Costello (Trinity College Dublin) *A Republican Theory of Privacy: securing intellectual freedom and the right to walk tall in the modern state* Dr Lukman Adebisi Abdulrauf (University of Ilorin, Nigeria) *Rethinking Constitutionalism in the Digital Era: Big Tech, Platform Power and the Future of Democracy in Africa*	Dr Robert Greally (University of Bristol/New York University) *The Least Examined Branch: A Genealogy of Legislative Assemblies in Public Law* Ms Marion Sandilands (University of Ottawa/Conway Litigation) *Corroding the Rule of Law through Law-Making: Examples from Canada* Mr MP Fourie-Viljoen

Principles as Safeguard for the Separation of Powers	Mr Yuri Behari-Leak (University of Cape Town) Justice Needs a Human Face: Artificial Intelligence, Social Justice, and Access to Courts in South Africa	(Constitutional Court of South Africa) *Invalidation of Legislation on Public Participation Grounds: Constitutional Tensions and Remedies*

12:30 – 13:30 – Lunch

13:30 – 15:00 – Closing Plenary Keynote: Public Law and the Future of Constitutional Democracy

Venue: Lecture Theatre 1

Chair: Prof Cora Hoexter (University of the Witwatersrand)

Deputy Chief Justice Dunstan Mlambo (Constitutional Court of South Africa)

Prof Geneviève Cartier (University of Sherbrooke)

Lord Justice Rabinder Singh (English Court of Appeal)

Closing remarks: Prof Hugh Corder and Prof Jason Varuhas

The organisation and staging of a conference such as this Public Law Conference would be impossible without the generous and willing support of a number of donors, all of which are based in South Africa. The 2026 Organising Committee would like to express its great gratitude to the following bodies whose financial and in-kind support has made this event possible:

The Millennium Foundation

The University of Cape Town, the University of the Western Cape, and Stellenbosch University, in each instance through the Dean of Law.

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ABSTRACTS PER SESSION

Thursday 2 July 2026

9:00 - 10:30 – Session 1 Parallel Panels

The Judicial Role Today - Venue: Lecture Theatre 1

Chair: Dr Sanya Samtani (University of Cape Town)

Judge Benjamin Zipser (Federal Circuit and Family Court of Australia) *The role of the judicial branch of government in the Australian constitutional democracy*

Abstract:

In the Australian federal constitutional system, the judicial branch of government (the federal courts) has power to check:

- the exercise of power by the legislative branch of government – through the invalidation of legislation made by the federal Parliament in breach of constitutional provisions or prohibitions; and
- the exercise of statutory powers and (more controversially – see for example *Davis v Minister* [2021] FCAFC 213) some non-statutory action by the executive branch of government - through the quashing of administrative decisions made by the Executive in breach of boundaries on the lawful exercise of power set by the High Court of Australia (High Court), and the invalidation of delegated legislation made outside the scope of delegation.

My paper, after explaining the Australian federal constitutional system to allow Australian and international readers to understand what follows, will consider the role of the federal courts in checking the exercise of federal legislative and executive power over the decades, and the context in which the federal courts' role is part of, and has contributed to, a stable constitutional democracy in Australia.

Issues likely to be addressed in my paper include:

- in respect of significant and controversial decisions of the High Court concerning the checking of legislative or executive power, reactions and criticisms by the legislative and executive branches of government at the time;
- the tensions between the federal courts on the one part and the legislative and executive branches of government on the other part in relation to migration laws and executive action concerning non-citizens (see for example *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Plaintiff M70/2011 v Minister* (2011) 244 CLR 144; and *NZYQ v Minister* (2023) 280 CLR 137);
- the perceived legitimacy of the High Court, techniques of the High Court to maintain legitimacy, and institutions which have contributed to the independence of (and respect for the independence of) the judiciary;
- the strict approach taken by the High Court to the separation of powers with respect to the judicial branch of government – to the effect that the executive cannot have judicial power (see

Brandy v HREOC (1995) 183 CLR 245) and the federal courts cannot have executive power (see *Wilson v Minister* (1996) 189 CLR 1);

- despite the separation of powers doctrine, the interconnections between the judicial and executive branches of government - for example that since the High Court's establishment in 1903 13 justices (including five chief justices) were previously members of federal or State parliaments, and the executive appoints the judiciary and has control over conditions of service;
- the High Court's support over the last century for an expansion of federal legislative power (and thereby federal executive power) in place of State government power;
- the establishment by the federal parliament in the 1970s of a federal tribunal with power to undertake merits review of exercises of statutory power by the executive, which has assisted the role of the federal courts in checking executive power;
- the social, cultural, political and institutional conditions in Australia in which the federal courts have exercised the checking powers the subject of the paper.

Justice Colin C J Feasby (Court of King's Bench of Alberta, Canada) *Judicial Reasons and Democracy in the Age of Misinformation and AI*

<u>Abstract:</u> Public reason giving, according to John Rawls, is the foundation of the liberal democratic political order. Even if one subscribes to a more pragmatic or realist conception of democracy, the idea that political choices must be justified by reasons matters. Nowhere do reasons matter more than in the legal domain where courts are expected to justify their decisions with written reasons. Sometimes courts confront questions that lie at the centre of a country's conception of democracy. Today, the idea of democracy and questions concerning the democratic process are contested in courts more than ever. This phenomenon has been called the constitutionalization of democratic politics. All courts, not just apex courts, are confronted with cases that strike at the heart of constitutional democracy. These cases, I argue, demand that courts depart from the normal conventions of judicial reason-giving to speak directly to the public. Judicial reasons often use inaccessible legal language because they are written mainly for the legal community and judges assume that their decisions will be explained to the public by expert interlocutors, including lawyers and the mainstream media. Now, in an age where there is growing mistrust of experts, mainstream media is in decline, politics is increasingly polarized, and some malevolent actors misrepresent judicial decisions to undermine the legitimacy of courts, judges cannot rely on others to explain their decisions to the public in good faith. This problem is most acute where judges are called upon to decide complex questions concerning the democratic process. The challenges of the political and social environment in which courts operate are magnified by technological changes, including the emergence of artificial intelligence ("AI"). AI is replacing experts and mainstream media as the essential source of trustworthy information for many people. This is problematic because most major databases of judicial decisions – CanLii for example – are inaccessible to the most popular AI models. This means that AI models are not trained using judicial decisions, they are trained by what people say about judicial decisions. The dependence of AI on secondary accounts of judicial decisions creates the risk that those decisions will be misrepresented to the public. As we enter an age of both misinformation and AI, courts and judges must remember that, as Marshall McLuhan said, the medium is the message. For courts to continue to fulfill their role as public reason givers, particularly in cases that concern the ideas and processes at the core of constitutional democracy, there must be a comprehensive rethinking of how courts communicate decisions to the public and how judges write their reasons. Courts must take new approaches to publicizing their decisions and assisting the public in understanding their decisions. Judges

must free themselves from the traditional constraints of judgment writing and embrace styles and formats that communicate the essence of judicial reasons to the public.

Prof Preston Jordan Lim (Queen's University Canada) *Judicial Diplomacy*

Abstract: My article focuses on the vital role that "judicial diplomacy" plays within and between constitutional democracies. Various jurists have used the term in different and sometimes contradictory ways, which makes it difficult to offer useful policy prescriptions on this important phenomenon. Most scholars use the term to describe judges' engagement in international networking. Thus, when the Justices of the Supreme Court of the United States meet with the Judges of the Court of Justice of the European Union, they engage in judicial diplomacy. When judges speak in the hallways at an academic gathering like the Public Law Conference, they engage in judicial diplomacy. Other scholars use the term in quite different ways. Some scholars, for example, employ the term to describe situations in which judges impermissibly attempt to achieve foreign policy ends. I argue that it is important to offer a clearer, overarching conceptualisation of judicial diplomacy, and that jurists must do more to reflect upon the advantages and risks of the craft. First, I bring conceptual clarity to the discussion on judicial diplomacy. I suggest that there are several ways of conceiving judicial diplomacy. The principal definition that I advance, however, envisions judicial diplomacy as a category of behaviours; it occurs when judges represent their courts or jurisdictions in external engagements. I develop several arguments about the scope of the phenomenon. For one thing, I suggest that judicial diplomacy can occur on the domestic plane. This is especially true in federal states marked by the strong decentralization of powers. When judges of the Court of Appeal for Quebec, who hail from a mixed civil-common law system, engage in official dialogue with the judges of the Court of Appeal for Ontario, who hail from a common law system, they are engaging in judicial diplomacy. For another, I argue that it is improper to divorce judicial diplomacy from the adjudicative work of judges. When judges across jurisdictions coordinate and adopt soft law protocols on bankruptcy law, for example, I suggest that they are engaging in judicial diplomacy. I thus push jurists to think of judicial diplomacy in new and hopefully, profitable, ways. Second, I draw attention to the broader context of judicial diplomacy. Various forms of judicial diplomacy are under attack today. Economic retrenchment in a range of jurisdictions has led to a sharp decrease in funding for international judicial work. It is vital that jurists publicly explain and defend the merits of judicial diplomacy. I will cover some of the major advantages of the craft, which range from boosting the soft law attractions of a judge's jurisdiction to defending the global rule of law. I will also note that judicial diplomacy can in certain circumstances place immense strain on the separation of powers and compound public mistrust of the judiciary. I close by arguing that judges can successfully respond to the risks of the craft by embracing a thick conception of judicial wisdom.

<u>Administrative Justice - Venue: Lecture Theatre 2</u>

Chair: Mr Mitchell de Beer (University of Cape Town & Cape Bar)

Prof Geo Quinot (Stellenbosch University) *An indigenous reimagination of administrative justice to craft fit-for-purpose democratic governance in Africa*

Abstract: The notion of administrative justice has increasingly become an important element of democratic governance worldwide. Several domestic and international human rights and constitutional

instruments now contain some recognition and/or protection of administrative justice. The origins of this development can (at least partially) be traced back to democratisation processes in Africa in the early to mid-1990s. Namibia's independence constitution of 1990 stands as an important signpost of the formal recognition of a right to administrative justice as part of a justiciable bill of rights. The subsequent emergence of administrative justice rights embedded in many African constitutions ostensibly represents a break from the common-law tradition, positioning administrative law within human rights frameworks and constitutional supremacy rather than parliamentary sovereignty. This development fundamentally repositions the role of administrative law within democracy. In fact, it may be argued that such development contributes to a shift in the conceptualisation of democracy itself – one that is less reliant on representative structures and more on participatory decision-making. However, despite the emerging prevalence of administrative justice as key to democracy in numerous African systems, administrative law in many (if not all) of these same systems continues to be locked into a common-law paradigm. Courts, and to a limited extent legislatures, continue to privilege common-law approaches to administrative law while failing to meaningfully incorporate indigenous governance traditions. The failure of administrative law in these systems to develop beyond its common-law origins and to take up its role as a cornerstone of administrative justice within the framework of legal plurality espoused by these African constitutions, undermines the emergence of a truly fit-for-purpose operational model of democracy. The argument put forward here is that this failure amounts to a lost opportunity to develop plural conceptualisations of administrative justice that embed indigenous traditions of administrative governance within constitutionalised frameworks of administrative law. The contribution calls for greater attention to indigenous administrative law in African systems as a way of realising democracy in a manner that is embedded within local contexts.

Dr Narelle Bedford (Bond University, Australia) *Responsive Justice: Why Tribunals Must Matter for the Future of Public Law*

Abstract: Tribunals occupy a crucial, yet persistently undervalued and underfunded, place within legal justice landscapes. This paper argues that tribunals which combine civil and administrative jurisdictions can deliver accessible dispute resolution in the domains that most directly affect everyday life. Examples include housing, consumer transactions, guardianship, mental health, neighbourhood disputes, planning, and vocational regulation. In addition, they also conduct merits review of government decision-making. They do all this straddling the private law and public law divide and all while operating with procedures that are by design less formal, faster and more affordable than courts. This paper situates tribunals within the 2026 Public Law Conference theme, Public Law and the Future of Constitutional Democracy, by arguing that tribunals function as integrity institutions of everyday constitutionalism. They operationalise access to justice and the rule of law by providing dispute resolution and merits review, delivering transparent reasons and accessible remedies in high-volume, rights-affecting domains. With the tribunals' focus on speed, informality and affordability, these forums are attractive for self-represented applicants and function as the first point, or at least an early point, of contact into the legal justice system. Empirical and policy evidence on access to justice underscores the systemic importance of low-cost, informal pathways, while cautioning against "creeping legalism" that can erode tribunal advantages unless processes, evidential rules and representation conditions are calibrated to these tribunals' statutory objectives. The paper will advance four claims. First, tribunals are buffers against democratic erosion or over-reach: by providing routine, review-based accountability of power in quotidian decisions (tenancy,

public housing, vocational regulation and discipline, consumer rights). They solidify legality and fairness without resort to superior court litigation. Second, tribunals are vectors of inclusive justice. Through guardianship, mental health, child and other forms of protective decision-making, tribunals can assist vulnerable groups, in particular people with disabilities, First Nations peoples, and self-represented parties, with processes designed to be comprehensible and responsive. Third, tribunals are sites of innovation: the model of tribunals conferred with combined jurisdictions have demonstrated the efficiencies from ongoing amalgamations, expanding jurisdictional conferral, digital filing and easy to comprehend reasons. These types of tribunals exemplify adaptive institutional design that sustains rule-of-law values under resource constraints. Fourth, tribunals offer sensitive and responsive justice in topical emerging areas including voluntary assisted dying, advance care directives, special medical procedures, and urgent health care. By reframing tribunals as integral to constitutional democracy rather than lesser or peripheral, the paper invites comparative reflection on how tribunals can be harnessed to fortify public law against populist pressures, administrative opacity, and inequality.

A/Prof Hanna Wilberg (University of Auckland) *The legal effect of administrative tribunal decisions: promoting access to justice, the rule of law and socio-economic rights*

Abstract: Suppose an administrative tribunal has finally addressed a longstanding question about the correct approach to a contested question under a complex administrative regime. What happens next - what is the legal effect of the tribunal's decision and what should it be? This question has a number of different aspects, and the answers to all of them are surprisingly uncertain. If the defendant authority's practice has been found unlawful, is it required to revise its internal guidelines to ensure compliance with the tribunal's decision in other cases? If the authority appeals the decision, is it required to comply with it pending the appeal? Is a lower tier review body bound by the tribunal's decision, and is the tribunal itself bound by it in future cases? The literature on tribunals tends to focus on accessibility in terms of the procedures followed by tribunals and the cost of using them, rather than the effect of their decisions. There is also literature on the impact of court or tribunal decisions on public administration, but this tends to be empirical work exploring what happens in fact. This paper asks about the legal effect of tribunal decisions. It explores this by reference to legal doctrinal principles such as the doctrine of precedent, as well as access to justice and rule of law principles. Furthermore, socio-economic rights are at stake in many administrative contexts, such as in social security decision-making. In such cases, the question about the legal effect of tribunals' decisions can also be explored by reference to principles concerning adequate protection of socio-economic rights. In terms of the conference theme, this paper engages with the future of constitutional democracy by exploring the demands of the rule of law and the protection of socio-economic rights. It does so in relation to executive power and in the context of administrative justice.

<u>Contemporary Issues in Constitutional Democracy - Venue: Lecture Theatre 3</u>

Chair: Prof John Golden (The University of Texas, School of Law)

Dr Aurelie M Spinola and Dr Kalpana Sivabalah (Middlesex University, Mauritius) *Evaluating Constitutional Resilience to Contemporary Populism: The Role of Constitutional Mechanisms in the United Kingdom and the French Fifth Republic.*

Abstract: This paper examines the adaptability of constitutional mechanisms when confronted with contemporary populism, with a focus on resilience and vulnerabilities within constitutional democracies. Over the last decade, populism has re-emerged through nationalist narratives and the strategic weaponisation of the 'People's will' to advance political agendas. This rise is associated with risks such as deepening social fragmentation and the erosion of democratic values, potentially undermining the capacity of constitutional democracies to address pressing challenges through collective action. Adopting a comparative legal framework, the study focuses on France and the United Kingdom, employing an ideational definition of populism to illuminate how legal mechanisms are employed, hijacked, or channelled to respond to populist pressures. France and the UK offer contrasting institutional settings: a codified constitution with a semi-presidential system versus a political, uncodified constitution underpinned by the principle of parliamentary sovereignty. By tracing the usage, timing, and outcomes of these mechanisms, the paper reveals how formal constitutional design can both constrain populist dynamics and be repurposed to concentrate power or bypass scrutiny. To this end, this paper scrutinises the operationalisation of three key French constitutional mechanisms—how and when Article 49.3 is invoked, the strategic employment of motions of no confidence, and the Constitutional Council's constitutional scrutiny of budgetary and policy measures—and traces their practical effects on governance, legitimacy, and democratic norms. The paper then turns to a consideration of how the Brexit process has exposed certain vulnerabilities within the UK's flexible, evolutionary constitution. It examines three deficiencies within the UK's constitutional framework, namely the overreliance and misuse of prerogative power by the executive, the flaws within the first-past-the-post electoral system and the absence of constitutional entrenchment to protect fundamental rights. The paper proceeds to evaluate the extent to which protective mechanisms such as constitutional conventions and judicial review help correct these deficiencies. The analysis will reveal how the rigid constitutional mechanisms of France, juxtaposed with the UK's flexible, uncodified framework, create distinct environments for either constraining or enabling populist dynamics. It will consider whether these mechanisms mitigate or facilitate populist dynamics, and under what political and institutional conditions they function as genuine checks versus instruments that can be repurposed to concentrate power. By tracing these dynamics, the paper aims to develop provisional insights into how constitutional architecture mediates democratic legitimacy under populist pressure. The work remains exploratory, with conclusions contingent on ongoing comparative analysis, and will contribute to broader debates on constitutionalism, resilience, and reform.

Dr Nick Friedman (University of Cambridge) *Constitutional Democracy at Scale*

Abstract: Constitutional democracy is a precarious enterprise. Far-right populism, the corrupting influence of billionaires, and the disruptive effects of technology are just some of the current dangers it faces. In my proposed paper for the Public Law Conference 2026, I explore a more basic threat to constitutional democracy: its size. Drawing on political philosophy and political science, I argue that democratic governments face a tension between their legitimacy and their scale. The world today is composed of 195 nation-states. These borders were drawn by war, greed, and empire, with little regard for the public interest. The result, even in small nations, is that millions of people—with radically different worldviews, spread over an expansive territory—live under one authority. Is this the appropriate scale for constitutional democracy? My paper suggests it may not be, and that countervailing, remedial steps are needed to localise (and legitimate) democratic control. In broad outline, the argument is as follows. First, I consider 'reason-based' theories of authority, according to which political decisions are legitimate if

they take all the relevant reasons into account and judge the balance of those reasons correctly. I argue that large, centralised governments, in many situations they seek to regulate, are unlikely to get the balance of reasons right. Second, I consider 'process-based' theories of authority, according to which political decisions are legitimate if they are made in the right way; that is, with the meaningful participation of those whom the decisions affect. I argue that such participation is frequently impossible in large, centralised governments. Finally, I bolster these theoretical claims with two recent case studies from British constitutional politics. One is Brexit, in which the European Union was painted as an unaccountable bureaucracy insensitive to the needs of the United Kingdom. The other is the Scottish independence movement, which makes nearly identical claims about the Westminster Parliament. While these movements are associated with different ends of the political spectrum, they both reflect, I argue, a grassroots rejection of massive political unions, driven by concerns about the legitimacy of distant political elites. The paper has important implications for some perennial themes in public law. It seeks to understand the conditions in which power should be devolved to subnational regions and local authorities, as well as the conditions under which responsibility should be delegated to frontline decision-makers. The paper also has implications for the future of constitutional democracy. The politics of the nation-state operate on a superhuman scale that is alienating to ordinary citizens. To retain their investment, democracy may need to become much more radically local. Thank you for your consideration.

Ms Nurina Ally and Ms Tatiana Kazim (University of Cape Town) *Apology as a Public Law Remedy: Securing Accountability for Breaches of Public Law Duties in South Africa*

Abstract: Apology orders in South Africa have largely been utilised in private law disputes. In that setting, the remedy has been cast as a restorative justice mechanism aimed at securing reconciliation and forgiveness. But apology orders also have an important accountability dimension. A compelled apology requires a wrongdoer to publicly acknowledge harm that has been caused, accept responsibility for wrongdoing, and account to complainants. In some cases, a compelled apology may even serve as a form of punishment.[1] In this paper, we suggest that court-ordered apologies are a viable, albeit underexplored, public law remedy in South Africa. In response to breaches of public authority duties, apology orders can reinforce constitutional norms, prompt governmental action and vindicate the rights of complainants, thus affirming their dignity. By personalising responsibility, apology orders can make those who wield power directly confront the individuals and communities impacted by non-fulfilment of public duties. A compelled apology can be complementary to other remedial interventions, or an alternative form of relief. South African courts have, for example, adopted a cautious approach to constitutional damages. This reluctance has been informed by concerns over the efficacy of their deterrent effect, the burden on the public purse, and the potential windfall to individuals in cases involving systemic rights violations. Rather than leaving complainants without a remedy, apology orders offer a path to securing a measure of accountability and vindicating complainants' rights without risking a flood of damages claims against the state. Part I of the paper outlines the nature of apologies and, in particular, compelled apologies and addresses the argument that apologies must be sincere to be effective. Part II considers South African jurisprudence on compelled apologies, primarily in the context of hate speech and defamation cases. Part III considers the role of apology orders in response to breaches of public authority duties and draws lessons from foreign jurisprudence on the crafting of such orders. Finally, Part IV considers several cases in the basic education context where apology orders could have played an accountability-reinforcing and rights-vindicating role, either in addition to the remedies sought by the parties, or as an alternative to them.

[1] Nurina Ally and Kerry Williams, 'Penance and punishment: Apology as a remedy for hate speech' in Melanie Judge and Dee Smythe (eds.) Unsettling Apologies (Bristol University Press, 2022) 75-98.

10:30 – 11:00 – Coffee Break

11:00 – 12:30 – Session 2 Parallel Panels

Roundtable on Dyzenhaus, *The War Against Law* - Venue: Lecture Theatre 1

Abstract: When President Trump calls for a federal judge to be impeached for issuing an order staying the deportation of some migrants, many diagnose a constitutional crisis happening in real time. In issuing the call, Trump is supported by the work of legal scholars who argue for the idea of the 'unitary executive', in effect that the President as the head of the government of the day is the 'guardian of the constitution' in that he gets to determine the limits of his own legitimate authority. This idea has its roots in Carl Schmitt's political and legal theory, adopted wholesale by Harvard Law Professor Adrian Vermeule, whose Tweet on this topic was reposted by Vice President JD Vance. Vermeule is also a leading exponent of 'integralism', a controversial interpretation of Catholicism, vehemently opposed to liberalism, which requires the state to enforce religious doctrines on its citizens, and Vance has publicly embraced the same ideology. Vermeule combines this political ideology with a legal theory he calls 'common good constitutionalism'. A similar set of ideas has played an outsize role in the UK ever since the 'Judicial Power Project' was founded in 2015. Headed by Oxford Law Professor Richard Ekins, the project influences UK politics by using legal arguments to advance the political agenda of retired Oxford Law Professor John Finnis, one of the founders of 'new natural law theory', which amounts to integralism in all but name. Ekins and others in the UK have an alliance with Vermeule in another project, the 'Common Good Project', which seeks ominously to put in place a 'ruler' who will 'promulgate the common good'. There is one final commonality. The major political influence on Finnis is Eric Voegelin, another German authoritarian thinker from the Weimar period, who adopted Schmitt's legal theory in the 1930s, and, after emigrating to the US in 1938, became perhaps the most important intellectual inspiration for the rightwing ideology now ascendant there. In this book, I focus on the UK to make a more general point about common good constitutionalism. As that label suggests, its theory of constitutional order is instrumental to achieving what it takes to be the common good. And, as the combination of integralism with common good constitutionalism suggests, the common good at which it aims is to be filled out by a highly controversial, state imposed, religious conception. My focus on the UK manifestation of these ideas shows concretely how the political agenda of the Common Good Project drives the legal arguments of the Judicial Power Project with the help of political powerful allies, for example, Lord Wolfson, the Conservative Party's shadow Attorney General. I do this through an analysis of the heated and ongoing debates about the rule of law occasioned by the Rwanda Act.

Moderator: Prof Geneviève Cartier (University of Sherbrooke)
Discussants:

Prof David Dyzenhaus (University of Toronto)

Prof Hugh Corder (University of Cape Town)

Judge President/Prof Dennis Davis (University of Cape Town; Competition Appeal Court of South Africa)

Mr Dan Mafora (University of Cape Town)

Public, Criminal Law and Detention - Venue: Lecture Theatre 2

Chair: A/Prof Jameela Omar (University of Cape Town)

A/Prof Gerard J Kennedy (University of Alberta) *An Exception that Proves the Rule: Criminal Law and the Administrative-Legislative Paradox*

Abstract: Public law is quintessentially divided into administrative law and constitutional law. Many disputes in these areas of law concern the degree of deference judges should give to the branches of the state subject to democratic accountability. It is striking, however, that in Canada and the United States, jurists and scholars most likely to advocate for deference to the executive on administrative law matters are least likely to advocate for deference to the legislature on constitutional law matters. Superficially, this may appear to be a contradiction, but in fact can be explained in a principled way by analyzing the deeper normative commitments of these scholars and jurists, considering whether they put comparative emphasis on the internal or external coherence of law, have a comparatively strict or loose conception of the separation of powers, or place particular emphasis on text or purpose in legal interpretation (Daly; Kennedy; Sirota). This article explores why an exception to this general phenomenon may further help explain it: the fact that criminal law often creates "strange bedfellows" of scholars and jurists, where quintessential predictable divisions are no longer apparent. For instance, Justices Sonia Sotomayor and Neil Gorsuch are often known to agree with each other on criminal law matters in the United States while Justices Russell Brown and Sheilah Martin frequently did the same in Canada. This is despite the fact that these jurists would usually disagree on major constitutional and/or administrative law issues. This paper explores why criminal law can create strange scholarly—and at times jurisprudential—bedfellows. By analyzing decisions of the Supreme Court of Canada and the Supreme Court of the United States, this article will analyze the extent to which this general phenomenon is in fact true, and identify caveats that need to be added to it. The explanation for why will build upon and complement work by Paul Daly, Gerard Kennedy, and Leonid Sirota that explores divisions in public law more generally. It is hypothesized that three trends will need explanation: regarding interpreting the substantive criminal law and whether the prosecution has met its burden, jurists who emphasize text and have a strict conception of the separation of powers will have very heavy expectations on the prosecution, while those who emphasize purpose and law's external coherence will be comparatively disinclined to acquit if a person's behaviour has clearly run afoul of criminal law's purposes; when it comes to sentencing the convicted, jurists who generally favour discretion in administrative law will do so, consistent with their normative commitments to privileging purpose in legal interpretation, while those who tend to defer to the legislature will do so in this context; and criminal procedure complicates this even further, perhaps influenced by differing views on the "type of actor" one considers the police to be in the constitutional order. The goal of the chapter is to explain empirical phenomena against theoretical divisions, with the goal of demonstrating that results that may seem puzzling on first impression can in fact be explained by understanding persons' normative commitments.

Prof Charles Tyler (University of California) *Discriminatory Legalism and Selective Prosecution*

Abstract: Discriminatory legalism refers to the use of government power—particularly prosecutorial power—to harass, attack, and undermine political rivals. It is one of the characteristic vices in authoritarian regimes. During the twentieth century at least, the U.S. legal system has not been thought to suffer from high levels of discriminatory legalism. There are exceptions, to be sure. But, in general, U.S. legal scholars have not historically worried about widespread use of prosecutorial power to attack political opponents. The current moment, however, is different from the recent past. The current administration has brought criminal charges against several high-profile former and current government officials. And those charges have openly been motivated by the President's animus toward those officials. My paper addresses the rise of this new era and asks how judicially enforceable law might respond. Historically, the courts have not had much role to play in policing bad faith prosecutions of the sort described above. Instead, the U.S. legal system relied almost exclusively on two other types of safeguards. First, the law relied on prosecutors' own sense of professionally appropriate conduct. Second, the law relied on constitutional norms that insulated federal prosecutors from political influence by the White House. Both safeguards have deteriorated in recent months, as the White House has exerted much greater control over the Department of Justice. That then raises the question whether the courts might provide a different form of safeguard against discriminatory legalism. One area of doctrine that is potentially relevant is the doctrine of selective prosecution. That doctrine allows defendants in criminal cases to move to dismiss their prosecutions on the ground that the prosecutions were grounded in illicit motivations. Stated at that level of abstraction, the doctrine seems well tailored to the problems raised by the current moment. The doctrine, however, evolved to address a different set of problems than the current ones. In particular, it evolved to address problems of racial and religious discrimination, rather than political opposition. For that reason, the law as it exists today does not clearly prohibit political animus as a motivation for charging decisions. Nor does the doctrine take into account the motivation of a political principal, such as the President or Attorney General, rather than the motivation of a line prosecutor who initiated the charges. The paper will argue that the doctrine of selective prosecution should be reformed to better address the current threats to constitutional democracy in the United States.

Dr Duncan Wallace (University of Melbourne) *An Australian Fiction of Detention and Punishment*

Abstract: A fiction about detention has emerged in Australian public law. To see the fiction, it helps to start with the reality of detention in contemporary Australia. Over the last decade, there has been a sharp rise in the proportion of prisoners who have not been sentenced for a crime. "Unsentenced prisoners" now account for 41% of the prison population. In 2014 this figure was 24%, and for many years before it hovered around 20%. The mean period of detention for unsentenced prisoners has increased, if slightly, from 5.1 months (2014) to 6 months (2024). Little has changed about the prison system's treatment of Indigenous Australians, more than 600 of whom have died in custody since a 1991 royal commission on the issue. The rate of imprisonment of Indigenous Australians (imprisoned persons per 100,000 adults) has actually increased since 2014, from 2,044 to 2,728, and with it the ratio of the rate of Indigenous to non-Indigenous imprisonment. A major cause of these trends has been a series of changes across Australia's states and territories in the law and administration of remand. These changes require many accused persons, including those charged with low-level offences like theft and assault, to prove to a high standard that they will not cause harm to the community if they are released on bail. Australian public law has had nothing to say about remand, which now resembles a kind of preventive detention. This is

curious. The High Court of Australia has believed since 1992, when it decided a case about executive detention called Lim, that the vast majority of all detention is "punitive", in the sense of following from a court-ordered sentence. Non-punitive forms of detention must accordingly be "exceptional". The court revisited this view in 2023–24 to explain why certain schemes for immigration detention were unconstitutional. It is true that these recent cases and Lim concerned federal rather than state or territory laws, and that some of the court's members doubt the applicability of principles in Lim to state and territory laws. But state and territory laws informed the view of detention that was expounded in Lim. Each of the "exceptional" forms of non-punitive detention that were noted in the case, including remand, is the domain of state and territory laws. The court's view of detention has not kept pace with, or been used to rein in, changes in these laws. Non-punitive detention is nowadays anything but "exceptional". Besides illustrating this fiction, the paper has two aims. The first is to argue that public law must offer some avenue of challenge to state and territory detention schemes if the reasoning and principles in Lim, which constrain executive detention, are to endure. The second is to explain why such an avenue has not yet been forthcoming. The reasons include the timing and focus of Lim; the limits of a constitutional principle about state courts, known as Kable; and historical failures of lawyers in squaring up to the reality of detention, especially the detention of Indigenous Australians.

Judicial Appointments and Administration - Venue: Lecture Theatre 3

Chair: Justice Adedotun Adedamola Grace Onibokun (High Court, Osun State, Nigeria)

Mr John H Jeffery (Independent, Cape Town) *Court Administration in South Africa – the Principles and the Practicalities*

Abstract: This paper explores the critical relationship between judicial independence and the administration of the courts in South Africa. While judicial functions are universally recognized as the exclusive domain of the judiciary, responsibility for the administration of the courts was traditionally that of the executive. There has been growing support both internationally and in South Africa for the judiciary to take over court administration and a number of British Commonwealth countries have applied this position. Court administration in South Africa was managed by the Minister and the Department of Justice but the current legal framework, as set out in the Superior Courts Act, 2013 (Act 10 of 2013), envisages a shared responsibility between the executive and the judiciary. For over two decades, the South African judiciary has advocated for greater autonomy in court administration, but the debate remained largely unresolved. There is currently a new impetus from the current Minister of Justice to finalise a court administration system with the Judiciary's buy-in, which makes a discussion on this issue even more topical. The paper traces the evolution of court administration in South Africa since 1994 and the debates that have taken place since then, particularly between judiciary, the executive and Parliament. It examines the current division of responsibilities between the Office of the Chief Justice and the Department of Justice, as well as between the Chief Justice and the Minister of Justice and court administration. The paper identifies the harms that judicial administration of the courts seeks to address, as well as the potential pitfalls, particularly regarding accountability to Parliament and SA citizens for court performance and financial expenditure. Comparative perspectives from other Commonwealth countries and the United States are considered to evaluate the results of judicial administration of the courts in these countries and in particular whether there has been an improvement in court administration

as well how the judicial accountability for court performance has worked in practice. The paper also includes personal observations based on being a member of the Justice Portfolio Committee in Parliament for 14 years and Deputy Minister of Justice for 11 years. Ultimately, the paper assesses whether the current system adequately protects judicial independence, identifies what needs reform, and discusses the dangers of executive control over court administration. It concludes with proposed solutions to enhance the efficiency and independence of court administration and thus ensuring the future of constitutional democracy in South Africa.

Mx Dimakatso Nchodu, Ms Alison Tilley, Ms Genevieve Maujean and Mr Mbekezeli Benjamin (Judges Matter, Democratic Governance and Rights Unit, South Africa) *Enhancing Judicial Appointment Transparency: Monitoring the Judicial Service Commission through a Score Card Approach*

Abstract: One of the key functions of the Judicial Service Commission (JSC) of South Africa is to ensure the proper functioning of the judiciary through the appointment of judges. Judicial appointments occur twice a year – usually in April and October as mandated by section 178 of the South African Constitution. During the country's first democratic elections held in 1994, the judiciary was comprised of mostly white males, subject to the exception of one white female, and three black males. Since then, the commission has increasingly reflected the country's racial demographics in its appointments, with about 8% of appointments being white, aligning with the demographics of South Africa. However, as the judicial appointments process evolved, there became a glaring issue with the manner in which the JSC commissioners were treating candidates through their line of questioning – displaying political favouritism, sexism and racial bias. This resulted in many critiques from civil society organizations, including Judges Matter. Eventually, the JSC introduced formalised criteria for judicial appointments in April 2022. These criteria aim to standardise and legitimise the interview process by guiding commissioners on appropriate lines of questioning, to ensure that the questioning is based on merit, fairness, and to ensure the safeguarding of the integrity of the candidates. The new criteria, reflective of the South African constitutional mandate, requires that candidates be suitably qualified, fit and proper, independent, and must ensure that the judiciary's gender and racial composition mirrors that of the South Africa population. The introduction of these criteria has resulted in marked improvements in the appointment process. Interview sessions from April 2024 onwards, have been characterised by a more robust and rigorous examination of candidates' legal skills, knowledge, and judicial philosophy. These past interviews have shown the benefit of applied criteria, as the questioning has become more structured, regulated, and focused on constitutional requirements. To monitor and evaluate whether the new criteria has been consistently applied to all candidates, Judges Matter developed a "score card" which tracks the lines of question during JSC interviews. The scorecard outlines the criteria in detail, and the interview questions are then recorded and compared with the criteria, to assess their compliance with the said criteria. The research further highlights which criteria are most frequently emphasised, assesses their alignment with the characteristics of successful appointments, and provides evidence that the criteria contribute to rational, merit-based selections. This research article seeks to report on the scorecard data, for the purposes of assessing whether the practical integration of the criteria into the JSC's decision-making process protects institutional autonomy and reinforces the judiciary's independence and legitimacy. By producing a transparent and structured evaluation of how the criteria are applied in the JSC appointment process, the paper provides recommendations on how to safeguard the appointment process from potential abuse, how the entire appointment process will be strengthened through the application of

the criteria, and as a result contribute to strengthening South Africa's democratic governance and judicial integrity.

Dr Benjamin Perryman (University of New Brunswick) *The Overlapping Powers Doctrine*

<u>Abstract:</u> The separation of powers doctrine is a feature of many common law and civil law systems. The shared rationale for the doctrine is to ensure that each branch of government respects their constitutionally mandated role. This has significant implications for the judicial role in a constitutional democracy because the doctrine shapes what constitutes judicial "overstepping". The consensus on the rationale for the separation of powers doctrine masks considerable divergence on how the doctrine is conceived and applied in different countries. Part I of this paper provides a comparative analysis, based on historical, empirical, and functional considerations, of the separation of powers doctrine in Canada, the United States, South Africa, France, and Germany. This analysis reveals several important observations about the separation of powers doctrine: (1) there is no universal doctrine, (2) the doctrine is dynamic not static, and (3) the doctrine is amenable to reconceptualization. Part II of the paper reviews recent attempts to theorize and reconceptualize the separation of powers doctrine. Building on these attempts, the paper develops the concept of an overlapping powers doctrine. An overlapping powers doctrine recognizes there is inevitable and desirable overlap between the branches of government in responsibility for interpreting and applying the constitution. This shared and overlapping responsibility is an incident of modern constitutionalism, especially the increasing importance of proportionality, dialogue, and justification in rights adjudication.
An overlapping powers doctrine changes how each branch of government shares responsibility for the constitution. It also changes how the judicial role should be understood within this shared arrangement. Part III of the paper reflects on how an overlapping powers doctrine might alter the judicial role in the context of positive rights claims, especially the application of proportionality analysis in hard cases.

12:30 – 13:30 – Lunch in the Pius Langa Quad

12:45 – 13:30 – Doctoral Panel A

<u>Conceptualising the State, State Action and State Power: Contemporary Challenges - Venue: Lecture Theatre 1</u>

Chair: Prof Geo Quinot (Stellenbosch University)

Ms Raisa N Cachalia (Stellenbosch University) *Distinguishing State Power under the South African Constitution: From Functional Classification to Institutional Identity*

<u>Abstract:</u> Before 1994, South Africa lacked a supreme, justiciable Constitution. The "state" did not exist as a juridical entity constrained by higher-order constitutional norms; Parliament was sovereign, and no court could invalidate an Act of Parliament, however unjust or discriminatory. State power therefore derived from statute or the common law, not from a constitutional framework. The 1996 Constitution transformed this landscape by establishing a supreme law that creates the state, defines its institutions, and subjects all state conduct to constitutional dictates. The state is thus the Constitution's primary legal subject and moral agent. Yet South African public-law discourse remains tied to a functional method that classifies conduct as "public" or "private" according to the nature of the function performed. This approach, I argue, is misdirected when applied to state institutions. Because the state and its constituent bodies derive their existence, powers, and duties from the Constitution – the supreme law – all state power is necessarily public in character. The proper regulatory lens is therefore institutional rather than

functional: the decisive question is whether the actor is the state. If so, public law applies automatically. On this view, the state cannot divest itself of its public character and remains subject to constitutional norms in all its dealings. Whether it governs, contracts, or litigates, it acts as a constitutionally constituted entity. The state is thus always distinct from private actors, even when the latter perform public functions. Building on this premise, the article develops an institutional account of the South African state across three normative dimensions. The first dimension – the state's establishment and ambit – is developed through a detailed textual and principled interpretation of section 239, which defines an "organ of state." Paragraph (a) covers departments, statutory bodies, and state-owned enterprises under governmental control, while paragraph (b) includes independent institutions exercising public power "in terms of" the Constitution or legislation. Regarding the latter, I critique the Constitutional Court's reasoning in AllPay 2, which treated a private contractor as an organ of state under section 239(b) due to the constitutional importance of the social-grants function it performed. The Court, I argue, relied too heavily on the function's public character while overlooking the textual constraint imposed by the "in terms of" requirement, which limits the ambit of what entities form part of the state. The second dimension concerns the state's distinctive constitutional roles and privileges – law and policy-making authority, fiscal power, the administration of justice, and the monopoly on legitimate coercion – powers that no private actor can independently claim. The third dimension examines the state's heightened governance and rights-based duties, including legality, the public interest, impartiality, accountability, transparency, participation, and the positive duty to "respect, protect, promote and fulfil" rights. These elevated duties arise not from the nature of the function performed but from the state's constitutional identity. Ultimately, the article advances a unified conception of state power under the 1996 Constitution – one that demonstrates why the state is always constitutionally distinct from private actors and grounds public-law regulation in institutional identity rather than functional classification.

Mr Nakul Nayak (LSE) *Between Citizen, Capital, and State: Law and Politics of Digital Public Infrastructures*

Abstract: My paper seeks to conceptualise the phenomenon of digital public infrastructures (DPIs) for the public lawyer. Taking a political perspective, the paper addresses how DPIs have changed two principal relations that public law holds dear: between citizens and the state, and between the state and the private sector. DPIs refer to state-created (or endorsed) data sharing systems that act as the foundation upon which public and private organisations build digital goods and services at population scale. While DPIs manifest in many forms, the consensus 'big three DPIs' are digital identity, digital payments, and data exchange systems. DPIs lie at the intersection of two theoretical approaches to the study of the contemporary political moment: the platformisation of the state and the digitalisation of public infrastructure. My paper takes India as the lead case study to theorise DPIs. India has been the global leader in devising and operationalising DPIs, and remains its most ardent champion in international fora. India has already exported its digital identity and digital payments infrastructure to more than 20 countries. Critically reflecting on the success (or otherwise) of DPIs in India is crucial to any understanding of DPIs. My paper advances two claims. First, by making digital the principal medium through which transactions take place, the DPI project reconstitutes political relations between citizens and the state. DPIs reorder public administration by requiring citizens to interact with them through the production of digital identity and the negotiation of digital interfaces. However, people's ability to access and exploit the infrastructure, content, and skills that digital technologies require is unevenly distributed. The very persons who are most keenly reliant on public services are also those who are least likely to

navigate public administration designed on digital-first principles. The effect is a transformation of citizenship in two ways: from passive to active, and from citizen to user. The political upshot is a change in the terms of accountability: rather than citizens holding the government to account, it is the government that holds users to account. Second, the DPI project seeks to reorganise the political economy by centralising the place of the private sector in the production of goods and services. Technology companies, as much as the state, create, operate, and govern DPIs. If DPIs are to realise their potential, the private sector must be able to exploit the data that DPIs offer. DPIs come with a particular neoliberal commitment: to shrink the government's place in the political economy and to rely on private firms to take its place without the same accountability mechanisms. A public law lens must examine the nature and consequences of the data-sharing arrangements between the state and the private sector, and consider the political effects of the consolidation of data power in the private sector. By examining the transformation of the two relationships, this paper hopes to provide the foundation for public lawyers to evaluate the manner in which countries in the Global South are using digital technologies to reorganise public administration and their political economies.

Mr James Monaghan (LSE) *Between the Minister and the law? The Civil Service and the Rwanda asylum plan in R (FDA) v Minister for the Cabinet Office [2024] EWHC 1729 (Admin), [2025] KB 269*

Abstract: In proceedings arising out of the Rwanda asylum plan pursued by successive Conservative UK governments, the claimant – a civil service union – advanced the striking submission that civil servants have a "constitutional personality" distinct from that of Ministers. The submission was advanced as part of a challenge to the lawfulness of guidance issued to civil servants which said that if a Minister decided that the UK would not comply with an interim measure of the European Court of Human Rights restraining removal of an asylum seeker from the UK to Rwanda, civil servants would be obliged to implement the Minister's decision. The challenge failed, and it proved unnecessary for the court to consider in detail the meaning or correctness of the "constitutional personality" submission. Yet the submission lingers. It reaches backwards, echoing in a critical key Thatcher-era tensions between civil servants and Ministers. And it resonates in the present, engaging both contemporary political tussles over the duties of civil servants, and recent scholarship. That scholarship includes Janet McLean's work on the constitutional role of the civil service, together with work by Kristen Rundle and Peter Cane questioning the descriptive accuracy and normative adequacy of received accounts of the structure of parliamentary government — particularly in relation to the administration. Beginning with the historical echoes of the "constitutional personality" submission, and moving from them to a close analysis of aspects of Chamberlain J's reasons for judgment in *R (FDA) v Minister for the Cabinet Office* [2024] EWHC 1729 (Admin), [2025] KB 269, I argue that individual responsiveness to legality is intrinsic to what it means to be an official in the common law tradition. Such responsiveness is an incident of two aspects of the legal structure of official agency in that tradition: the absence of any sharp delineation between official power and personal responsibility; and an understanding that domestic public law addresses officials in a distinctive way. Recognising that individual responsiveness to legality is intrinsic to what it means to be an official has two important consequences. First, it requires that we conceive of the relationship between Ministers and civil servants in a way that accommodates that fact. And second, it points to one way in which civil servants can contribute to the maintenance of constitutional democracy — by paying thoughtful attention to legality's call, not just that of the Minister.

Law and Change - Venue: Lecture Theatre 2

Chair: Dr Jason Brickhill (Johannesburg Bar & University of Cape Town)

Ms Ropafadzo Maphosa (University of Johannesburg) *Courts as Political Battlegrounds: Strategic Litigation and the Future of Constitutional Democracy in South Africa*

Abstract: Over the years, political actors in South Africa have increasingly turned to the courts, not merely as sites of legal dispute resolution, but as instruments for advancing political agendas, shaping public narratives and influencing electoral outcomes. While judicial review is an essential feature of constitutional democracy, the growing trend of strategic litigation, designed to achieve political rather than legal objectives raises questions about the vulnerability of the judiciary. This instrumentalisation of courts by political actors is perhaps most evident when one looks at how former President Jacob Zuma's long-standing engagement with the courts has evolved into a deliberate political strategy. Cases such as Electoral Commission v Umkhonto Wesizwe Political Party (EC v MK) and his decade-long "Stalingrad Strategy" in corruption proceedings demonstrate how litigation can be weaponised to delay accountability and cast doubt on judicial legitimacy. However, Zuma is not an outlier. Other political actors, including opposition parties such as the Democratic Alliance, have similarly turned to courts as strategic arenas for political contestation. From challenges to executive appointments to applications seeking to shape electoral rules or restrain parliamentary conduct, these litigations often blur the line between principled constitutional enforcement and political manoeuvring. The paper argues that this increasing judicialisation of politics reflects both the strength and fragility of South Africa's constitutional democracy. On one hand, it underscores the centrality of an independent judiciary as the ultimate guardian of constitutional rights and accountability. On the other hand, it exposes how courts can be politicised or co-opted into political conflicts, thereby risking the erosion of public trust and straining already limited judicial resources. Using doctrinal analysis and case-based illustrations, the paper examines how strategic litigation affects institutional legitimacy, judicial independence, and the broader functioning of democratic governance. It also explores the institutional and procedural safeguards necessary to prevent the judiciary from becoming a battleground for political power struggles and assesses whether current mechanisms are adequate to preserve the courts' legitimacy and independence in an increasingly polarised political environment.

Mr Pascual Cortés (LSE) *'We would have remained the same': On the Chilean Carabineros' constitutional embeddedness*

Abstract: Police organizations exhibit significant institutional inertia. In the Latin American context, a prominent explanation is active police resistance. This study examines the Chilean Carabineros' endurance in the face of recent constitutional proposals to reform their military character, advancing the existing research in three directions. First, it considers how constitutional police reform creates distinct tensions and resistance dynamics within the police. Second, it illuminates institutional persistence occurring even without strong police resistance. Third, it examines how reform failure can be linked to the role of reformers themselves and how they frame reform. Contributing to an underexplored connection between police studies and constitutional law theory, this article draws on interviews with serving and retired officers to argue that the Chilean police's deep constitutional embeddedness—coupled with reformers' overreliance on formal legal change—helps explain the failure of recent attempts to modify the Carabineros' institutional foundations. The work advocates a more informal approach to how

we think about the police's constitutional position and a closer examination of how police integration into constitutional imaginaries obstructs transformation.

Ms Arshia Sana (O P Jindal Global University) *Legal Discrimination and Democratic Backsliding in India: Use, Misuse, Abuse of Law to Marginalise Minorities*

Abstract: This paper interrogates how the use, misuse, and abuse of law in contemporary India have contributed to systemic legal discrimination and democratic backsliding, with a particular focus on the marginalization of religious and social minorities. Aligning with the Conference theme, "Future of Constitutional Democracy and Rule of Law," the paper offers a critical examination of legislative, judicial, and administrative dynamics that undermine constitutional commitments to pluralism, equality, and the rule of law. Since 2014, the Indian state, led by the Bharatiya Janata Party (BJP), has enacted and enforced an array of legal measures that selectively target minorities—especially Muslims and Christians—under the rhetoric of national security, cultural integrity, and majoritarian interests. Laws such as the Citizenship Amendment Act (CAA) introduce explicit religious criteria, disrupting the Article 14 promise of equality and eroding the secular ethos enshrined in the Indian Constitution. Anti-conversion statutes, cow protection laws, and the use of preventive detention and anti-terror legislation (such as the Unlawful Activities (Prevention) Act) further empower executive agencies and non-state actors to harass and criminalise minority groups with impunity. The paper will also explore the phenomenon of "bulldozer justice," whereby state authorities demolish properties associated with minority communities, often without due process, compounding social insecurity and trauma. Judicial complicity—ranging from selective deference to executive power to the perpetuation of "securitized" exceptionalism—has further narrowed avenues for remedial action, allowing ethnonationalist rationales to trump universal rights protections. In regions like Jammu and Kashmir, the revocation of constitutional autonomy and ongoing militarization illustrate the entwined crises of legal exclusion and democratic accountability. Empirical evidence and illustrative case studies underscore how laws are weaponized to stifle dissent and chill civic engagement, often under the guise of combating sedition or maintaining public order. Voter suppression tactics and the deployment of legal mechanisms to suppress opposition voices have further diminished the level playing field essential for democratic participation. The consequences are not confined to minority communities: they represent a profound threat to the resilience of constitutional democracy itself, as the infrastructure of rights and institutional checks is hollowed out from within. This analysis situates India's trajectory within global patterns of democratic backsliding and the resurgence of exclusionary nationalism, highlighting comparative lessons for the future of public law in plural societies. Ultimately, the paper contends that reclaiming the constitutional promise of equal citizenship—for minorities and majorities alike—requires robust judicial independence, legislative restraint, and the revitalization of civil society as bulwarks against the abuse of law. Legal reform and vigilant public scrutiny are vital to ensuring that India's constitutional model remains a living framework for inclusive democracy, rather than an instrument of marginalization and division.

Legislation, Interpretation and Legal Plurality - Venue: Lecture Theatre 3

Chair: Dr Megan Finn (University of Johannesburg)

Ms Ariella C Gordon (University of Cambridge) *The Dialogue around Disguised Legislation* *in the United Kingdom and Australia*

Abstract: The rise of administrative law-making, and the implications that this type of law-making has for executive aggrandisement, is a growing concern across jurisdictions.
My paper will focus on a particular type of administrative law-making, which the Delegated Powers and Regulatory Reform Committee in the UK have called 'disguised legislation'. Disguised legislation is an instrument that is formally 'non-legislative' in title, such as administrative determinations, guidance or codes of practice, however its character and content is legislative in effect. There is concern that disguised legislation gives unchecked power to administrative actors to make law, because Parliament is not provided with any opportunity to supervise the exercise of such legislative power. This trend was noticed by many commentators during the pandemic and has continued since. My paper will consider the thorny question of how to regulate disguised legislation. It will focus on the history of regulating administrative law-making in Australia compared to the UK, shedding light on recent proposals about how to reform the system in the UK. In particular, the Hansard Society in the UK has argued that the solution to excessive delegation of legislative power is to improve the dialogue between government and parliamentary actors, who are often said to "be talking past each other" about the important issues.[1] To achieve improved dialogue, the Hansard Society proposes that agreed criteria are created about when legislative power can be delegated to administrative actors. Australia and the UK were chosen as key examples because of their very different regulatory schemes in this area. While Australia has a comprehensive statutory scheme that regulates parliamentary oversight of administrative law-making, a system that has been in effect for 22 years now, the UK has a sparsely regulated scheme, with commentators arguing for reform of the UK system in similar ways to the Australian federal system.[2] My paper will outline the results of qualitative data analysis and frequency analysis undertaken of 10 years' worth of reports in Australia and the UK, covering reports from 2014 to 2024, to compare the quality of the dialogue between parliamentary and government actors under the two different regulatory schemes. The reports chosen for the study are from the two major parliamentary committees that monitor this area, the Delegated Powers and Regulatory Reform Committee in the UK and the Senate Standing Committee on the Scrutiny of Bills in Australian federal law. The preliminary results from my qualitative data analysis and frequency analysis indicate that many of the problems in the UK's sparsely regulated system still exist in Australia's comprehensively regulated system. It will offer important insights into the regulation of administrative law-making, insights that may also be applicable to other similar systems who are facing similar issues, such as New Zealand and Canada.

[1] Hansard Society, Proposals for a New System for Delegated Legislation (Delegated Legislation Review Working Paper, 6 February 2023) ("New System of Delegated Legislation"), iii, 9[8], 10.

[2] See, eg, Andrew Edgar, Regulation-Making in the United Kingdom and Australia: Democratic Legitimacy, Safeguards and Executive Aggrandisement (Hart Publishing 2024) 121–123.

Mr Konstantinos Sioufas (LSE) *The Impact of Constitutionalism on Statutory Interpretation*

Abstract: This paper argues that constitutionalism introduces a new method of statutory interpretation whose aim is to read the constitution into an otherwise unconstitutional statute, even if this means changing the meaning of the statutory text and disregarding the intention of its makers. At its core, constitutionalism describes the theory of government dictating that a written constitution, which creates

all government power from scratch, including the power of the legislative body, is the supreme law of a state. First introduced in the U.S. constitution of 1787/1791, constitutionalism establishes the constitution as a special kind of positive law, which is superior to ordinary legislation. In so doing, it makes the interpretation and the enforcement of the constitution the preserve of the judicial department. These features of constitutionalism have important implications for the reading of statutes. Statutory interpretation is the process of finding the valid law in a legislative provision to apply it to the facts of a case. When the constitution is not in play, law is to be found in the conventional sources, most prominently the ordinary meaning of a statute's language and the intention of the lawmaking body. Where the constitution imposes an unconditional obligation on the legislature, however, it supplants these sources of law because it leaves no room for legislative choice. Consequently, where the legislation – construed through conventional methods, is in breach of such an obligation, statutory interpretation becomes the process of finding the only valid law – constitutional law, in the statute. It is important to note that this way of interpreting statutes is available to judges regardless of whether the statute is ambiguous. Exactly because the constitution displaces the language and the purpose of a statute as sources of law, courts are allowed to read the constitution into the statute, effectively amending its text even in cases where the latter is perfectly clear. Understanding the method of statutory interpretation introduced by constitutionalism permits us to make sense of the practice of courts in the constitutional democracies, in particular the United States. Despite their long experience with constitutionalism, American courts have refused to change the meaning of legislation by reading into it the rules of constitutional law. The only way they have used the constitution in statutory interpretation is through the rule of 'constitutional avoidance': When a statute is ambiguous, i.e. there are two tenable interpretations of it, one of which would make it unconstitutional, courts will opt for the other. In practice, however, courts have held clear statutes to be ambiguous to avoid holding them unconstitutional. In so doing, they have applied the method of interpretation sanctioned by constitutionalism, while denying it in theory. It would be advisable for judges to openly acknowledge that in a regime which endorses constitutionalism, amending the statutory text is part of the interpretive toolkit of courts. Doing so would allow courts to employ this extraordinary method only when it is appropriate to do so, i.e. where the legislature has done exactly what the constitution unconditionally prohibited.

Mr James Gaetani (Australian National University) *Recognition in the age of statutes: Statute law and legal plurality in Australia*

Abstract: Statute law is the principal means by which Australian State legal orders recognise Indigenous laws. Statute law presents a viable mechanism to pursue recognition within Australia's current legal and political landscape, as it is constitutionally valid and can align with the State's democratic commitments. However, there is limited scholarship on how statute law is used in this regard. To develop a better understanding of this state of affairs, this paper explores how Australian State legal orders use statute law to recognise Indigenous laws within the parameters of their constitutional frameworks. It also evaluates whether the institutional practices of drafting and interpreting statutes align with core aims of representative democracy.

13:30 – 15:00 – Keynote Plenary: Judicial Independence and Accountability

Venue: Lecture Theatre 1

Chair: Prof Hugh Corder (University of Cape Town)

Chief Justice Mumba Malila SC (Supreme Court of Zambia) *Judicial Independence and Judicial Accountability: Compatible bedfellows?*

Abstract

Perhaps two of the most profound if not pervasive doctrines that underpin the legal process in many jurisdictions today are judicial independence and judicial accountability. Their significance calls for little debate. Yet it is undeniably true that no doctrine in the biosphere of the law rivals their elusiveness in their practical application. It is significant that as a starting point we all agree that judicial office is one of divine trust. Society has historically placed judges on a pedestal reserved for the sacred. This is because the Judiciary has a crucial role to play in resolving disputes in society, maintaining the rule of law and thereby stabilising society. To do so the courts must be independent. This realisation is too important to be ignored. Every citizen must thus have an interest in the sanctity of the Judiciary.

Any erosion of the independence, integrity and reputation of the Judiciary, deliberately or otherwise, cannot only weaken it but can also potentially lead to the collapse of the rule of law. Absence of the rule of law can be a major barrier to the attainment of democratic ideals and the attainment of social and economic development. It can give rise to, among other things, impunity and authoritarianism. The short point is that unless the Judiciary is allowed to maintain its independence, democracy dies. But that reverence for independence of the Judiciary is built on an implicit understanding that judges would uphold unimpeachable legal and ethical standards that engender confidence in the dispute resolution system administered by the courts.

Ideally it would be prudent for the judges to police themselves. To the extent that they may not always do so, citizens must help and remind them. Systems must exist to correct the judges when they go against the rules of engagement. Any good management system demands some measure of superintendence – some level of enforceable accountability, must exist. Those who have constitutional power to judge others must constantly be under the judgment of those who are judged. So, the question 'who will judge the judges?' is an eternally relevant one. Having a criterion for judging our judges and keeping them answerable in the use of their judicial authority is particularly important in ensuring that a spirit of arbitrariness, complacency and indifference does not take root.

Judicial independence and accountability are often framed as opposing forces, yet both are essential to the legitimacy of the justice system in democratic societies.in some instances sermons about judicial independence and accountability are even used to impress law learners and the uninitiated and to pre-occupy legal theorists. Too many people only pay lip service to the concepts as and when convenient to them.

In this presentation we examine how judiciaries navigate the tension between shielding judges from undue interference and ensuring that judicial power remains subject to public and institutional oversight. Drawing on comparative analysis across selected African jurisdictions, the paper argues that independence without accountability risks public mistrust, while accountability without independence threatens judicial integrity.

The paper first unpacks the constitutional and institutional mechanisms that protect judicial independence, including security of tenure, financial autonomy, and appointment processes. It then assesses accountability frameworks — disciplinary procedures, judicial conduct codes, transparency in adjudication, and public engagement — and evaluates their effectiveness in practice. Case examples illustrate how overreach by the executive or legislature, as well as internal resistance to scrutiny, undermine both pillars.

The paper concludes that independence and accountability are not zero-sum but mutually reinforcing. Sustainable judicial legitimacy in Africa requires institutional design that protects judges from political and other pressure while embedding transparent, fair, and enforceable mechanisms of accountability.

Recommendations focus on strengthening judicial complaints commissions enhancing public access to judicial information and fostering a culture of professional responsibility within the bench.

Prof Paul Daly (University of Ottawa) *An Institutional Approach to Judicial Independence and Accountability*

Abstract

My goal in this contribution is to set out and defend an institutional approach to judicial independence and accountability, drawing on the jurisprudence of the Supreme Court of Canada. By "institutional approach", I mean an approach that focuses on the institutions designed to secure judicial independence and accountability. In particular, I will emphasize the value of institutions that act as a buffer between judges and political controversy.

In this regard, I will draw on the literature on 'fourth branch' or 'integrity' institutions, explaining how, when it comes to judicial independence, the Supreme Court of Canada's jurisprudence anticipated the key characteristics of expertise, independence and accountability, providing a workable model for other jurisdictions. Across the three aspects of judicial independence – financial security, security of tenure and administrative autonomy – the Supreme Court's approach requires the implementation of arm's length institutional mechanisms, interposed between law and politics. These fourth branch or integrity institutions ensure that judges can resolve disputes between private parties or between private parties and the state according to their view of the merits of the cases that come before them, all in the service of public confidence.

Judicial accountability is another matter, as the available mechanisms do not quite have the character or cohesion of the institutions developed to protect judicial independence. Indeed, just when stronger institutions are most needed, the institutional protections in respect of accountability are weaker now than they were in previous eras, especially due to the increasingly professionalized character of contemporary politics – the declining political heft of the law officers of the Crown is a significant concern, with no cabinet-level figure capable of reining in politicians who exceed the boundaries of appropriate comment on judicial decisions; and politicized appointments processes contribute to a public perception that judges have affiliations to political actors. Mindful of these concerns and building on the Supreme Court's judicial independence jurisprudence and the literature on fourth branch or integrity institutions, I will emphasize the importance of identifying institutional mechanisms to secure judicial accountability.

Prof Ben Sihanya (University of Nairobi)

Abstract:

Judicial competence, independence and accountability are facing internal and external challenges in the quest for constitutional democracy in Kenya and East Africa. I conceptualize, problematize and contextualize judicial competence, independence and accountability in Kenya through a three-pronged methodology: the quality of decision-making; judicial and judges' discipline, and the effectiveness of the Judicial Service Commission (JSC) as an accountability mechanism in the Kenyan and African Judiciaries and judicial process. What are the challenges? What are the opportunities? And what are the reform proposals?

15:00 – 15:20 – Coffee Break

15:20 – 16:50 – Parallel Panels – Session 4

Human Rights, Proportionality and Punishment - Venue: Lecture Theatre 1

Chair: Ms Carol Selepe (Law Society of South Africa)

Prof Natasa Mavronicola (University of Birmingham) and Dr Mattia Pinto (University of York)
Rethinking the penal accountability paradigm for serious human rights violations

Abstract

In this paper, we unpack and critically examine the central features of the penal accountability paradigm in response to serious human rights violations. The primacy of penal accountability as a mechanism of redress for serious human rights violations compels states to criminalise, prosecute and punish the perpetrators of such violations, and to refrain from measures that hinder penal responses (e.g., decriminalisation, statutes of limitation and amnesty laws). We understand the pursuit of penal accountability to be paradigmatic in this context in the sense that it frames both how the relevant wrongs are understood and how redress for such wrongs is conceived and delineated. We consider some of the key pitfalls of the penal accountability paradigm, illustrating some of its limitations and harms with reference to the atrocities that have taken place in Gaza. The penal paradigm gives states an undue benefit of the doubt otherwise reserved for criminal defendants, thereby enabling other states (and other powerful entities) to appeal to plausible legality in erring on the side of facilitating atrocity in real-time; it decontextualises, individualises, and exceptionalises atrocities, thereby obscuring the realities of mass violence and obstructing its prevention; it marginalises alternative forms of accountability and opposition to atrocities, when these are both vital and under threat across multiple constitutional landscapes; and it fuels retaliatory impulses that threaten hard-fought red lines within international law. We close by invoking the multi-layered and multi-faceted accountability mechanisms (capable of) operating in relation to serious human rights violations; and – with particular reference to the African human rights experience and other forms of Indigenous or traditional grassroots justice in the region – we contemplate how paradigmatic accountability for both 'serious' and 'standard' violations of human rights can be rethought in transformative rather than punitive terms. Our paper is built on both sole-authored and co-authored work in this area, as well as advisory work by Mavronicola for the United Nations Special Rapporteur on Torture; but it specifically contemplates key dimensions of the African human rights context, including the interplay between transitional justice and human rights, the significance of socio-economic rights, and the relevance of reparative measures beyond the penal frame.

Mr Daniel Adjin Odonkor and Dr Nicola Palmer (University of Cape Town) *Navigating Criminalisation in African Human Rights Law*

Abstract: Within criminal law, human rights have traditionally been deployed to constrain punishment, prohibit torture, require fair trials, mandate proportionality and limit detention. Yet recently, through the doctrine of positive obligations, international human rights bodies increasingly require states to criminalize serious violations, investigate them effectively, and prosecute perpetrators. Some scholars and jurists have described this as a paradoxical relationship with human rights operating both as a shield restraining state power and a sword demanding its deployment (van den Wyngaert, 2006; Tulkens, 2011). Others have suggested that the two are co-constitutive, in which human rights simultaneously humanise and legitimise the extension of universalised carceral power (Pinto, 2025). This increasingly complex relationship between human rights and criminal law has led to arguments for European human rights jurisprudence to resist this 'criminal turn' (Engle, 2018; Mavronicola, 2024). Yet within these debates, scholars have undertheorized the African human rights institutions' distinctive approach. This paper examines the case law of the African Court and the African Commission on Human and Peoples' Rights. It highlights how the cases and commentaries have routinely recognised the role of 'restorative measures' as an alternative to criminal sanction. The paper argues that this reasoning could have been deepened through a closer engagement with Ubuntu philosophical reasoning and the extension of the restorative obligations to include a reckoning with the obligations owed by former colonial powers.

Dr Bruce Chen (Deakin Law School) *Proportionality Testing under the South African Bill of Rights and Australian Human Rights Acts: Strange Bedfellows?*

Abstract: South Africa and Australia are rather unique in the common law world in their protection and promotion of human rights. South Africa is well known for its progressive Constitution of the Republic of South Africa ('SA Bill of Rights'), celebrating its 30 year anniversary in 2026. Australia does not currently have a federal bill of human rights, although it has one in subnational state and territory jurisdictions – the Australian Capital Territory, Victoria and Queensland ('Australian Human Rights Acts'). There are significant differences between the SA Bill of Rights model, and Australian Human Rights Acts model. However, they share a common characteristic. Both models adopt a holistic or global approach to justification and proportionality testing of limitations on human rights, to determine whether or not there is a breach. South Africa and Australia have done this through the enactment of a holistic/global general limitations clause. It contrasts with the structured justification and proportionality approach developed by the courts in, for example, Germany and Canada. Although the South African s 36 general limitations clause has its origins in the structured German and Canadian models, the final SA Bill of Rights and, at least on a rhetorical level, the practice of the Constitutional Court have embraced an unstructured holistic balancing approach to determining whether limitations of rights are justifiable. Yet, in practice the picture is more complex. As for the Australian Human Rights Acts, the holistic/global approach was first introduced in the State of Victoria. The extrinsic materials made clear that it was modelled particularly on s 36 of the SA Bill of Rights, and the purpose was to provide certainty and guidance for its application within government. This drafting was subsequently adopted in the Australian Capital Territory and Queensland (although it has been argued that the Queensland enactment lends more towards structured justification and proportionality testing). The paper undertakes a comparative analysis of the jurisprudence of the SA Bill of Rights and Australian Human Rights Acts. To date, such an analysis has yet to be undertaken. It examines how the courts have interpreted and applied the general

limitations clauses in their respective jurisdictions. As a story of transplantation, the paper asks whether the respective courts have applied a common approach to the general limitations clauses, or if they have diverged, why that is so. Is it successful in replicating the SA Bill of Rights approach, or is this a cautionary tale of transplantation? The paper touches on several key themes of the 2026 Public Law Conference, including questions as to how the multi-factorial considerations are balanced as a bulwark against the erosion of rights, what is the institutional role of the courts for the future of constitutional democracy, and the issue of deference in light of the separation of powers. It concludes on the implications that the unique South African and Australian models for justification and limitation testing have on the protection and promotion of human rights.

Transformation, Authoritarianism and Populism - Venue: Lecture Theatre 2

Chair: Justice Seena Yacoob (High Court of South Africa)

Prof Olaf Zenker (Martin Luther University, Germany) *Reclaiming Transformative Constitutionalism: Postliberal Affordances between Southern-Decolonial Critique and Northern Authoritarianism*

Abstract: This paper interrogates contemporary debates surrounding transformative constitutionalism in South Africa through the prism of what may be termed our postliberal moment—a historical conjuncture in which liberalism, broadly understood as a political, economic and/or social-democratic project, has lost its hegemonic purchase. Drawing on recent interventions (e.g. Davis & Klare 2024, Fowkes 2025, Madlingozi 2024, Mnisi Weeks 2026, Modiri 2024, Ramalekana 2025, Roux 2024, Sibanda 2013, Sindane 2024, van der Westhuizen 2024), the paper situates South Africa's constitutional discourse within a global reconfiguration of democratic imaginaries, contending that the exhaustion of liberalism today may paradoxically open new affordances for rethinking the possibilities and limits of constitutional democracy. In the Global South, decolonial critiques of constitutionalism have questioned its liberal underpinnings, arguing that its universalist aspirations disguise the persistence of colonial power relations and neoliberal economic arrangements. Yet the postliberal condition, this paper argues, requires a more nuanced response. The repudiation of liberal democracy from the left in the South often finds echoes, in uncanny ways, in the illiberal populisms and far-right nationalisms surging (not only) across the Global North. As a white German–South African scholar, I approach this debate from a doubly situated positionality: one shaped by South Africa's transformative constitutional project, engaged through legal-anthropological research, and another by a European experience of northern populism. This vantage point foregrounds how privilege and proximity to both contexts sharpen awareness of liberalism's failures while revealing how its critique can, if unreflexive, align with authoritarian longings for closure. Both decolonial critique and northern authoritarianism share, despite profound differences in motivation and history, a suspicion of constitutional constraint, a valorisation of majoritarian sovereignty, and impatience with rights-based pluralism. This structural resemblance demands vigilance: it calls for distinguishing between the urgently needed critique of actually existing liberalism—its complicity with inequality, technocratic elitism, and market orthodoxy—and the equally necessary defence of liberal-democratic norms indispensable for resisting authoritarianism, racism, chauvinism, and xenophobia, and for grounding the project of radical transformation itself. From this perspective, the postliberal moment is not merely a crisis but an affordance—a space of possibility for conceptual and political recalibration. It allows assessing both the emancipatory deficits of South Africa's constitutionalism since 1994 and the continuing necessity of constitutional frameworks for protecting dignity, equality, and freedom. Rather

than abandoning transformative constitutionalism as a failed or co-opted project, the paper argues for its radical re-articulation: a re-grounding of constitutional practice in the substantive equality commitments embedded in the text itself. Such a re-articulation would entail a renewed and radically expanded emphasis on redistribution (addressing material inequalities), recognition (acknowledging diverse identities and historical injustices), and representation (deepening participatory and deliberative democracy). By mobilising postliberal experiences and sensibilities also from northern authoritarianism, the paper proposes that South Africa's constitutional experience can serve as a critical laboratory for global democratic thought. The challenge, it concludes, is to inhabit the postliberal affordance not as anti-liberal regression but as an opportunity to reclaim the transformative promise of constitutional democracy against surging neoliberal inequality and populist-majoritarian authoritarianism.

Mr Denin O Omondi (Moi University, Kenya) *Populism, Nationalism, and Fundamentalism: Reassessing Constitutionalism Thirty Years After South Africa's 1996 Constitution*

Abstract: Rising populism, assertive nationalism, and renewed forms of political fundamentalism pose direct challenges to long-standing constitutional norms, institutional checks, and the rule of law. The timing is especially significant for South Africa, which marks the 30th anniversary of its democratic Constitution of 1996. That Constitution represented a decisive break from decades of systemic injustice. It offered a transformative vision built on dignity, equality, and freedom, supported by structural commitments to accountability and legality. Three decades later, however, growing concern about the resilience of these commitments reflects wider anxieties shared across constitutional democracies. This paper engages with the Conference theme by examining how contemporary political dynamics are reshaping the perception and practice of constitutional democracy. Populist movements often frame constitutional constraints as elite barriers to the "will of the people." Nationalist narratives elevate cultural or majoritarian identity at the expense of pluralism and minority protection. Forms of political fundamentalism, whether religious, ideological, or personality-driven, challenge the idea of an open, contestable public sphere. These forces intersect in ways that weaken public trust, undermine constitutional culture, and erode institutional independence. Their spread reveals patterns that transcend regional boundaries, yet their effects are deeply conditioned by local histories, legal frameworks, and socio-economic realities. In the first part, this paper will examine South Africa's experience to provide a valuable lens through which to consider these developments. The 1996 Constitution was designed to prevent the abuses of the past and to cultivate habits of democratic participation and accountability. Its transformative ambitions relied on a sustained commitment to the rule of law. Secondly, the paper will examine the present challenges, such as political fragmentation and intensified identity politics, which have raised questions about whether those foundational commitments remain robust. South Africa is not unique as similar pressures confront democracies in other common-law systems, and this makes a comparative analysis necessary. Thirdly, drawing on doctrinal, theoretical, and comparative insights, this paper argues that the future of constitutional democracy depends on strengthening constitutional culture as much as constitutional design. Legal frameworks remain vital, but they cannot operate effectively without public trust, political leadership that respects institutional boundaries, and civic norms that encourage reasoned disagreement rather than polarisation. In the final part, the paper will assess how populism, nationalism, and fundamentalism disrupt these norms and explore strategies for reinforcing democratic resilience. These strategies include renewed civic education, stronger safeguards for institutional independence, and interpretive approaches that foreground constitutional purpose rather than

political expediency. The paper highlights the vulnerability and the adaptability of constitutional democracy by placing South Africa's constitutional anniversary within broader global trends. It concludes that confronting contemporary challenges requires a multidimensional approach that draws from doctrine, theory, empirical evidence, and comparative experience to secure the future of constitutional democracy in an increasingly volatile political era.

Dr Justice Alfred Mavedzenge (Democratic Governance and Rights Unit, University of Cape Town)
Competitive Authoritarianism and the subversion of judicial autonomy in Africa

Abstract: Judiciaries are often regarded as crucial bulwarks against authoritarianism, tasked with upholding the rule of law even under intense political and other forms of pressure. Drawing on case studies from Zimbabwe, Zambia, Ghana and Senegal, this paper applies the political science theory of competitive authoritarianism to examine the subtle and yet profound ways in which judicial independence is being eroded across parts of Africa. The analysis identifies mechanisms such as strategic judicial packing, covert systems of judicial patronage, and the disguised persecution of judges as key strategies employed by competitive authoritarian regimes to weaken judicial autonomy. The paper concludes by proposing measures to mitigate these challenges, while emphasizing that sustainable protection of judicial independence ultimately depends on empowering citizens to dismantle autocratic regimes and replace them with governments that are genuinely committed to constitutionalism, the rule of law and judicial independence. The analysis presented in this paper is developed from a doctrinal review of relevant literature as well as interviews conducted with key legal experts and practitioners who include judges.

Accountability Beyond Courts - Venue: Lecture Theatre 3

Chair: Mr Mashudu Kutama (Law Society of South Africa)

Dr Molefhi M Phorego (Nelson Mandela University) *Presidential Commissions of Inquiry as a Mechanism to Effect Constitutional Review: Perspectives from Botswana and Comparable Jurisdictions*

Abstract: Over the years, emerging democracies are increasingly resorting to presidential commissions of inquiry as a mechanism to effect constitutional review. Arguably, this approach is not at odds with foundational pillars of constitutional democracy, including those of the rule of law and legality. However, the extent to which presidential commissions of inquiry encroach on the domain of the legislative branch of government should be questioned, given the fact that it is the branch of government where most issues of national importance are debated. Against this background, this paper examines the extent to which presidential commissions of inquiry to conduct constitutional review processes trench on the separation of powers in comparable jurisdictions. Botswana, Gambia and Ghana are selected for comparison, with experiences drawn from South Africa's experience used as a case study. The paper compares and contrasts the use of presidential commissions of inquiry against other democratic mechanisms aimed at constitutional review, such as that used by South Africa during the transitional phase leading to the country's first fully democratic elections. To this extent, the paper questions the nature, structure and extent of presidential commissions of inquiry, and the extent to which it interferes with the right of the public to participate in the constitutional review process. Due to the fact that presidential commissions of inquiry are bestowed upon the President alone in the form of discretionary powers, their recommendations

are not legally binding. The central argument advanced is that the legislature should drive the process, with the President playing a key role in formalising the attendant recommendations.

Prof Dean R Knight (Victoria University of Wellington) *Conceptualising an integrity or fourth branch of government in Aotearoa New Zealand: promoting probity in governance and safeguarding constitutional democracy*

<u>Abstract:</u> In this paper, I explore the concept of an 'integrity' or 'fourth' branch of government in Aotearoa New Zealand and its role in promoting the health of the nation's constitutional democracy. The notion of a fourth branch of government capturing institutions, other than the judicial branch, charged with ensuring integrity and probity by other branches has emerged in comparative constitutional and other scholarship (eg, Tushnet (2021): 'fourth branch', with particular acknowledgement of Chapter 9 of Constitution of South Africa ('state institutions protecting constitutional democracy'); Khaitan (2021): 'guarantor institutions'; Spigelman (2004): 'integrity branch'). This paper builds on this comparative work elsewhere and conceptualises the nature and shape of an integrity or fourth branch in New Zealand in the light of its distinctive constitutional framework and traditions. The absence of a written or master-text constitution and resultant blurring the fields of constitutional and administrative law is an obvious distinctive feature. The small-ish nature of country — both in population and civic capacity — also colours the jurisdiction's constitutional culture. So too does the way parliamentary sovereignty limits the supervisory role of the judicial branch, perhaps thereby raising expectations about the utility and efficacy of integrity institutions other than the courts. Finally, the significant role played by the Waitangi Tribunal — a standing commission of inquiry charged with investigating breaches of the Crown's duties under the Treaty of Waitangi / te Tiriti o Waitangi to indigenous Māori — is especially distinctive in the suite of integrity institutions. I draw together the conceptual framing of a fourth or integrity branch and these distinctive constitutional settings in order to imagine how this relatively novel branch might be realised in New Zealand. I conclude this paper by explaining the virtue of realising this institutional collective as a branch of government — conceptually as part of our constitutional imagination and understanding of the anatomy of systems of democracy, practically in its promotion of the health of our constitutional democracy and institutionally in the operation and reform of the integrity bodies included within it. The paper itself sits within a broader project undertaking a deep analysis of the nature and operation of integrity institutions in New Zealand's particular context and unlocks a forthcoming institution-by-institution appraisal of the efficacy of integrity bodies and their contribution to constitutional democracy. The aim of this paper is to contribute to both domestic and global conversations about future of constitutional democracy: for the former, especially the nature and operation of New Zealand's constitutional ecosystem and associated accountability mechanisms; for the latter, especially arguments about the value of reconceptualising the standard constitutional anatomy and insights into the notion of a fourth branch from a distinctive case-study.

Ms Monica de Souza Louw (University of Cape Town) *Promoting accountability and going 'back to basics' in South African traditional governance*

<u>Abstract:</u> In 2014, the South African government launched a 'Back to Basics' campaign in which it promoted the ideals of accountable governance particularly at the local government level. Whether the campaign achieved its desired outcomes is subject to debate. Yet, the principles put forward remain valuable for realising the Constitution's vision of a democracy built on accountability, responsiveness and

openness, to support people's power. Similar principles underpinned law reform processes that dealt with South Africa's traditional governance systems soon after the transition to a constitutional democracy. Core to this transition was the idea that, in order to be accepted into the new political order, traditional leadership institutions would need to transform. This was necessary to restore the legitimacy that many leaders lost through interference by the colonial and apartheid governments or cooperation with the oppressive state. However, in practice, legislative and policy approaches to traditional authorities have not been particularly transformative, with devastating results for accountability and the constitutional rights of people living in traditional communities. This has further harmed the institution's popular legitimacy.
This paper argues for the re-prioritisation of the legitimacy of traditional authorities, as understood in terms of customary law, and a return to 'basic' principles of good governance and accountability. The first section of the paper describes measures supporting accountability in existing traditional governance legislation, including the Traditional and Khoi-San Leadership Act 3 of 2019 and Traditional Courts Act 9 of 2022. These measures are evaluated in terms of their ability to change behaviour, prevent abuses of power and increase the effectiveness of traditional authorities, with consideration for the contexts in which they ought to apply in practice. Accountability gaps are identified. The legislated accountability measures are then further assessed against existing constitutional principles of good governance and administration. It is argued that by applying or promoting these principles in traditional governance, the identified accountability gaps could be resolved or diminished. The final section of the paper considers the extent to which the legislated measures and good governance principles being argued for align with accountability in terms of customary law. It is argued that if there is close alignment with customary law, the legitimacy of traditional governance institutions can be enhanced while continuing to honour the Constitution's vision for South Africa's democracy.

16:50 – 17:30 – Transfer to Dinner venue

17:30 – 22:00 – Gala Dinner at the Norval Foundation Art Gallery

Dinner speaker: Judge President/Prof Dennis Davis (University of Cape Town/Competition Appeal Court of South Africa)

Building constitutional jurisprudence from nothing: 30 years of the Constitutional Court

Dress: Smart casual

Friday 3 July 2026

9:00 – 10:30 – Parallel Panels – Session 4

<u>Control of Discretionary Power - Venue: Lecture Theatre 1</u>

Prof David Dyzenhaus (University of Toronto)

Prof Genevieve Cartier (University of Sherbrooke) *Discretion, Prerogative Power and Constitutional Democracy*

<u>Abstract:</u> Prerogative power enables the government and its ministers to make discretionary decisions without statutory authorization. This is therefore a notable exception to our general understanding of the

law-governed and democratic state. Having the discretion to decide is, by definition, being free to choose among possible courses of action or inaction. But how can this be compatible with the rule of law, when the latter requires pre-existing legal authorization to act? Furthermore, if the exercise of prerogative power necessitates no statutory authorization, how does it accord with democracy? A few years ago, two notable instances of prerogative power were met with significant controversy in Canadian political and public circles: the prorogation of Parliament in 2008 and again in 2009, and the Canadian government's decision not to request the repatriation of Omar Khadr, a Canadian citizen who was detained and tortured at Guantanamo Bay (*Canada v. Khadr*, 2010 SCC 3). A number of academics fiercely debated whether the prorogation crises involved a political or legal question. And while the Supreme Court declared that Canada had violated Khadr's fundamental rights, it refused to order the government to request his repatriation, leaving it to the government to determine how best to respond to the violation under the prerogative over foreign affairs. More recently, in *R v. Bissonnette* (2022 SCC 23), the Supreme Court discussed the prerogative of mercy in the context of an argument that mercy could validate a statutory provision imposing a life sentence with no realistic possibility of parole; such a provision being considered cruel and unjust punishment. However, the Court rejected the argument that the prerogative could play such a validation role. In previous work, I argued that statutory discretion could, and should be understood as implying a form of dialogue between decision-makers and those affected by their decisions. I argued that a dialogic approach better explained significant judicial rulings on questions of statutory discretion, and justified the exercise of such power in terms of democracy, the rule of law and individual autonomy. In this paper, I will consider whether discretionary powers exercised under the prerogative can be conceived in a similar way. To this end, I will focus on the prerogative of mercy in Canada and England, while also exploring the similarities and differences between this prerogative and the US President's authority to grant pardons.

Dr Edward Clark (Te Herenga Waka | Victoria University of Wellington) *The Shared Burden of Justification and the Separation of Powers: A Dynamic Equilibrium?*

Abstract: In this paper I intend to pull together two theoretical threads about the nature of the courts' role in securing the rule of law in a constitutional democracy through the lens of recent developments in New Zealand. During the transition to democracy in South Africa, Etienne Mureinik developed the concept of law as a culture of justification (as distinct from the culture of authority under the apartheid regime). This idea was later fleshed out further by David Dyzenhaus and can be seen, broadly, as the proposition that law - and the legitimacy of law - is a collaborative exercise between legislature, executive, and courts in justifying the projection of state power to that state's citizens. All three branches play a role in the justificatory exercise. What happens, though, if one of the branches of government, at least for a time, fails to discharge its burden of justification? Can another branch take on more of the weight? I will argue that observations by Thomas J of the New Zealand Court of Appeal in his somewhat idiosyncratic concurrence in Lovelock v Waitakere City Council provide a useful way to think about the issue, at least from the perspective of the courts. Thomas J suggests (at p 399) that "Judicial review, no less than other areas of the common law, will develop to meet the requirements and expectations of the community." He argues that depending on the context and broader legal and political circumstances, greater or lesser levels of intervention might be called for. I suggest in this paper that the circumstances where greater judicial scrutiny might be justified include when other branches of government are delinquent in discharging their share of the justificatory burden of law. The role of each branch is part of a dynamic equilibrium, shifting over time. The paper will examine the last few years in New Zealand as a case study to test that

proposition. Over that time (first due the the Covid-19 pandemic, then due to the political approach of successive governments), New Zealand has seen some curtailment of normal Parliamentary scrutiny processes and participatory executive processes. Alongside this, there is also a burgeoning body of judicial review case law suggesting that the demands by courts for executive decision-makers to have robust, detailed official advice grounding decisions are increasing. This shift is visible both in terms of procedural changes and increasing numbers of substantively successful judicial review claims on this basis. This paper will propose that this case law can be seen as, if not a conscious response from judges to the deficiencies of Parliament and executive, certainly a systemic reaction that is appropriate in the circumstances. I argue that if a culture of justification is to be maintained, the courts stepping into any justificatory void left by the political branches of government must be permissible.

Dr Isabeau Steytler (Stellenbosch University) *The procedural fairness gap in the review of non-administrative actions in South Africa*

Abstract: South Africa's constitutional democracy is based on accountability, responsiveness, and openness. It is founded on the rule of law, of which procedural fairness is a long-established component. The Constitution's provision for the participation of the public in the decisions of the state and opportunities for individuals or groups to make representations in the decisions that concern them, is almost all-encompassing: courts must afford persons whose interests it will determine a fair opportunity to make their case; the legislature must allow for public comments before passing legislation; and exercises of public power amounting to administrative action must be made procedurally fairly whether they affect individuals, groups, or the public at large. However, there is a category of public decision-making that is allowed to take place without consultation with affected parties. In the case of *Masetlha v President of the Republic of South Africa* [2007] ZACC 20, the Constitutional Court – under considerable political pressure – found that it would be inappropriate to require that decisions be procedurally fair under the principle of legality. This means that all exercises of public power that do not amount to an administrative action under the Promotion of Administrative Justice Act, do not need to be made procedurally fairly. In effect, this is an enormous and diverse group of decisions. It includes most executive decision-making; the appointment of judges; the process and findings of commissions of inquiry; the findings of the public protector; the discontinuation of a prosecution, and many more. This exclusion puts South Africa out of step with many other Commonwealth countries where procedural fairness has not been excluded from these kinds of decisions. In fact, in many countries, the importance of procedural fairness in cases like commissions of inquiry and public hearings is often emphasised. For example, the vital importance of an opportunity to make representations before a commission of inquiry which might make a finding detrimental to one's reputation, has been noted in several Commonwealth courts. Moreover, it is nowhere evident that applying procedural fairness to non-administrative exercises of public power would be inappropriate. It does not impinge upon the separation of powers in the way that a ground of review like reasonableness might, as it does not give courts scope to make their own valuation of the ultimate decision. Furthermore, the inherent flexibility of procedural fairness, means that it will not unnecessarily impede the state in meeting its mandates, as various factors can reduce the content of procedural fairness in the appropriate circumstances. Within this context, the blanket exclusion of procedural fairness from exercises of public power subject only to the principle of legality is a hole in the net of the South African Constitution's commitment to public participation, openness, and accountability. It also has the potential to erode the public's confidence in a state which allows public decisions to be

made procedurally unfairly. In the over 30 years since it opened its doors, the Constitutional Court has never overruled itself. It is time that it does so.

Constitutional Challenge and Change in Africa - Venue: Lecture Theatre 3

Chair: Mr Frankl Weber (Law Society of South Africa)

Dr Musa Kika (Institute for Human Rights and Development in Africa, Gambia) *Jurisprudence of Coups: Trends in Constitutional Adjudication of Coups in Africa*

Abstract: As with other regions that have suffered a series of military coups, there is a discernible pattern in Africa where successful coups are accompanied by a plethora of legitimating action, including seeking judicial validation. Through both direct and indirect legal suits, civil and criminal, and through opportunistic questions that courts seize to pronounce themselves on the legality and constitutionality of coups, courts become instruments of unconstitutional change of governments and active participants in judicialization of politics and of coups. Through the elements of timing, stealth, indirect endorsement, Hans Kelsen's theory of revolutionary legality which posits that a successful revolution creates a new legal order by invalidating the old grundnorm and establishing a new one, and other legal concepts such as the doctrine of necessity and recognition of de facto government as the de jure, the result of courts participation in coup validation is to create harmful jurisprudence that lend aid to cycles of coups, distorts norms of legal recognition, and hurts judicial independence and credibility. This study which examines recent coup jurisprudence from across Africa and Africa's regional courts identifies patterns and trends which illuminate a dangerous jurisprudential area in constitutional adjudication, and suggests an appropriate response. It finds in multiple instances where governance is already weak, judiciaries lending legitimacy and insulation to coups, elbowing out deferential international intervention. But there are also illuminating standards from some courts on holding the line and defending the courts' true role of being the last line of defence of constitutions and constitutional orders, especially from the ECOWAS Court of Justice. Whether courts, faced with the reality of a successful coup, are faced with coercion, co-option, practical situations of coup-executors that have become de facto authorities, survivalist instincts, or other forms of judicial arm-twisting, the study suggests that the correct response lies in courts declining jurisdiction to determine the legality of coups and the actions of coup governments in the immediate aftermath of a coup such as declarations of states of emergencies, suspension of the constitution, promulgation of new laws and other decrees, and the creation or dissolution of statutory, constitutional and other bodies, as political questions that must be resolved politically. Is it an unnecessary, even academic, pursuit to examine whether it is unrealistic and purely legalistic to decline jurisdiction in the face of what may be a coup government that has effectively taken control, for if a coup government has effectively taken control then it has no existential need for judicial endorsement and must be left to survive on its own devices and for political forces to decide its fate and what would thereafter become the grundnorm. If judges decide to be seized with a matter and rule on merits on account of fear and self-preservation, then that ceases to be law at play but politics of survival, which has a worse effect on rule of law and constitutionalism.

A/Prof Jameelah Omar (University of Cape Town) *The discriminatory component of consent: an analysis of sexual assault in South Africa*

Abstract: The issue of ‘consent’ as an element of many sexual offences, including sexual assault and rape has long been a contested one (Pithey & Smythe 2021). This paper will engage with the concept of consent and consider the impact that emphasised consent has in unfairly distinguishing sexual assault from other types of assaults. While consent in sexual offences is an (almost) universal one, the frame of reference is the South African context. This is an important area of research because ‘without consent’ is a definitional element of both rape sexual assault in South African in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The emphasis on proving the absence of consent fundamentally affects the rhetoric of sexual violence and the possibility of proving a sexual assault in court. Unlike other types of assaults, such as common assault, sexual assault is effectively deemed to be lawful but for the lack of consent. This means that in sexual assault cases the starting point is that the conduct is lawful unless the allegation that it was ‘without consent’ can be proven beyond a reasonable doubt. This is a public policy choice, one heavily influenced by historical and social factors and (mis)understandings of gender, sex, sexuality and a general patriarchal approach that is so visible in the law of sexual offences. It is, however, inappropriate to consider rape to be otherwise lawful sexual intercourse, rendered unlawful through lack of consent (Omar 2022). Consent as a definitional element is one of the aspects of the law of sexual offences that is most heavily criticised (Pithey & Smythe 2021; Du Toit). Feminist scholars have long decried the discriminatory impact on the victim (such victims being predominantly women) as it forces a trial focused on the conduct of the victim. It has been suggested that defining the offence in terms of ‘coercion’ would place the appropriate emphasis on the accused’s conduct (MacKinnon 1989, 245). In South Africa, such a mixed approach has been adopted, with the Sexual Offences Act defining consent in terms of coercive circumstances. I argue in this paper that because of the entrenched gender and sex power disparities in the local and global patriarchal society within which the law operates, this middle-ground approach does not go far enough and is ineffective in changing the rape culture embedded in the law on sexual offences. This in turn, has a marked impact on complainants in sexual offences, who are dissuaded from reporting because cases are difficult to prove, and where they do, suffer the inequalities of a legal culture that treats them with suspicion and secondary victimisation. Thus, the Criminal Law and the complainant’s experience of the criminal justice system are negatively impacted.

Dr Ibrahim Harun (University of the Western Cape) *From Balance to Domination: Executive Power and Democratic Accountability in Post-2010 Kenya*

Abstract: The promulgation of Kenya’s 2010 Constitution marked a watershed moment in the country’s democratic evolution, introducing far-reaching reforms to strengthen the separation of powers, enhance accountability, and consolidate constitutional governance. The judiciary was empowered to act as an independent check on executive excesses, while the legislature was designed to exercise oversight and ensure the implementation of constitutional mandates. In practice, however, the post-2010 period has revealed a persistent tension between formal constitutional guarantees and the realities of political practice, as the executive increasingly asserted dominance over both the legislative and judicial branches.
The judiciary has at times demonstrated its capacity to uphold constitutional norms and safeguard democratic accountability. Former Chief Justice Maraga exemplifies this potential. In 2017, the Supreme Court under his leadership nullified the presidential election, affirming judicial independence and the supremacy of constitutional law. Later, he issued a historic advisory recommending the dissolution of Parliament under Article 261(7), following the failure of both the National Assembly and Senate to enact legislation implementing the constitutionally mandated two-thirds gender rule. While the High Court

suspended this recommendation, the episode highlighted the judiciary's ability to challenge executive and legislative inaction, as well as the limitations of judicial power in the face of entrenched political and institutional resistance. Other interventions by the judiciary during this period have reinforced constitutional safeguards, but these remain exceptional and often contested by informal political networks. Concurrently, the legislature has exhibited structural weaknesses that have undermined accountability. Political oligarchies, coalition-driven party loyalty, and executive-aligned networks have constrained both the National Assembly and Senate, resulting in repeated failures to pass critical legislation such as the gender-balance law. Parliamentary committees designed to exercise oversight over executive actions have frequently been dominated by members aligned with presidential priorities, limiting scrutiny and diluting the legislature's effectiveness. These developments illustrate how formal institutional designs, though constitutionally mandated, can be weakened by informal power structures and patronage networks. This paper situates Kenya's post-2010 experience within broader debates on executive capture, institutional resilience, and democratic accountability. It addresses the central research question: How has the consolidation of executive power after the 2010 Constitution affected legislative and judicial accountability, and what are the implications for Kenya's constitutional democracy? To answer this, the study employs a qualitative methodology, combining document analysis of constitutional provisions, parliamentary records, judicial rulings, and policy reports with semi-structured interviews of legal scholars, political analysts, and parliamentary insiders. This approach allows for a detailed assessment of both formal institutional mechanisms and informal power dynamics shaping governance. The study will analyse executive influence over Kenya's legislature and judiciary. It will identify gaps between constitutional theory and practice, assess judicial resilience under figures like Maraga, and offer concrete policy solutions. By highlighting successes and systemic vulnerabilities, it aims to strengthen institutional safeguards, reinforce oversight, and consolidate Kenya's challenged yet enduring constitutional democracy.

Equality: Wealth, Education, Identity - Venue: Lecture Theatre 3

Chair: Ms Zenobia Du Toit (Miller du Toit Cloete Inc)

A/Prof Jason Brickhill (University of Cape Town/Johannesburg Bar) *The Constitutional Imperative to Regulate Extreme Wealth*

Abstract: Constitutional democracies have, to varying degrees, traditionally been concerned with the existence of poverty, deprivation and inequality. With growing global recognition of socio-economic rights and increasingly substantive and restitutionary conceptions of equality taking root in domestic and regional legal systems has come greater acceptance of the duties of states to provide for the material needs of those worst off. Socio-economic rights and non-discrimination duties have offered some universal benchmarks for provision (as reflected, for example, in the 'minimum core') but also relative benchmarks. Inequality has long been a central concern of constitutional and human rights practice and scholarship, contrary to the arguments of theorists such as Samuel Moyn who argue that the focus has been on minimum provision only. However, approaches to inequality and the use of relative measures have tended to assess the extent to which the poorest sections of society measure up against a socially acceptable minimum, mean or median. Constitutional law has paid little attention, in contrast, to extreme wealth. I argue that the existence of extreme wealth conflicts not only with normative commitments to human rights and equality, but also to the structural dimensions of constitutionalism. It is in tension with the

egalitarian and universalist pre-commitments of representative democracy. Beyond theory, contemporary experience across diverse parts of the world is increasingly demonstrating the ill-effects of extreme wealth on constitutional democracy. In this piece, I engage the constitutional arguments against extreme wealth. Going beyond its instrumental harms in keeping poor people in poverty and exacerbating inequality, I draw out its impact on democracy, corruption, social cohesion and international relations. I argue that sustaining constitutional democracy today requires policy and regulatory approaches that focus not only on bottom-up measures to alleviate poverty and material deprivation, but top-down measures that curb or cap individual wealth accumulation. Drawing on the 'limitarianism' approach charted by Ingrid Robeyns and earlier theorists' contributions on 'capabilities', I offer a working answer to the underlying question, 'how much is too much?' I argue that the regulative ideal of limitarianism calls on societies to set a benchmark above which it is constitutionally legitimate to restrict individual wealth. In setting this limitarian benchmark, I argue that constitutional systems should identify the point at which individual wealth threatens two sets of constitutional ideals: first, where it threatens healthy democratic processes by enabling disproportionate impact on political discourse and electoral processes; and second, where it threatens human rights realisation, especially in relation to socio-economic and environmental rights. The appropriate measures to implement the limitarian regulatory principle may vary contextually, but are likely to include legal restrictions and rules relating to, among others: ownership of immovable property, wealth taxes, human rights-based budgeting, reform of aspects of company law, redistributive schemes (for example, in relation to land), inheritance laws, campaign finance and lobbying, and requirements for public office-bearers and officials to divest from or declare commercial interests. Ultimately, I argue that appropriate legal and regulatory measures to tackle extreme wealth above a constitutional-limitarian threshold are vitally necessary to sustain constitutional democracy in the face of contemporary threats.

Dr Lisa Draga (University of the Western Cape) *Language in education: Access to education versus recognition of diversity*

Abstract: Language in education was one of the most controversial clauses during the making of the 1996 South African Constitution. It almost disrupted the talks as the political parties representing the interests of Afrikaners insisted on the recognition of the right to education in minority language. Section 29(2), which enjoins the state to consider "all reasonable educational alternatives including single medium institutions, subject to considerations of equity, practicability and the need to redress the results of past racially discriminatory laws and practices", represents a compromise that was finally agreed upon by the political parties after long painstaking negotiations. The aim of this paper is to provide a broader understanding and insight into the status of the protection of the right pertaining to the use of language in education in South Africa. By discussing the issues against the background of international and regional human rights instruments, this paper will assist in identifying and giving clarity about the standards in terms of which the national legal and policy framework pertaining to the use of language in education can be evaluated. This paper argues that the jurisprudence of the South African Constitutional Court has oscillated between privileging access to education over diversity imperatives, treating both imperatives equally, showing little regard for diversity and ultimately embracing both principles again.

Ms Jessica Waldman (University of Cape Town) *A denial of common humanity? Unsolved murders, impunity and the right to a dignified death investigation*

Abstract: The prevalence of homicide in South Africa combined with low conviction rates represent one of the greatest challenges to our constitutional democracy, calling into question the legitimacy of the state. It is said that death is the great equaliser. However, this does not hold true for South African death investigations, where limited resources necessitate tough choices about case prioritisation, creating an uneven playing field where certain deaths are afforded more value than others. Bereaved family members are often left 'in the dark,' concerning the deaths of their loved ones, which is a denial of common humanity. Engaging with the themes of administrative justice and how race, class and spatial inequality shape experiences of the criminal justice system, this paper argues that the South African Constitution affords the (currently under-realised) right to a dignified death investigation. This paper draws upon mixed methods research conducted on the inquest process in the Western Cape. An inquest is a court investigation which takes place when the NPA has declined to prosecute a death. It makes determinations regarding how a person died and whether anyone can be held responsible, with the deeper purpose of exposing truth and ensuring accountability. Although inquest case law suggests that there is a presumption towards a public hearing, in practice public hearings are rarely held and most inquest cases are decided on the papers. Structural pressures and the perception that inquests lack importance interact to minimise the scope of South African inquest inquiries. Bereaved family members are rarely granted legal aid for legal representation during inquest proceedings. Consequently, inquests usually function as hidden, bureaucratic procedures with little opportunity to interrogate the evidence. Analysis of inquest case files highlights the lack of attention and care afforded to most violent deaths by the criminal justice system. This violates the rights of bereaved family members to dignity, equality, and equal access to the law. Other common law jurisdictions have explicitly recognised an investigative obligation attached to the loss of life, particularly where the state is implicated. In England, this derives from European human rights law, and guarantees the right to a public hearing, where the bereaved are legally represented. Meanwhile, in Australia, this has developed through coronial legislation. More recently these jurisdictions have centred the importance of placing the bereaved 'at the heart' of the process. These normative developments appear to recognise a humanising imperative in death investigations. Resource restrictions, skills deficits and the overwhelming number of violent deaths in South Africa may jeopardise attempts to introduce similar policies here. Nonetheless, dignified death investigations should not be restricted to the privileged few. This paper argues that the South African Inquest Act 1959 should be reformed to bring it in line with the Bill of Rights. Whilst the inquest process is itself a colonial imposition, intractable from South Africa's history of violent settler colonialism, it could be reimagined to offer a sense of justice and humanity which is currently missing from the investigation of homicide.

10:30 – 11:00 – Coffee Break

11:00 – 12:30 – Keynote Plenary: Reconceiving Public International Law

Venue: Lecture Theatre 1

Chair: Dr Nicola Palmer (University of Cape Town)

Justice Richard J. Goldstone (Constitutional Court of South Africa) *The Urgency for Middle Power Support for Public International Law*

Abstract

During the past 18 months the Trump Administration has committed serious violations of international law leading many to fear for its future viability and efficacy. However, the violations by the US are not novel. During the past forty years there have been serious violations of public international law committed by the Administrations of Presidents Reagan, Clinton, Obama, G W Bush and Biden.

Unhappiness with the policies of the United States is one of the reasons that led to the establishment of BRICS whose eleven members constitute almost half of the world's population and produce about one-quarter of the world's global exports. Not all the members of BRICS have manifested the wish to abandon public international law and many of them would rather refashion it in a way more respectful of the sovereignty of its members.

One legacy of colonialism in Africa is the sensitivity of African nations to any actual or perceived inroads into their sovereignty. However, it is important for them to recognise that public international law is the essential lubricant for an efficient modern world.

Africa is also the world's fast urbanising region and by 2050 will have the second largest urban population after Asia. Two out of three of its 1.5 billion people will live in an urban area. African states need to find the political will and the resources to strengthen transnational law in Africa and to lead in rejuvenating and strengthening Public International Law. That movement should not anticipate, or depend on, leadership from the United States, China or Russia. The time is ripe for wide discussion and planning by the middle powers of the world and especially the democracies on all continents. This movement should be led, in the first instance by the academy and civil society.

Prof Antony Anghie (National University of Singapore) *The Weak Suffer as They Must?*

Abstract

Great power politics and illegal wars of conquest by the United States, Russia and Israel are defining features of contemporary international relations. These are often justified by the `realist' argument that it is power and not law that is inescapably decisive. The peoples of the Global South (and indeed, everywhere else) have been gravely harmed by these wars; their already fragile and precarious livelihoods are further undermined.

It is in this context that this presentation will return to a moment when countries from what we now term `the Global South' gathered together to articulate their vision of international law and world order-the Asian-African Bandung Conference of 1955. What lessons can be learnt from Bandung? And what resonance does Nkrumah's warning about neo-colonialism have in these times? These are some of the themes that will be raised.

Ms Tafadzwa Pasipanodya (Partner and Chair, Africa Practice, Foley Hoag LLP, Washington DC)

Emeritus Prof John Dugard SC (Leiden University/University of the Witwatersrand)

Abstract

When I started teaching public international law in 1966 it was necessary to devote the first lecture to the question: Is international law really law? The absence of a legitimate aw-making body, an effective executive and active international judicial system compelled a lecturer to spend time convincing students that despite these weaknesses international law was really a legal system .

Subsequent events, such as decolonization, the end of the Cold War and the increased use of international courts did much to challenge this pessimistic assessment. It became accepted that there was a fair and sophisticated body of legal rules, legitimately adopted; that most states complied with most of these rules most of the time; that international courts were widely used to settle disputes.; and that international law was law.

Recent events have compelled international lawyers to re-consider this assessment. First, there is the question whether there is a set of rules that most states, particularly the powerful, regard as binding upon them? The most powerful state in the world, the United States of America, has for many years regarded many rules of international law as not binding upon it.

The Biden administration claimed that it was bound by a Rules Based International Order – RBO – reflecting the US understanding and interpretation of international law rather than international law. The Trump administration has gone further in its complete denial of existence of international law. It actions, and threats of action, on Venezuela, Iran, Gaza, Greenland, Panama, Canada and Falklands provide abundant evidence that international law is no longer seen as a set of rules binding upon the United States. Law has been replaced by power and deal-making.

Second, there is the question international law is more enforced today by the community of nations than it was – say – fifty years ago. Sadly it is not. The executive body of the UN, the Security Council, has been brought to a standstill by the US veto. Both the Biden administration and the Trump administration have invoked the veto consistently to block action on Gaza or any matter of interest to the United States. There has been a return to the Cold War use of the veto power.

Thirdly, The United States has undermined the work of the International Criminal Court by imposing sanctions on judges for issuing a warrant of arrest against Israeli leaders. And It has also made threats against South Africa for bringing a case against Israel in the ICJ.

In summary, international law is no longer regarded as binding by the most powerful state in the world and by an intermediate power in the Middle East – Israel. The power of the United Nations to make peace and punish wrongdoing has gone – thanks to the US veto. And international courts are subject to rebuke.

In these circumstances it is incumbent on teachers of international law to address the question whether international law is still law.

12:30 – 13:30 – Lunch

12:45 – 13:30 – Doctoral Panel B

Law, Society and Equality - Venue: Lecture Theatre 1

Chair: Prof Nico Steytler (University of the Western Cape)

Ms Sinethemba Memela (University of New South Wales) *The Interpretation of Constitutional Labour Rights and material inequality in South Africa*

Abstract: Organised labour played a pivotal role in the dismantling of apartheid and in negotiations for democratic constitutionalism, and by contributing to the inclusion of various labour rights in the Constitution. However, apartheid labour relations persist. The labour rights in the South African Constitution are intricately linked to discourses on historical redress, post-apartheid material inequality and indeed the future of constitutional democracy, and yet remain under-theorised. The interpretation of constitutional rights in South Africa, often understood in the language of transformative constitutionalism, has been subject to both reverence and critique for the many ways in which it intervenes in social structures. This chapter begins by situating constitutional labour rights – which include access to work, fair labour practices and industrial democracy – in their historical and political context to present a critical analysis of their drafting history and constitutional manifestation. It then considers their subsequent interpretation, and lack thereof, by the South African Constitutional Court in three cases, which are distinguishable from the approach taken in the interpretation of other socio-economic rights where proceduralisation has been employed to avoid material questions. An exegesis of the South African Constitutional Court decisions in *State v Jordan* (sex work), *SATAWU v Garvis* (trade union liability for labour protest related property damages) and *NEHAWU v Minister of Public Service and Administration* (collective bargaining) is undertaken to illustrate how, through the practice of constitutional interpretation constitutional labour rights have been stripped of their transformative potential to redress material inequality. It concludes by advocating for a method of constitutional interpretation that is historically and materially grounded, with its attention on questions of repair, redress and redistribution.

Mr Balu G Nair (University of Melbourne; National Law School of India University) *Affirmative duty to protect: A broad accountability mechanism or a narrow duty on the Indian State?*

Abstract: A Constitution Bench of the Supreme Court of India in Kaushal Kishor[1] held that the State has an affirmative duty to protect life and personal liberty guaranteed under Article 21. The duty applies, irrespective of whether the threat of harm to the right arises from the State itself or a private party. Despite the significance of its decision, the majority in this case did not expand on the exact scope of the affirmative duty. This is particularly concerning as Article 21 guaranteeing right to life and personal liberty has been interpreted extremely broadly by the Supreme Court, to the point that some commentators think that the provision has lost all normative coherence. The dissenting judgment in the case by Justice Nagarathna, pushed back against a general duty on the State to protect. She limited the duty to those instances where the Constitution or statutory law specifically casts a duty on the State to protect individuals from harm. She identified a few such instances, one of it being the duty to protect rights-holders from a hostile/violent group. This disagreement finds parallels in the debate surrounding Supreme Court of India's social rights jurisprudence. While numerous accounts have argued that systemic social rights are firmly a part of the Indian Constitution, Madhav Khosla has asserted that the Supreme Court's judgments on socio-economic rights do not confer any systemic rights; instead, they merely uphold the State's duties under existing legislation or policy, making them "conditional rights".[2] Borrowing the terminology and framework from the social rights debate, I pose the following question: Is affirmative duty to protect then a systemic right against any infringement of one's life and personal liberty or a conditional right, as Justice Nagarathna seems to hint? In answering this, I will use Sandra Fredman's argument that all human rights trigger a host of corelative duties, including the duty to protect.[3] I will

further argue that it is particularly important for constitutional law and its remedial framework to step in to fix positive duties as private law mechanisms – particularly within India - are notoriously bad at fixing liability for mere omissions, leading to a remedial vacuum for rights-holders. The concept of affirmative duty has special significance at this moment in time in India as the State has actively disowned its duty to protect the most vulnerable, be it refugees seeking protection from persecution or data subjects made vulnerable to cybercrimes. The paper will test its account of affirmative duty to some of these cases to illustrate the relevance and utility of the duty.

[1] *Kaushal Kishor Vs. State of Uttar Pradesh and Ors.*, MANU/SC/0004/2023: (2023) 4 SCC 1.

[2] Making social rights conditional: Lessons from India, I•CON (2010), Vol. 8 No. 4, 739–765.

[3] Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties (Oxford, 2008; online edn, Oxford Academic, 1 Jan. 2009), https://doi.org/10.1093/acprof:oso/9780199272761.001.0001, accessed 8 Dec. 2025

Accountability, Relief and Public Law - Venue: Lecture Theatre 3

Chair: Mr John Jeffery (Independent, South Africa)

Mr Nathaniel Reilly (University of Oxford) *Damaging Good Governance: A Game-Theoretic Perspective*

Abstract: From at least the venerable decision in Ashby v. White (1703) 92 ER 126 to the present, common law judges have been trading assertions about the consequences of public officials' liability for good governance: undesirable government actions might be deterred by such liability, or desirable actions might be chilled. Despite these assertions' long pedigree, however, they are often undertheorized. That is, judicial decisions and academic commentary have often failed to provide a compelling justification—beyond bare assertions—for why either positive or negative effects might flow from officials' liability. This is partly because there has been relatively little effort to examine how officials' liability interacts with structural incentives inside the executive branch (e.g., the policy preferences of internal supervisory bodies, the scope of indemnification policies, etc.). This paper explores how officials' liability may interact with the structural incentives within the executive branch. It does so by using simple game-theoretic models, which provide an avenue to test the plausibility of judges' assertions. The models suggest that those assertions are often unpersuasive. Instead, the effects that flow from officials' liability appear to be complex and contingent—even in simple models. The paper then addresses the fact that reality is considerably less simple, arguing that the effects that flow from liability are therefore likely to be all the more complex and contingent. In light of the results that flow from the models, the paper examines the implications for courts' approaches to tort and constitutional remedies. Those implications are significant, because judges have embedded claims about good governance effects in several doctrinal settings. For instance, in contemporary Canadian law, the possibility for chilling effects has been used to justify limits on the recognition of duties of care for public officials and organizations, and to justify limits on the availability of constitutional damages awards. The paper argues that if those limits are to be retained, alternative justifications would be more convincing. Conversely, in other settings the possibility for deterrent effects has been used as a justification for imposing liability. Indeed, deterrence is one of the purposes that the Supreme Court of Canada has recognized for constitutional damages awards. The paper argues that justifications for such awards more plausibly rest on the other purposes that the Court has recognized: compensation and vindication of rights. Beyond doctrinal implications, the paper argues that

the models are most useful to inform answers to broader theoretical and methodological questions in public law. They demonstrate the importance of attention to institutional and organizational structures within the executive branch. And more broadly, they are a useful lens through which to see the limitations of traditionalist conceptions of the rule of law—exemplified by the work of A.V. Dicey—that placed near-total faith in the capacity of the ordinary courts and the ordinary law to hold public officials to account.

Mr Benjamin Christy (University of Auckland) *A New [Zealand] Parliamentary Sovereignty: Can sovereign parliaments be liable for human rights violations?*

Abstract: This paper challenges the assumption that parliamentary sovereignty absolutely precludes liability for human rights violations enacted in primary legislation. It contends that the New Zealand Bill of Rights Act 1990 (NZBORA) establishes a distinctive model under which Parliament is legally accountable for non-compliance with its human rights obligations, despite the continued validity of its rights-inconsistent statutes. When it comes to substantive limitations on parliamentary sovereignty, including for human rights, there are typically thought to be two possible models. Under the first, parliament's competence to pass valid legislation becomes constitutionally defined, as in Canada and, over more limited matters, Australia. In effect, parliamentary sovereignty is redefined to exclude supreme lawmaking authority in favour of constitutional supremacy over specified areas. Under the second, parliament's competence remains absolute despite statutory definition of substantive normative aims as, for example, in the statutory bills of rights in the United Kingdom and three Australian states. While those bills of rights preserve absolute legislative competence, each empowers courts to issue non-binding declarations notifying parliament of rights-inconsistent legislation. When the New Zealand Supreme Court found a judicial declaration of inconsistency (DOI) power within NZBORA in *Attorney-General v Taylor* [2018] NZSC 104, scholars took it as confirmation of New Zealand's adoption of the second model. However, there is a more novel possibility suggested by the reasoning in the Taylor decision: a third, intermediate model for substantive limitations on parliamentary sovereignty. Under this model, legislation is both a valid exercise of legislative power and an unlawful exercise of that power due to inconsistency with statutory rights. Put another way, parliament's competence to pass valid legislation remains absolute while its competence to pass lawful legislation becomes statutorily defined. I argue that this approach remains fully consistent with parliamentary sovereignty, because that doctrine is only concerned with limitations on the first and not the second type of competence. While this approach may appear counterintuitive or even heretical, as validity typically tracks lawfulness, I explore how the doctrine of parliamentary sovereignty permits a separation of these concepts. Taking the reasoning in Taylor as its point of departure, this paper explores how this third model arises from the nature of NZBORA as what I term a 'standard-based statute'. A standard-based statute is one which sets a legal standard applying to certain conduct (e.g. lawmaking) without affecting the validity of that conduct for failing to conform to that standard. This paper concludes that this new model offers insights for scholars working in jurisdictions with parliamentary sovereignty and for comparative constitutional scholars interested in the relative benefits of variations of the so-called new Commonwealth model of constitutionalism.

Dra Anne Bombay (KU Leuven) *Courts and the Vacant Seat of the Legislator: Judicial Remedies for Unlawful Legislative Inaction in Constitutional Democracies*

Abstract: The earliest constitutions impose constraints upon state powers: no actor of government may unduly infringe upon citizens' rights. At their core, framers were concerned with judicial protection against government action. Still, in the 20th century, and especially after World War II, constitutionalism evolved beyond a sole focus on government restraint: constitutional design is now also concerned with governmental inaction. As Richard Pildes notes, "the flight from political responsibility – the problem of political abdication – is now seen as at least as serious a threat". In many constitutional democracies, citizens increasingly turn to courts because their legislatures fail to fulfil lawmaking obligations arising from constitutional, human rights, or international commitments. Rather than challenging unlawful legislation, litigants now contest unlawful legislative inaction. This shift raises profound questions about the boundaries of the judicial function and the resilience of the separation of powers in modern constitutional democracy. From the perspective of institutional design, the question remains how political actors, and in particular the legislature, can be prompted to assume the responsibilities they would rather avoid. Seeing a rise of litigation before the courts, the challenge then lies in determining how far the judiciary can go in providing effective redress without overstepping into the political domain. This paper examines how courts navigate this tension through the development of judicial remedies against unlawful legislative inaction. It first explores the question of what unlawful legislative inaction entails. It thereby expounds upon the concepts of substantive legislative obligations and procedural legislative obligations, both deriving from States' public-law framework. Whereas the former prescribe, more or less precisely, the content of the legislation that must be adopted, the latter form general legal bases from which the obligation to actually enact the legislation emanates. This framework offers a clear delineation to the discussion: the central question in this paper is what role can courts play in the enforcement of legislative obligations and how they fulfil this duty. The paper then develops a typology of judicial remedies against unlawful legislative inaction. It focuses on dialogic remedies and how these might acquire "teeth", evolving from mere signals in the legislative-judicial conversation to court orders to legislate, through tools like state liability law and structural injunctions. Drawing on case law, both from the civil courts and the Constitutional Courts in civil law countries (like Belgium, the Netherlands and Germany) and comparing it with the approach taken by their common-law counterparts (like the US, Canada, and South-Africa), the paper explores how judges engage with legislative inaction and the normative considerations underlying that engagement. In doing so, the paper contributes to understanding the evolving balance between effectiveness of rights and respect for democratic self-government. It asks whether judicial responses to legislative inaction can strengthen the rule of law, or whether they signal a deeper transformation in the separation of powers.

Testing Democratic Resilience - Venue: Lecture Theatre 3

Chair: Mr Jonathan Mort (Jonathan Mort Inc)

Ms Lisa de Waal (Stellenbosch University) *Accountability in South Africa's International Law Participation: Measuring the Health of its Constitutional Democracy*

Abstract: Section 1(d) of the Constitution of the Republic of South Africa, 1996, highlights accountability as a central tenet of the concept of constitutional democracy. The notion of accountability within the concept of democracy has only ever been interpreted by South African courts within a domestic context. However, South Africa's historic proceedings against Israel in the International Court of Justice – the first instance since its democracy that the Republic of South Africa has instituted

proceedings against another nation at the ICJ – is an example of the State upholding the notion of accountability within an international context in two key respects. First, by instituting proceedings against the State of Israel in the ICJ, South Africa is exercising its extraterritorial right to hold Israel accountable for violating several Articles in the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), together with a request for provisional measures to be granted by the ICJ. Second, in doing so, South Africa is holding itself accountable to its international law obligations in respect of: Article I of the Genocide Convention, which mandates State parties to prevent genocide; Article IX of the Genocide Convention, which mandates State parties to submit disputes concerning the Genocide Convention to the ICJ; and in terms of the United Nations General Assembly Resolution 60/1 of 2005, to protect populations outside of a State party's own borders. The constitutional principle of accountability would be made richer, more robust and given more content, if it were conceptualised more widely, as applying both domestically and internationally. To successfully embed the international dimension of this principle, South Africa must approach its international law obligations consistently, which it arguably failed to do when, in 2023, it abstained from voting in the United Nations General Assembly on resolutions condemning Russia's role in the Ukraine war. An inconsistent application of South Africa's international law obligations undermines the accountability facet of constitutional democracy, and the rule of law. Thus, the central question that this paper seeks to answer is whether South Africa's direct participation in international law forums could be used as a manner by which to measure the health of the nation's constitutional democracy, and whether such participation could strengthen constitutional democracy. In attempting to answer these questions, this paper will use a doctrinal approach to critically analyse the meaning of accountability, the ICJ case, and South Africa's international law participation over the last decade, to assess whether this concept can and should have resonance outside of a domestic context as one way in which to measure the health of South Africa's constitutional democracy.

Ms Lisa Mariß (Leibniz University Hannover) *Right-Wing Extremism and Democratic Erosion: A Comparative Analysis of Institutional Resilience in Germany and South Africa*

Abstract: Three decades after the adoption of South Africa's 1996 democratic Constitution and more than seventy years after Germany's Basic Law, both states confront renewed pressures from right-wing extremist or otherwise anti-democratic movements. Although Germany and South Africa have markedly different historical trajectories, institutional designs, and social conditions, they exhibit strikingly similar patterns in how extremism threatens constitutional democracy: the infiltration or coercion of public institutions, the use of digital ecosystems to mobilise supporters, the delegitimisation of political adversaries, and efforts to undermine constitutional norms and democratic culture. This paper examines how right-wing extremism—understood as an exclusionary, ethnically defined, anti-pluralistic ideology—endangers democratic governance and the rule of law in both states, and which mechanisms of institutional resilience have emerged in response. In Germany, the focus lies on the instruments of "militant democracy," including party bans under Article 21 of the Basic Law, the domestic intelligence service's monitoring of anti-constitutional activities, and civil service obligations of constitutional loyalty. Judicial mechanisms ensure review of extremist tendencies within public authorities. Recent developments—such as right-wing networks within security institutions, digitally driven radicalisation, and extremist rhetoric in parliaments—demonstrate, however, that these mechanisms are increasingly strained and not always well adapted to the rapidly evolving dynamics of contemporary extremism. At the subnational level, questions arise as to whether Länder institutions—including constitutional courts and integrity structures within administrations—can effectively reinforce democratic resilience. South Africa

faces a different, yet structurally comparable, challenge. The 1996 Constitution is rooted in a commitment to equality, non-discrimination, and inclusive democratic governance. Nevertheless, persistent racial tensions, extremist narratives, and populist mobilisation pose risks to institutional legitimacy. Additionally, the extensive findings of the Zondo Commission on "State Capture" reveal how corruption, misuse of public power, and weakened state capacity undermine democratic processes and erode public trust. The Constitutional Court has, in landmark judgments such as Glenister II, emphasised the state's constitutional obligation to maintain effective anti-corruption mechanisms—an essential dimension of institutional resilience in a context of pervasive threats to integrity. By adopting a comparative perspective, this paper argues that democracies with divergent histories nonetheless depend on a shared set of structural safeguards to resist extremist pressures: a robust constitutional culture; independent courts; effective accountability institutions; and a professional, politically neutral public service capable of withstanding ideological capture. The analysis also allows for critical reflection on Germany's concept of militant democracy and highlights lessons that may be drawn from South Africa's experience with institutional degradation and regeneration. Ultimately, the paper contributes to understanding how constitutional democracies can strengthen their resilience in an era marked by rising extremism, socio-political polarisation, and escalating challenges to the rule of law.

Mr Douglas McDonald-Norman (University of Technology Sydney; UNSW) *The Canary: Tribunals and Democracy in India*

Abstract: This paper examines and theorises the relationship between administrative review tribunals (that is, non-court adjudicatory bodies which review government decision-making) and democracy, including the potential role played by these tribunals amid circumstances of government decline. This paper places these theoretical insights into the context of the history and functioning of tribunals in India since 2014. Tribunals are under-studied, combining features of courts and government officials but classifiable as neither. Courts and bureaucrats are potentially significant amid democratic decline – in resisting encroachments on power or, alternatively, in conferring legitimacy and authority on authoritarian regimes. Tribunals can serve similar functions, as bodies which exercise adjudicative powers akin to courts but which do not have the same institutional guarantees of independence as courts. Because of their relative vulnerability to government overreach, attempts by governments to exert greater control over tribunals may be 'the canary in the coalmine' – an early warning sign of executive aggrandisement or attempts to consolidate power. This paper posits three potential roles for tribunals amid democratic decline. Tribunals may serve as sites of resistance, resisting attempts by governments to expand their powers and prerogatives. Tribunals may serve as bystanders, continuing to perform their functions (even in a way which sometimes acts against the government) while accepting the policies and priorities of the new regime. Or tribunals may act as accelerants, using their powers in a way which reinforces the new regime – by legitimising its acts or endorsing its ideological foundations. This paper examines these theoretical roles by reference to two case studies in India: the Central Administrative Tribunal and the Foreigners Tribunals. Amid democratic decline, courts sought to protect tribunals like the Central Administrative Tribunal from attempts by the government to increase its role in their appointment – but only up to a point, and in defence of the independence of judicial power rather than for the sake of tribunals in their own right. The Foreigners Tribunals, meanwhile, lack independence and procedural fairness; their arbitrary, unfair operations have served to legitimise and give legal force to illiberal and chauvinist ideas about who 'belongs' to India and about the role and status of Muslims in India. These

ideas, in turn, have fuelled democratic decline in India by promoting a narrow and exclusivist idea of Indian national identity and of whose voices deserve to be heard.

13:30 – 15:00 – Parallel Panels – Session 5

Distribution of Power within Constitutional Systems - Venue: Lecture Theatre 1

Chair: Justice Colin Feasby (Court of King's Bench of Alberta)

Mr Dan Mafora (University of Cape Town) *Executive Authority under the Constitution: Doctrine in Search of a Theory*

Abstract: What is the character of the executive authority vested in the President by the Constitution of the Republic of South Africa, 1996? The case law offers little by way of illumination. The jurisprudence is a body of rules that have been incrementally developed, for the most part, by the analogical extension of administrative law doctrines, and that is not grounded in any coherent general theory of the Constitution's allocation of executive power. From its early days, the Constitutional Court has approached executive authority primarily as a domain to be constrained. That approach has yielded a jurisprudence concerned with control rather than interpretation, and informed by principles that are not always compatible with one another or with the constitutional text. In particular, the uncritical transposition of administrative law doctrines to the review of executive conduct has obscured the distinctive role of the executive carved out for it by the Constitution. The result is a jurisprudence concerned with the extent of executive authority with little attention paid to the nature or scope of such authority. This article seeks to lay the groundwork for the development of a more systematic theory of executive authority. It argues that such a theory must have fidelity to the text, structure and history of the Constitution. It begins with a descriptive analysis of the jurisprudence, identifying the structure and content of the doctrine that has emerged. It then offers a critique of that doctrine as an interpretation of the constitutional text, structure and history. Finally, it argues that any defensible theory of executive authority must turn on the standard applicable to the judicial review of executive action, and that such a standard presupposes a principled conception of the separation of powers discernible from the Constitution itself, rather than one devised ad hoc by judicial discretion within the sole preserve of the Constitutional Court, informed by its own conception of institutional propriety.

Prof John Golden (University of Texas at Austin) *Madison's Separation-of-Powers Oversight? Correcting for the Legislature's Long-Term Disadvantage*

Abstract: In Federalist Paper No. 51, James Madison, the chief architect of the United States Constitution of 1787, wrote, "In republican government, the legislative authority necessarily predominates." Consequently, he implied, the legislative branch presents the greatest danger to a properly balanced separation of powers. "The remedy for this inconveniency," he continued, "is to divide the legislature into different branches"—i.e., to have a bicameral legislature whose two chambers, the House of Representatives and the Senate, would act as checks on each other's power and thus on the power of the legislative branch as a whole. In contrast, "the weakness of the executive may require … that it should be fortified": hence, under the Constitution, the President's veto power and the Senate's capacity to ally with the President against the House served as means to prevent the President's powers from being overrun.

On the flip side, Alexander Hamilton, in Federalist Paper No. 73, deployed the assumption of legislative predominance to defuse fears that a monarchical President would abuse the veto power: "[t]he superior weight and influence of the legislative body in a free government and the hazard to the executive in a trial of strength with that body afford a satisfactory security that the negative would generally be employed with great caution." Whatever the exact nature of the intended balance and separation of powers, time has not been kind to these Founders' shared suggestion that, under the Constitution, the legislative branch would "necessarily predominat[e]." Instead, history has arguably provided more evidence in favor of Montesquieu's conjecture that democracy tends toward a "corruption" in which power becomes imbalanced until "aristocracy or monarchy" or despotism triumphs. Over the centuries, the Constitution's more fundamentally hierarchical and, at the apex, centralized branches—the executive and judicial—have proven much more adept at accumulating, retaining, and reasserting powers among the balance held and exercised by the federal government as a whole. Further, resulting concentrations of power outside the legislative branch appear difficult to unwind. Accordingly, in a November 2025 oral argument on the legality of tariffs ordered by President Trump, Justice Gorsuch of the United States Supreme Court questioned the practical capacity of Congress to recapture emergency powers once they were delegated to the President: he characterized the President's veto power as helping create "a one-way ratchet toward the gradual but continual accretion of power in the executive branch and away from the people's elected representatives." This Essay discusses the nature and causes of the comparative success of the United States' executive and judicial branches in accruing power; the nature and causes of the legislative branch's relative disadvantage; the extent to which a tendency toward an imbalance disfavoring Congress characterizes presidential as opposed to parliamentary forms of representative government; the extent to which such imbalance threatens the democratic and law-bound nature of the government as a whole; and ways in which Congress through legislation, the judicial branch through legal interpretation, and the People through constitutional amendment may correct for Congress's long-term disadvantage.

Dr Andreas Karsten (CUQ Ulster University, Doha) *From Riots to Responsibility, the Role of "Sanctuary Cities" in a World of Increasing "Sanctuary" Risks and Perpetual Violence: A New Democratic Frontier*

Abstract: Cities, both historically and in modern times, have stood at the centre of citizen revolutions and theatres of war. Even in jurisdictions of previously well-established democracies, in recent years, growing public discontent worldwide has positioned cities increasingly on the frontlines of societal instability, whether driven by geo-national politics, socio-economic problems, crime, or climate change fallouts. Present-day instances highlight how cities, particularly in relation to their responsibilities to govern both the wellbeing of their citizens and as administrators of infrastructure, have become focal points of national internal geo-political conflict due to their growing central role as guardians of democracy and as important interfaces between governance and citizenry. City governments are increasingly asserting their independence, therefore focusing on becoming more representative, citizen-centred democratic centres of government. Examples hereto include the cities of San Francisco and Chicago, which have adopted "sanctuary city" policies despite federal pressure to prevent the same. It follows that for purposes of this research paper, the metaphorical and symbolic sense of "sanctuary cities" are therefore extended beyond the usual immigration-related context and adapted to reflect the progressive nature of cities in responding to the needs of their citizens and addressing global and national ills from a local perspective. Other reformist examples of cities adapting to a more developmental governance approach, include cities portraying a different perspective of "sanctuary cities," comprising city governments enacting stricter environmental or climate policies, such as New York City or Los Angeles, notwithstanding increasing

federal attempts to roll back or preempt these policies. Belfast, likewise, could be described as holding its own “sanctuary” status, relating to its historical importance as city government in context of internal national geo-political tension and ongoing city reforms and efforts employed towards peace and the progression of anti-conflict law, especially given the city’s complex political and social landscape. In South Africa, combined national service delivery failures and the prevalence of serious crime, are increasingly shifting into the local jurisdictions and the domain of city administrations. South African cities have therefore transformed into contemporary theatres of active struggle against crime, climate change, the destruction of public and private infrastructure during episodes of social unrest, blocking of the so-called construction mafia, and the suppression of organised gang violence, to mention only a few of the perpetual crises confronting South African cities. It follows that cities leading the charge towards the status of “sanctuary cities” from a South Africa context, being at the coalface of pressing modern societal catastrophes, include the City of Cape Town and the eThekwini Metropolitan Municipality. This research therefore examines the evolving roles of how these South African city governments, as both democratic governance and security actors, are addressing these external societal threats and improve the security and wellbeing of its citizens. In light of the complexities of the external threats faced by city governments, the resilience of the current constitutional framework of developmental local government is also examined to understand city governments’ capacity to respond effectively to these challenges within the current ambit of the Constitution. Collectively, if left unattended, these external threats have the potential to profoundly undermine citizens’ constitutional rights pertaining to safety and security, threaten critical infrastructure, erode public trust in governance, and ultimately weaken the democratic institutions of cities. Hence the research paper explores the notion of modern South African "sanctuary cities" that carry positive legal and constitutional obligations in terms of the developmental mandate of modern cities which include security and services accountability obligations to enhance urban resilience. Finally, this paper therefore positions cities’ not merely as administrative service delivery actors but as “sanctuary cities,” representing the new frontier of democracy and positioning themselves as the primary guardians of citizens’ democratic rights, executing their constitutional obligation to provide accountable government for their citizens and to develop and protect infrastructure in an age of perpetual urban violence, corruption, and organised disruption.

Unwritten Norms - Venue: Lecture Theatre 2

Chair: Justice Steven Majiedt (Constitutional Court, South Africa)

Hon Justice Adedotun Onibokun (Nigerian High Court/Redeemer’s University) *Identifying and Upholding the Unwritten Norms, Values and Cultures that Sustain Democracy in Nigeria*

Abstract: In Nigeria, constitutional democracy takes place in two different ways. There is the Written Constitution which is the 1999 Constitution of Nigeria (as Amended) and, on the other hand, there are the Unwritten conventions, norms, and cultural values which characterize democratic rule. They support the legal framework with informal practices, cultural expectations, and the prevailing societal beliefs that make democracy work or perish. They supply the necessary framework, but these informal practices, cultural expectations, and the prevailing societal beliefs can make democracy flourish, diminish or perish. These unwritten norms co-exist to navigate a coherent policy thrust including foreign affairs policy, social factors like quota system, social intelligence, political mantra, gender parity, protection of human rights, with or without external force like the one Nigeria just experienced with the threat by President Donald

Trump of America on security issues, respect for the rule of law, independence of the judiciary, and other primordial sentiments. The focus of this study is to identify the sources of these conventions including indigenous culture and customs that shape the formal legal political structures. The study is desktop-based with reference to practical examples and anecdotes in Nigeria and countries like Britain and the United States of America. The research found the existence of critical gaps between democratic ideals and practices. It showed that these gaps lead to lack of public trust with the attendant need to attempt constitutional reforms.
Keywords: Constitutional democracy, policy thrust, political mantra, public trust, democratic culture, quota system.

A/Prof Marcelo B Rodriguez Ferrere (University of Auckland) *The weaponisation of comity in New Zealand*

Abstract: In 1950, "comity" was described as "that respect which one great organ of that State owes to another" (*Buckley v Attorney-General* [1950] I. R. 67, 80). 75 years later, comity remains a central idea within constitutional law, and especially to those jurisdictions who have adopted the Westminster system. For instance, Aileen Kavanaugh's vision of a constitutionalism sees the branches of government not as friends, nor enemies, but instead "partners in a collaborative enterprise where they are required to treat each other with comity and respect" (Aileen Kavanagh, The Collaborative Constitution (CUP: Cambridge, 2024), 98). Recent developments in New Zealand, however, have cast a pall on the otherwise universally positive idea of comity. In 2024, the Crown attempted to resist a summons to give evidence to a commission of inquiry – the Waitangi Tribunal – essentially on the basis that comity restricted the Tribunal's legal powers. The argument was initially successful in the High Court, and while the decision was overturned on appeal, by then the point had become moot: the Crown had achieved its practical aims of resisting the giving of evidence. More recently, the Crown has cited comity as a reason for limiting the terms of reference of an independent public inquiry into the state's responsibility for the abduction and disappearance of three children by their father. In other words, far from being a two-way street of what Kavanagh has described as "mutual self-restraint and mutual support" between the branches, comity in New Zealand is quickly becoming a one-way street, allowing the Crown to use comity as a shield against appropriate inquiry, accountability and transparency. In this paper, using the examples above, I will explain why New Zealand's present situation has provided fertile ground for the Crown's co-option of comity in this way. While it is a symptom of New Zealand's commitment to an uncodified, principle-based constitution, that is not the sole reason behind this development. Instead, I will argue, the Crown's cooption and misuse of comity was only made possible because of a lack of structure within administrative law regarding variable deference from the judicial to the executive branch, and a lack of clarity as to the appropriate constitutional position in New Zealand of tribunals and commissions of inquiry; otherwise known as the integrity branch. These twin deficits have allowed the vague concept of comity – traditionally restricted in New Zealand to the judicial branch's self-restraint when assessing matters before Parliament – to instead become a tool of constraint by the Crown against bodies seeking to hold it to account. The paper will provide lessons for not only New Zealand but all jurisdictions that cite comity and respect between the branches of government as integral parts of their constitutional systems. Clarity and understanding as to the meaning, place and practical impact of principles such as comity is crucial. Otherwise, as the New Zealand example will show, there is a risk that such positive, aspirational concepts which seek to advance productive collaboration amongst the branches of government are weaponised by bad actors to undermine that very aim.

Dr Shreeya Smith (Western Sydney University) *Democracy under the Constitution: how democratic participation and accountability inform our understanding of the power of the Commonwealth in Australia*

Abstract: Democratic participation and accountability are central tenets of the Australian constitutional project. Drawing on controversy over the scope of the non-statutory executive power of the Commonwealth in Australia, I argue that recourse to values that feed into facilitating democratic participation and accountability can inform how notions of constitutional democracy can inform constitutional interpretation. From at least the mid-1970s onwards, Australian courts have drawn on Australia's character and status as a nation to determine the scope of the non-statutory executive power of the Commonwealth. The question of whether such power can be recognised is hotly contested. Critics argue that such powers do not adequately take into account key constitutional structures such as responsible government and parliamentary sovereignty and reflect a democratic deficit. They argue that they are unhelpfully and dangerously focused on the Constitution, and grounded in vague, amorphous, political criteria that raise rule of law concerns. Scholars overwhelmingly prefer that the non-statutory executive power of the Commonwealth be defined by the common law. I eschew this distinction. On the one hand, in drawing on Australia's character and status as a nation it is not enough to look only to the needs of the polity to determine the scope of executive power. Constitutional structures such as representative and responsible government inform the scope of each of the arms of government to fulfil those needs. On the other hand, when considering how the common law powers and capacities of the Crown are adapted to the Australian context, we need to have regard to the extent to which those powers—which crystallise these considerations—need to be adapted in light of the shifting nature of responsible government and parliamentary sovereignty in the Australian context. I argue that whether you are considering Commonwealth non-statutory executive power in light of the nature of the polity created by the Constitution or how the common law powers of the Crown are adapted in the Australian context, structures such as responsible government and parliamentary sovereignty need to be understood not just in light of their history, but by reference to how the content of such structural features is informed by underlying constitutional values, including how the structures and values intersect with democratic participation and accountability.

Speech, Protest and Struggle - Venue: Lecture Theatre 3

Chair: Prof Bradley Slade (Stellenbosch University)

Ms Celia G Winnett (Sixth Floor Selborne Wentworth Chambers, Australia) *Anonymous Political Speech in a Constitutional Democracy*

Abstract: The High Court of Australia (HCA) has treated with scepticism the proposition that anonymous political communication may be worthy of protection in the civic discourse, between and amongst the governed and the governors, that facilitates Australia's constitutionally prescribed system of representative and responsible government. By contrast, in the US, "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment": *McIntyre v Ohio Elections Commission*, 514 US 334 (1995), 342. This paper will explore two paradigms in which anonymous

political speech may contribute to the effective workings of a constitutional democracy. The first is speaker-focused, prioritising broad engagement in politics by minorities as well as majoritarian forces. On this approach, protecting the ability of citizens to contribute anonymously to political processes can shield unpopular and vulnerable individuals from the risk of threats to their status, or reprisals, that might otherwise discourage them from participating at all. That rationale, reflected in cases such as the NAACP's challenge to Alabama's attempt to compel production of its membership lists (*NAACP v Alabama*, 357 US 449 (1957)), resonates even more strongly today given the trajectory of many authoritarian states towards repression of dissent through internet controls. For example, from 2014-2017, Russia's "Bloggers' Law" mandated that bloggers with over 3,000 daily visitors must register their identities with a government agency and state their name and contact information on their blogs. The second paradigm is listener-focused, prioritising the capacity of the electorate to receive political communications that may usefully inform voters' choices at the ballot box. The ability for political information to flow freely in civil society depends in part on whether a listener has erected barriers to the receipt of a message based on the messenger's identity, racial or social characteristics. A veil of anonymity cloaking a political communication can allow for the ideas to be embraced on their merit, without the baggage of prejudices sourced in the listener's perception of the speaker. Again, contemporary Russia illustrates the real-world application of that analysis: under "foreign agents" laws, persons designated by the Ministry of Justice as "foreign agents" are required to label all messages they disseminate with a disclaimer setting out that status (see *Kobaliya v Russia*, ECHR, 2025), which has had a stigmatising effect on the public reception of that discourse (Zavyalova 2025, p87). By approaching these paradigms through a comparative analysis of constitutional cases in Australia, the US and Canada, the paper will consider how the courts should balance the democracy-reinforcing traits of anonymous speech with the countervailing concerns expressed in several HCA judgments: that electoral processes may be unfairly swayed by concealment of the source of political messages (*Smith v Oldham* (1912) 15 CLR 35, 358-359), and that it is "distinctly jejeune to insist that participation in the public affairs of the nation must not involve a cost to one's privacy" (*LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, [75]).

Dr Tanveer R Jeewa (Stellenbosch University) *The History of Mass Unlawful Occupation*

Abstract: South Africa is grappling with a severe housing crisis, which has led to a sharp increase in unlawful land occupations, sometimes involving as many as 60 000 people. These large-scale occupations – what I term 'mass unlawful occupations' – constitute a distinct legal phenomenon, requiring recognition as a separate category of unlawful occupation from cases involving a single-family unit. Mass unlawful occupation is not a new phenomenon but a direct result of apartheid-era property practices and the exclusion of Black communities from the formal property regime. To make sense of this, the article traces its origins through a historical-legal method, drawing on archival sources and statutory developments to uncover how this phenomenon emerged and why it persists. This method also debunks several persistent myths and assumptions about unlawful occupation in South Africa – including when it actually began to be regulated and for what reasons. Through this approach, the article highlights the gaps in existing literature, which has tended to focus narrowly on post-1994 jurisprudence without probing the deeper structural causes behind large-scale occupations in urban areas. While I distinguish between mass unlawful occupation and instances involving a singular family unit, this distinction has never been made in law. Hence, the point of departure is the origin of the regulation of unlawful occupation, regardless of scale, before narrowing it down to cases of mass occupation. Although the regulation of unlawful

occupation was not originally distinguished based on scale, it is shown throughout the article that the state repeatedly adapted its responses depending on the nature and magnitude of the occupation. This article thus sets out the context around unlawful occupation in South Africa and establishes the reasons behind the seemingly never-ending influx of unlawful occupiers in urban areas. It does so by assessing how occupation was historically regulated and by investigating what was considered "unlawful" occupation to begin with. It identifies the moment at which mass unlawful occupation was effectively produced through the exclusion of specific groups from the legal property regime. In doing so, the article demonstrates not only the various unsuccessful attempts by the state to curb mass unlawful occupation, but also that the persistence of this phenomenon can only be meaningfully addressed through land reform measures aimed at correcting the structural consequences of apartheid-era dispossession.

Prof Mlungisi Ernest Tenza (University of KwaZulu-Natal) *An investigation into the justifiability of the use of struggle songs, slogans and apartheid symbols as modes of expression and heritage in a democratic South Africa*

Abstract: The Bill of Rights in the Constitution of the Republic of South Africa, 1996 (the Constitution) makes provision for fundamental rights that are guaranteed to individuals and entities. Included among these rights is the right to freedom of expression, which is a method of receiving or conveying information. Expression can be made through verbal and written utterances. It can also be made through non-verbal utterances and/or non-written conduct that is believed to convey or receive information. The Constitution protects various other forms of expression, such as artistic creativity in the form of graphics, images or other forms that represent the identity, history and heritage of the people of South Africa. Some of these artistic forms of expression fall into the category of national symbols, while others were once national symbols but, due to changes in government, they no longer fit into that description. Struggle slogan(s) are also forms of expression with the potential to infringe on other people's rights. An example of this is "Kill the Boer Kill the Farmer" slogan. There has been so much debate about the use of certain symbols, such as the old apartheid flag and the chanting of the "Kill the Boer, Kill the Farmer" slogan. The question is whether they are still relevant in a democratic country like South Africa with a diverse society. The question that this article attempts to address is whether the chanting of such a slogan and the use of the old flag is constitutional.

15:00 – 15:20 – Coffee Break

15:20 – 16:50 – Parallel Panels – Session 6

The Public-Private Interface - Venue: Lecture Theatre 1

Chair: Ms Pippa Reyburn (ENS Attorneys)

Prof Janina L Boughey (University of New South Wales) *Government Outsourcing of Expertise: Lawfulness and Legitimacy*

Abstract: Governments across the common law world rely on the private sector for expert advice, to assist and guide their decision-making, in a range of circumstances. That advice takes myriad different formats, and feeds into decisions about people's rights, entitlements, interests and obligations in various ways. For example, social security payments in many jurisdictions, are based on expert, private sector,

medical evidence or a person's support needs. During the COVID-19 pandemic, governments frequently explained their decisions to restrict people's movement and association solely on the basis that they were "following health advice". Sometimes that advice came from health officials within government, but sometimes it came from outside of government; such as medical research institutes which receive a mix of public and philanthropic funding but are independent of government. An especially controversial use of private sector "expertise" by governments across the common law world is the use of management consultants to provide the kinds of policy advice traditionally provided by the public service. While many uses of private sector expertise may be well-accepted and desirable, all ultimately raise some common public law accountability concerns and questions. The private sector does not have the same professional protections, duties or incentives to provide "frank and fearless" advice to governments as the public service does. The private sector is also not subject to the same political, administrative and legal oversight mechanisms that apply to the public service, such as freedom of information laws and parliamentary oversight. In this article, I examine the public law accountability implications of the administrative state relying on private sector expertise in a range of contexts. Using case studies from different spheres, I show that, regardless of whether private sector advice is desirable in relation to a particular policy or administrative decision, its use has the potential to undermine the development of the culture of justification and therefore the legitimacy and, sometimes, the legality of the government decisions that rely on the advice. However, I suggest that these problems can be overcome if governments follow some general principles in their use of private sector expertise and advice.

Dr Meghan Finn (University of Johannesburg) *Revisiting the remedial repertoire in South Africa's horizontal constitutionalism*

Abstract: Private actors both violate and vindicate human rights in South Africa. The Constitution explicitly recognises private persons as constitutional duty-bearers, and courts have developed a growing body of horizontality jurisprudence. This is a response to South Africa's history of racial subordination and enduring patterns of inequality that are often reproduced by private actors. However, the remedial dimensions of the horizontal application of rights remains underexplored. This paper examines the remedial repertoire available where private actors infringe constitutional rights. The current remedial approach is fragmented and underdeveloped, with insufficient attention paid to how remedial choices should be determined, including responsiveness to the specific nature of private actors' constitutional duties, countervailing rights and interests, and the context in which violations occur. In the anti-discrimination context, section 21 of South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) confers broad remedial powers on Equality Courts, but in practice these powers are seldom invoked in ways that secure substantive entitlements. A similar pattern emerges in general horizontal jurisprudence: courts recognise broad duties in principle but tend to issue modest or procedural remedies in practice. In this paper, I explore how remedial tools might address these limitations, drawing on South Africa's broader public law "just and equitable" remedial jurisprudence while remaining sensitive to the distinct features of horizontal application. Although scholarship has developed a rich account of remedies in response to state inaction and dysfunction, remedies in the horizontal domain have not yet been examined in depth. I contend that greater remedial consideration is needed, particularly where competing rights are at stake and where discrimination is systemic rather than discrete. However, remedial development must also be sensitive to the risks of displacing ongoing burdens onto complainants and those already disadvantaged, and must grapple with the limits of law, particularly adversarial litigation, as a tool for securing large-scale social transformation. Drawing on

constitutional horizontal duties broadly, and on anti-discrimination duties under PEPUDA, I develop a taxonomy of horizontal remedies. I identify overlapping but distinct remedial categories: (1) relational and dialogic remedies, including meaningful engagement, apologies and structured dialogue processes; (2) procedural remedies, including audi alteram partem duties; (3) substantive, positive remedies, including obligations to take steps to fulfil rights, as well as positive measures in anti-discrimination law; (4) compensatory remedies, including both PEPUDA mechanisms such as damages or payments to relevant organisations, and common-law relief; (5) legislated remedial channels, including those in company and consumer protection law addressing private power through specific regulatory regimes; and (6) structural and supervisory remedies, drawing on experimentalist remedial developments in public law. These remedial categories can operate along a spectrum of intensity and fulfil multiple functions.

Ultimately, I argue for a more deliberate, systematic and context-sensitive approach to remedies in horizontal application cases. By developing a clearer taxonomy and advocating for refined remedial responses, South African law can better hold private actors accountable while calibrating for the complexity of horizontal constitutional obligations.

Ms Claire Rankin and Ms Margeaux Wassenaar (Legal Resources Centre, South Africa; Webber Wentzel, South Africa) *Crossing the divide: the diminishing returns of retaining siloed public, private and commercial legal sectors in judicial reasoning*

Abstract: The adoption of the Constitution of the Republic of South Africa brought about a seismic change to South Africa's legal system. The creation of a system based on constitutional supremacy, a justiciable Bill of Rights, and the obligation of courts to interpret legislation and develop common and customary law in line with the spirit, purport and objects of the Bill of Rights was intended to reform South Africa's conservative legal culture away from an era of parliamentary supremacy and draconian legal formalism. The new constitutional dispensation did not eradicate key understandings of legal relationships. However, the universal application of the rights contained in the Constitution and the broad imposition of obligations flowing therefrom significantly altered the traditional understanding of the vertical and horizontal application of law. In this regard, courts have readily imposed enriched service delivery obligations on private parties through state contracting, positive socio-economic obligations on private parties and the need for procedural fairness in the termination of certain contracts. The shift in the imposition of obligations has increasingly rendered the differentiation between public law and private or commercial law obsolete. While differentiation may still serve a practical purpose, the centrality of the Constitution and the Bill of Rights to all areas of law have reduced the consequential value of such a distinction. It is no longer helpful to consider the context of private law, public law or commercial law when trying to ascertain how to interpret, apply or enforce a particular legislative provision or a certain legal principle. These individualised and sector-specific contexts have been either replaced with reference to the spirit, purport and object of the Bill of Rights entirely or significantly reformed in light thereof. This approach has arguably morphed the South African legal system into a single system, unified in its subjection to constitutional principles. However, the legal system still maintains a strict divide between public, private and commercial law. This paper explores why such a division is no longer warranted under the Constitution and demonstrates how a siloed approach to law undermines the overarching transformation of the legal system, subverting constitutional supremacy. Instead, this approach facilitates legal exceptionalism, perpetuating a conservative understanding of the legal system and the application of key legal concepts and remedies. This paper considers how this approach is exemplified in several

judgments from the high courts and the Constitutional Court over the past 10 years, demonstrating and sustaining a conservative understanding and application of the principles pertaining to constitutional damages, liability for breaches of statutory obligations under the Companies Act 71 of 2008, and the recognition and enforcement of both delictual and contractual liability. In conclusion, we argue that the retention of siloed distinctions facilitates an approach to legal reasoning that is unnecessary and undermines the transformation of South Africa's legal system in line with what is clearly envisaged under section 39(2) of the Constitution. The distinction remains an unwritten norm that thus undermines the full appreciation of South Africa's constitutional democracy.

The Judicial Branch and Judicial Process - Venue: Lecture Theatre 2

Chair: Prof Jason Varuhas (University of Melbourne)

Justice Sheilah Martin (Supreme Court of Canada) and Chief Justice Glenn Joyal (Manitoba Court of King's Bench) *The Modern Judicial Role and the Paradox of Judicial Independence*

Abstract: In the Canadian polity, the judiciary is taking up an increasingly greater footprint. It enjoys considerable influence at a time where institutions generally are viewed with increased cynicism and distrust. Within this context, the authors—both long-time members of the Canadian judiciary—will consider the paradox of judicial independence and the intersection between this paradox and the subjects of judicial freedom and judicial ethics. They will also explore how to preserve and promote public confidence in the judiciary. The paradox of judicial independence involves a tension between two coexisting and seemingly contradictory realities. First, there is the well-understood requirement for reserve associated with the judicial role, which is meant to safeguard the connected public confidence in an independent and impartial judiciary. At the same time, the authors suggest that there now exists a need for the sometimes bolder action of judges to say and do things—outside of the adjudicative sphere—that might seem inconsistent with the traditional restraint associated with the judicial role. The authors posit that without this sometimes bold judicial engagement, public confidence in the administration of justice—and by extension, judicial independence—could become diminished. They contend that any assessment of potential impacts on judicial independence should start by considering not only the effect on public confidence if a particular course of action is pursued, but the impact on public confidence if it is not. The authors explore this paradox in the context of contemporary societal and institutional challenges increasingly arising in Canada's pluralistic liberal democracy, challenges which have resulted in increased scrutiny on the courts and judiciary. More assertive calls for access to justice, demands for greater transparency and accountability, changes in the media and digital landscape, and the imperative of reconciliation with Indigenous communities in Canada all require the judiciary to think differently about the confines and responsibilities of their role. In advancing their thesis, the authors will reflect on the role of the judiciary—through the vantage point of both a Chief Justice who also chairs the Committee that supervises judicial conduct in Canada and a puisne judge of the apex court—in protecting and preserving judicial independence through a prudential calibration of restraint and action. In so doing, they will examine the contours of judicial freedom and the evolving boundaries of those freedoms as informed by jurisprudence, the Canadian Judicial Council's Ethical Principles for Judges, and the associated CJC judicial conduct regime. They will suggest that an important reference point for a judge's calibration of restraint and action is the sometimes underemphasized concept of judiciousness. Within that framework,

they will also consider the concept of civility as an overarching principle which must inform all aspects of judicial conduct and engagement. Ultimately, this paper contributes to ongoing discussion about the judicial role in a constitutional democracy and the complex and overlapping topics of judicial ethics, judicial independence and judicial freedom. It aims to inform both scholarly and policy discussions and to generate further analysis around ways to enhance public confidence in the judiciary.

Prof Ntombizozuko Dyani-Mhango (University of Pretoria) *The doctrine of stare decisis and judicial accountability in the South African Constitutional Court*

Abstract: The doctrine of stare decisis requires courts to follow precedent to promote consistency, predictability, and stability within the legal system. Its objectives are to safeguard legal certainty, ensure equality before the law, and uphold judicial accountability by appropriately constraining judicial discretion. In South Africa, the Constitutional Court (the Court) has affirmed the binding force of stare decisis on lower courts and its role as a guiding principle for its own jurisprudence. Yet, a line of cases reveals that the Court has, at times, departed from its earlier legal positions without explicitly overruling prior authority. Several decisions illustrate this trend. In *Chirwa v Transnet Ltd* (2007/2008), the Court departed from its holding in *Fredericks v MEC for Education and Training* (2002) regarding public sector employees' access to judicial review, effectively narrowing access to constitutional remedies without expressly overruling the prior authority. In Albutt v Centre for the Study of Violence and Reconciliation (2010), the Court shifted its approach to executive pardons, insisting on procedural rationality in victim participation despite the majority decision in *Masetlha v President* (2007) suggesting that procedural fairness requirements did not apply to executive action. In *Prince v Minister of Justice* (2018), the Court declared unconstitutional the criminalisation of private possession and cultivation of cannabis, grounding its reasoning in the right to privacy. This marked a substantive departure from *Prince v President of the Law Society of the Cape of Good Hope* (2002), where the prohibition had been upheld. More recently, in *Bwanya v Master of the High Court* (2021), the Court recognised the inheritance rights of permanent life partners, marking a significant departure from *Volks v Robinson* (2005), where the majority had refused to extend maintenance rights to such partners. The Court's practice of departing from precedent without explicitly overruling prior authority undermines judicial accountability. By distinguishing earlier cases rather than openly overruling them, the Court creates uncertainty for lower courts and legal practitioners, which can be seen as a failure to adhere to the doctrine of stare decisis. This lack of adherence demonstrates a potential lack of judicial accountability because it allows the Court to avoid transparent engagement with its prior decisions. Judicial accountability requires courts to justify their departures from precedent openly and clearly, ensuring that their reasoning aligns with the principles of legal certainty and equality before the law. Against this background, the paper examines the objectives of stare decisis and the obligations it imposes on the Court. It then evaluates whether the Court's reasoning in these cases preserves the integrity of the doctrine. Where appropriate, the paper offers recommendations for the future application of the doctrine. The premise is that the Court's approach, while aimed at constitutional development, risks eroding the integrity of stare decisis and diminishing trust in the judiciary's commitment to consistent and predictable decision-making. This, in turn, risks breaching judicial accountability.

Dr Sanya Samtani (University of Cape Town) and Prof Jonathan Klaaren (University of the Witwatersrand) *When 'force' and 'will' require 'mere judgment': Engaging the Constitutional Court through Presidential and Parliamentary Referrals*

Abstract: The South African Constitution contains two mechanisms that engage the apex court's jurisdiction outside of its ordinary adversarial proceedings. Section 79 empowers the President to refer Bills to Parliament should he have constitutional reservations, and subsequently the Constitutional Court should his reservations remain unaccommodated by Parliament. Similarly, section 80 empowers a third of the members of the National Assembly to apply to the Constitutional Court within 30 days of an Act being assented to and signed. These provisions have been underutilised and understudied. While the Court has recently heard the second-ever Presidential referral under section 79, section 80 has never been used. Both provisions may see more use under conditions where no party commands a parliamentary majority. This article unpacks and critiques the rationale behind these provisions from a constitutional design perspective. It also highlights issues that the Constitutional Court may encounter when deciding abstract challenges. While the article discusses both provisions due to the abstract constitutional review that they invite, there are important differences in their operation. The title of this article comes from one of the most widely read paragraphs from the Federalist Papers no.78, where Hamilton terms the judiciary the "least dangerous branch" of government. He states "[t]he judiciary […] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE [which we consider to be the Executive] nor WILL [which we consider to be Parliament], but merely judgment". This has spawned endless academic work on judicial review. However, our paper is different. We aim to understand the rationale underlying sections 79 and 80 of Constitution against the exclusive jurisdiction reserved to the Constitutional Court of these proceedings by sections 167(4)(b) and (c). We bring to this analysis three layers: constitutional jurisdiction in general (e.g. separation of powers), exclusive jurisdiction of the various constitutional actors in these proceedings, and interpretation issues invited by sections 79 and 80.
We ask: Why does the South African Constitution empower the President and Parliament to engage the Constitutional Court? And how does this sit with the carefully calibrated separation of powers throughout the Constitution? When these provisions are triggered, what are the issues that the Constitutional Court is likely to have to consider in its determination? How might these provisions be thought of differently after three decades of South African democratic constitutionalism? In Part I, we discuss the rationale for these provisions. We consider the Court's past jurisprudence, the South African Constitutional Assembly debates and comparative constitutional law. In Part II, we discuss conceptual issues likely to arise when the Court is faced with an abstract review. These issues include relevant legal standards to be met for such referrals to be validly made, substantive jurisdictional issues concerning the scope of such referrals before the Court, evidentiary issues concerning such matters, and the remedial powers of the Court in such matters. Part III concludes.

The Efficacy of Constitutional Democracies - Venue: Lecture Theatre 3

Chair: Prof Henk Botha (Stellenbosch University)

Dr Robert J Craig (University of Bristol) *In defence of First Past The Post*

Abstract:
In defence of First Past the Post
First Past the Post ('FPTP') is widely regarded as an unsatisfactory electoral system that gives too much power to an unaccountable 'elective dictatorship' and fails to properly reflect the democratic will. It has

been described undemocratic and as ‘flagrant minority rule’. This paper seeks to defend the democratic and representative credentials of FPTP, suggesting that the system has numerous benefits that make it entirely democratic, fully responsive and wholly appropriate for the United Kingdom’s political constitution. Indeed, it reflects the deepest values, development and history of that constitution. The British public evidently agree that the system is satisfactory as an expression of their collective will, as evidenced by the thumping majority in favour of the status quo in the referendum on the electoral system in 2011. FPTP is entirely democratic not least because it forces what would otherwise be different factions and parties into compromises and broad coalitions that usually give the public, in effect, a straightforward choice between two strategic directions for the country over a 5 year period, with echoes of Rousseau. Stable two party systems have been a feature for decades despite recent ructions, and it is not clear how the current mix of parties will coalesce at the next election. The usual choice between two executive slates standing on their carefully hammered out manifestos based on compromise and negotiation within the main parties is arguably more democratic than alternative systems where it is far more likely that coalition agreements are made after the election and therefore do not have the imprimatur of direct public approval. The winning manifesto secures a direct democratic mandate. Accountability for implementing a manifesto is at the ballot box. Our votes in UK General Elections are bifurcated. We vote for the local candidate and the party – so we vote for the legislature and the executive at the same time. This paper challenges the oft cited but erroneous idea that we only vote for the candidate for the legislature. This idea fails to align with even a cursory assessment of the nature of modern UK General Elections. The paper also deals with the myth of the wasted vote and the diachronic filter in FPTP but what underpins the analysis is respect for the historical arc that sees the two extreme camps – the Roundheads and the Cavaliers – accommodated today within parliament as the Whigs and the Tories. These two viewpoints can also be framed as the Westminster and Windsor views: the former suggests that the democratic mandate lies solely with MPs, the latter that it rests solely with the winning slate and their manifesto. The Whitehall view operates as the sensible middle pathway, accounting for both perspectives within parliament. This paper falls squarely within the themes of the conference in relation to institutional design, public participation and accountability mechanisms in relation to constitutional regulation in a political constitution.

Ms Ritwika Sharma (Jindal Global Law School) *Delimitation of Electoral Constituencies in India – Constitutional Expectations, Political Realities*

<u>Abstract:</u> India has not witnessed a nationwide population census since 2011. This exercise is critical for the delimitation of India’s electoral constituencies that is expected to follow every census. The Constitution of India expects boundaries of electoral constituencies to be revisited after every decennial census, and seats in India’s popularly-elected legislatures reapportioned, to account for changes in the country’s population. The Constitution requires that each state (India’s regional provinces) receive seats in the popularly-elected Upper House of the Indian Parliament (the “Lok Sabha”) in proportion with its population, and that constituencies in a state have roughly the same population. This is to ensure a basic principle of democracy: the value of one person’s vote should be the same as any other person’s, or the ‘one person, one vote, one value’ principle. Disregarding this principle would mean that some voters will have more of a say than others in deciding how legislatures are formed and laws are made. Effectively, the Constitution expects each legislator to represent roughly the same number of citizens. Since the 1970s, however, there has been no reapportionment of seats in the Lok Sabha. This is because in 1976, the 42nd Amendment to the Indian Constitution froze the delimitation of constituencies as per the census of 1971, up to the 2001 census. This freeze was effected to assuage concerns of those states (mostly in the southern

part of India) which took a lead in population control, and faced the prospect of reduction of their number of seats in the Lok Sabha. In contrast, states in the north of India witnessed a steep rise in population. In 2002, the day of reckoning was pushed further to 2026. This deadline is now at the country's doorstep. Because the delimitation and reapportionment question has been left unattended for so long, population differences have widened considerably and the effects on seat allocation could be quite radical. This has implications for (i) inter-state allocation of parliamentary seats, and (ii) the comparative value of individual votes between people in different parts of the country. The former concern has been the source of intense political friction, with states predominantly from south India apprehending the loss of seats in the Lok Sabha if current population levels are used for delimitation and apportionment of seats in Parliament. Simultaneously, legislators in north India continue to represent more citizens than their counterparts in the south. It becomes imperative to approach these issues with a view to harmonise two competing constitutional values – (i) federalism, and (ii) political equality. To that end, this paper will explore the constitutional concerns and challenges that any future delimitation will have to contend with, and the constitutional stakes involved in any impending reapportionment of seats. This paper will probe the cause of anxieties among those Indian states that face the prospect of losing out numerically in the Lok Sabha. Once these issues are explained, this paper will propose broad contours of how a constitutionally-acceptable delimitation could be carried out in India.

Adv Benjamin Cronin (University of Cape Town) State Capture from within: The technocratic threat to the rule of law

Abstract: The post-Apartheid South African state has been beset by persistent crises that threaten the Rule of Law, ranging from express attempts at private capture of public institutions and the systemic failure of law and order in the July 2021 civil unrest, to severe socio-economic conditions and the declining rates of participation in national elections. A conventional analysis of these treats would typically focus on the risks of unconstrained power in the hands of elected politicians. The intention of this paper, however, is to shift the focus to a more nuanced, but nevertheless equally dangerous, fault line in the South African constitutional framework, namely: the growing dominance of unelected officials in state institutions, and in particular in National Treasury. This paper critically examines the institutional design of National Treasury and considers its constitutional mandate in the larger context of the determination of government policy and the decisions taken regarding the effective capacity of the state to fulfil its obligations. While National Treasury is vested with the responsibility to ensure accountability for public expenditure, its institutional dominance creates constitutional tension where government policy is effectively determined by means of technical models and technocratic framing of financial constraints, rather than through democratic deliberation. Finally, this paper offers a critique of the prevailing narrative surrounding state capture. The phenomenon is often mistakenly characterized and defined through the lens of corruption and illegality. I argue in this paper that the purest form of state capture is achieved not through breaking the law, but by means of the systemic redesign of government policy and the law itself. By capturing policy making levers within the state the National Treasury aims to institutionalise and hardcode its own policy objectives into operation of the state. I argue that this form of technocratic capture is likely the most form of state capture and a significant risk to the Rule of Law as it converts unconstitutional objectives into legal acts, insulating them from traditional judicial and democratic accountability.

17:00 – 18:30 – Keynote Plenary: 30 Years of South African Constitutionalism

Venue: Lecture Theatre 1

Chair: Dr Nomfundo Ramalekana (University of Cape Town)

Prof Joel Modiri (University of Pretoria)

Mr Dan Mafora (University of Cape Town)

Prof Cathi Albertyn (University of the Witwatersrand)

Ms Prelisha Singh (Webber Wentzel Attorneys)

Saturday 4 July 2026

9:00 – 10:30 – Keynote Plenary: Comparative Influences in National Jurisdictions

Venue: Lecture Theatre 1

Chair: Chief Justice Satiu Simativa Perese (Supreme Court of Samoa)

Lord Justice Rabinder Singh (English Court of Appeal)

Abstract

This paper will address three topics that illustrate ways in which comparative jurisprudence may influence the development of constitutional law in the United Kingdom (including the Judicial Committee of the Privy Council). First, the role of foreign case law in the development of the proportionality test in UK human rights law. Secondly, the use of foreign case law in the development of the law on the protection of the rights of same-sex couples in Gibraltar. Thirdly, the decision of the Judicial Committee of the Privy Council in Attorney General of Trinidad and Tobago v Maharaj [2023] UKPC 36; [2024] 1 LRC as an example of the potential role of comparative case law in interpreting legislation in the common law world which has shared historical origins.

Prof Charles Fombad (University of Pretoria) *Comparative African Constitutional Jurisprudence and the Future of Constitutional Democracy*

Abstract

This paper will examine the growing role of comparative constitutional jurisprudence in shaping the future of constitutional democracy in Africa. It argues that, despite the continent's diverse colonial legal inheritances and institutional trajectories, African courts are increasingly participating in a process of intra-African judicial cross-fertilisation in which constitutional doctrines, interpretive approaches, and democratic norms migrate horizontally across jurisdictions confronting similar constitutional crises. The paper situates this development within the broader constitutional transformations that followed the democratic transitions of the 1990s, during which constitutional supremacy, judicial review, enforceable bills of rights, and multiparty democracy became central features of African constitutionalism.

The paper will demonstrate how courts across Anglophone, Francophone, and Lusophone Africa have become increasingly central actors in disputes concerning electoral legitimacy, presidential term limits, constitutional amendments, judicial independence, and human rights protection. Particular attention will be paid to the growing influence of landmark decisions such as Raila Odinga v IEBC in Kenya, Chilima v Mutharika in Malawi, Unity Dow v Attorney-General in Botswana, and the jurisprudence of the South African Constitutional Court. These cases will be used as examples to illustrate the emergence of a distinctly African constitutional conversation grounded in shared democratic challenges rather than mere transplantation of European or North American constitutional models. At the same time, the paper adopts

a cautious perspective regarding the transformative potential of courts. It will argue that comparative constitutional jurisprudence cannot, by itself, overcome entrenched structural obstacles such as executive dominance, weak constitutional cultures, institutional fragility, and democratic regression. Nevertheless, the paper will contend that judicial cross-fertilisation increasingly strengthens constitutional accountability and contributes to the gradual consolidation of a broader Pan-African approach.

Prof Jason Varuhas (University of Melbourne) *Government Private Powers: A Common Problem in Comparative Perspective*

Abstract

A common problem is rising to prominence across common law jurisdictions: how should the law respond to the challenge of government's "private" powers? Governments have inherent powers to do things which private individuals can also do, including powers to contract, deal with property, distribute funds, partner with corporations, issue guidance, disseminate information via social media, initiate litigation, decide which media outlets to engage with, and adopt new technologies. These things may be done absent conferral of dedicated statutory authority. Governments are increasingly relying on these powers in consequential ways and for ideological ends, partly because these powers are not subject to the same democratic and legal controls as statutory powers. While in the past these powers may have been conditioned by a common set of public values, we are witnessing a breakdown of the consensus that once sustained those values. Whereas government private powers are emerging as an increasingly important issue, the nature of these powers remains steeped in uncertainty, and legal frameworks for their regulation remain embryonic and uncertain. Against this background this paper will consider the core issues that arise in relation to government's private powers, pooling insights from different jurisdictions, and in doing so consider how the distinct legal and constitutional frameworks of different common law jurisdictions may inform and condition how these issues are addressed. The paper's focus is Australia, the UK and New Zealand.

10:30 – 11:00 – Coffee Break

11:00 – 12:30 – Parallel Panels – Session 7

<u>The Interface between International Law and Constitutional Law - Venue: Lecture Theatre 1</u>

Chair: Dr Nicola Palmer (University of Cape Town)

Dr Fiona Roughley (Banco Chambers, Australia) *International Law and Constitutional Democracy: Interconnection, Independence and Immunity*

Abstract: In the last half of the twentieth century, a number of treaties were drafted and entered into by States which altered, at least on the international plane, the legal rules applicable in respect of the conduct of constitutional democracies (and other States) within their own territories. For example, from the late 1950s, international institutions such as the World Bank worked with States to create and integrate public international law rights and obligations into States' own nation-building projects, and create transnational or supranational arrangements for dispute resolution. The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, brokered by the World Bank, is one of the best known examples. These arrangements were then built into many of the Bilateral Investment Treaties of the twentieth century, coinciding with a global free-trade agenda. The suite of treaties pertaining to the environment entered into by States in this century, as well as the recent advisory opinion of the International Court of Justice pertaining to the Obligations of States in respect of Climate Change, supply other examples of the increasing interconnectedness of international law rights and obligations

with the domestic policy, and law-making agenda, of constitutional democracies. This interconnectedness has implications for the autonomy of constitutional democracies within their own territories. It also has the potential to create conflict, particularly in dualist systems, between the rights and obligations of a State as determined on the international plane and that which the core institutions of a State are required or permitted to do under the internal laws of that State. This paper explores key fault-lines of this kind exposed by recent litigation and the issues for the future. It is highly topical, in circumstances where apex courts in a number of constitutional democracies (the United States, the United Kingdom and Australia) have recently been asked to adjudicate disputes against foreign States referable to the investor/State architecture created in the twentieth-century, and courts in many jurisdictions grapple with the impact of international law obligations pertaining to climate on domestic disputes concerned with the internal laws and policies of the forum State.

Dr Gus Waschefort (4-5 Gray's Inn Square Chambers) *A Practitioner's Perspective on the Domestication of Customary International Law: A comparison of English and South African Constitutional Principles as Safeguard for the Separation of Powers*

Abstract: In his famous 1977 judgment in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 Lord Denning, borrowing from Lord Talbot's 1737 judgment in *Buvot v Barbut* (1736) 3 Burr. 1481, held that "…the law of nations in its full extent was part of the law of England". This principle of "incorporation" is reflected in S. 232 of the Constitution of the Republic of South Africa, 1996: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." Yet, more recently, the Supreme Court of the United Kingdom have adopted what Lord Lloyd Jones has referred to as "a more sophisticated approach" to the domestication of customary international law (lecture delivered at the Lauterpacht Centre, University of Cambridge on 17/10/2025). This approach was espoused most recently by Lord Reed, Lord Lloyd-Jones and Lord Kitchin in *The Law Debenture Trust Corporation plc v Ukraine* [2023] UKSC 11 in the following terms:

"…the application by courts in this jurisdiction of rules of international law is clearly restricted by domestic constitutional principles... Moreover, it is not possible to make sweeping deductions from broad statements of principle. The relationship between customary international law and the common law in this jurisdiction is far more complex… It seems preferable, therefore, to regard customary international law not as automatically a part of the common law but as a source of the common law on which courts in this jurisdiction may draw as appropriate." [§204]

The proposed paper will take the form of a comparative analysis of South African and English constitutional principles that has bearing on the domestic application of customary international law. Three such principles will inform the analysis: 1) doctrine on the incorporation of customary international law into domestic law; 2) the Crown act of state doctrine; and 3) the foreign act of state doctrine. All three principles featured in English and South African law historically. However, these principles have undergone, at times, dramatic evolution in both systems, with the adoption of the South African Constitution marking a sharp divergence. The aim of the comparative analysis is two-fold: 1) to determine what the practical implications of these constitutional principles are based on concrete facts; and 2) to determine the implications of such principles for the calibration of the separation of powers. As the paper intends to convey a practitioner's perspective, the facts and procedural history of two recent significant High Court judgements, one from South Africa and one from England, will be used to frame the

discussion, these are: *S v Ephraim and Others* (SS70/2021) [2025] ZAGPJHC 410 ("Cosas Four"); and *R (Al-Haq) v Business and Trade Secretary* [2025] EWHC 1615 (Admin).

Dr Matilda Gillis (Corpus Christi College, Cambridge) *Plausible Deniability, Genocide and Public Law: Rethinking the Relationship Between Constitutional Democracy and Norms of Jus Cogens*

Abstract: On 30 June 2025, the UK's High Court held, in Al-Haq v Secretary of State for Business and Trade (Al-Haq), that F-35 fighter jet components could continue to be exported from the UK in spite of the fact that these fighter jets were being regularly used by Israel in the ongoing conflict in Gaza. The claimant argued that the continued export of these components would breach the UK's international law obligations, as contained in Common Art 1 of the Geneva Conventions, Arts 6 and 7 of the Arms Trade Treaty, Art 1 of the Genocide Convention and rules of customary international law, specifically relating to war crimes and the prohibition on genocide. The UK Government had already suspended all other licences for arms exports to Israel on 2 September 2024 because of the risk that Israel would use those arms to commit serious violations of international humanitarian law (IHL) and international human rights law. The UK Government argued, however, that stopping the export of the F-35 components would 'impact [] international peace and security', 'undermine US confidence in the UK and NATO' and 'seriously undermine the credibility of the UK as a trusted partner on the international stage'. The High Court's decision was upheld by the UK Court of Appeal on 12 November 2025. This paper argues that this case was incorrectly decided, and that the current understanding of the relationship between public law and international law (both in the UK and in jurisdictions like Australia) needs rethinking when it comes to norms of jus cogens – fundamental, mandatory and 'uncontroversial' norms of international law – such as the prohibition of genocide and certain violations of IHL. The paper makes this argument in three parts. First, it demonstrates, using Al-Haq as its case study, that the UK courts' deference to the Executive, via the courts' unwillingness to examine unincorporated treaties and customary international law beyond ascertaining that the UK's Government's view of its international law obligations is 'tenable' (i.e. the 'tenability standard'), does not and should not, on the Courts' own reasoning, apply to norms of jus cogens. Second, it argues that the preceding argument does not undermine parliamentary sovereignty by valuing international law above public law. Rather, the argument only calls for re-prioritising certain public law principles (such as accountability) above other such principles. Third, the paper explores the concept of plausible deniability and makes the normative argument that, without this re-prioritisation, decisions by courts, such as that in Al-Haq, amount to judicial facilitation of Executive engagement in the plausible deniability of genocide and of other international crimes. It calls, on this basis, for the rethinking of the future relationship between constitutional democracy and international law – and, specifically, between constitutional democracy and norms of jus cogens.

<u>Privacy, Surveillance and Technological Power - Venue: Lecture Theatre 2</u>

Chair: Dr Felicity Kalunga (University of Zambia)

Dr Róisín Á Costello (Trinity College Dublin) *A Republican Theory of Privacy: securing intellectual freedom and the right to walk tall in the modern state*

Abstract: This paper makes the case for, and articulates the content of, a republican theory of privacy. During the twentieth century, courts have repeatedly stated that privacy is 'contextual' while eliding more

sustained interrogations of what privacy is – and what purpose it serves within democratic orders. Scholars, meanwhile, have focused on privacy's role in the protection of human dignity, personal control and individual liberty. Privacy in these accounts is concerned with freedom of choice, the intimacy required to form and sustain relationships, and the ability of each individual to know themselves. These accounts offer coherent justifications for recognising a right to privacy. They also furnish us with some boundaries of the right's scope. However, they largely neglect the primary role which the right to privacy has historically played within common law systems - as a mechanism for restricting executive power, promoting intellectual freedom and, consequently, supporting democratic participation. Current theories of privacy privilege the value of the right to the individual but have largely overlooked the right's historic role in protecting the psychological and physical spaces necessary for political dissent and democratic participation. In doing so, I argue that modern privacy theories have neglected a core aspect of the right to privacy – namely its contribution to the democratic project. In this paper I argue that if we are to understand the central importance of the right to privacy today we must unite modern individualistic accounts of privacy, with a coherent understanding of the historic role of the right within the democratic state. Drawing on the work of Philip Pettit, I argue that through unifying these accounts of privacy's justification and function we can expose the republican core of privacy as a right which advances the capacity of every individual to walk tall, and to enjoy freedom from domination. I argue that this republican theory of privacy allows us at once to understand privacy as a personally motivating right that is freedom enhancing and dignity protecting and also as a right that is central to social justice and political legitimacy. Privacy, in this theory, is a good that guides the democratic governments that people form and sustain. It is also a right that is realised not merely through the political grant of an individual right but through the power of the freely made choices of individuals. This republican concept of privacy is critical to understanding the central, and crucial, role the right has in the future of constitutional democracy. By articulating a politically implementable idea of what privacy is, we can begin to form a more coherent, and sustainable, understanding of how states can secure the right, and the role individuals have in realising it. This, in turn, permits us to appreciate how best to respond to the threats that new technologies, and corporate actors pose to privacy, and to see how those threats impact not only individual rights but also the democratic process.

Dr Lukman Adebisi Abdulrauf (University of Ilorin, Nigeria) *Rethinking Constitutionalism in the Digital Era: Big Tech, Platform Power and the Future of Democracy in Africa*

Abstract: The digital era is transforming the constitutional landscape in Africa, as it is globally. Traditional constitutional thought in Africa, powerfully shaped by scholars has focused on restraining state excesses and consolidating democratic governance. Yet, the digital transformation introduces a new constellation of threats emanating not from the state but from powerful non-state actors particularly global digital platforms otherwise known as 'Big Tech'. The rise of Big Tech that controls digital infrastructures and vast datasets, increasingly shapes public discourse, electoral processes, and the boundaries of civic participation in Africa. These non-state entities exercise powers that are analogous to state powers and raise issues of constitutional concern as they exercise forms of private, quasi-sovereign authority that operate outside traditional constitutional checks. In response, contemporary constitutional theory has begun to shift from state-centrism towards a broader conception of constitutionalism that addresses the diffuse power of digital infrastructures. This has largely given birth to the idea of digital constitutionalism which seeks to understand how the constellation of powers - those of the state, private entities and foreign big tech corporations - should be exercised within the boundaries of the rule of law. Yet, this idea has

largely evolved from the Global North and reflects its political and epistemic assumptions. For African societies, such frameworks risk reproducing colonial hierarchies of knowledge and governance, failing to capture local socio-political realities or the struggle for digital sovereignty. This paper argues that constitutionalism, historically meant as an idea to limit political power, can provide a useful lens within which to analyse the exercise of powers in the digital age. However, for it to be valuable as a means of limiting excess powers (especially from Big Tech) there is a need for a reconsideration of the normative and philosophical basis of constitutionalism in Africa. Therefore, the paper makes two normative claims. First, to adequately protect democracy and promote the rule of law in the digital age, there is a need to reconsider the dominant state-centric approach towards constitutionalism. Second, digital constitutionalism has offered a valuable framework for understanding constitutionalism in the digital age, particularly in addressing the power of Big Tech. However, its analytical foundations remain largely shaped by Global North experiences. To make digital constitutionalism meaningful in Africa, a decolonial approach is required - one that recognizes the peculiar socio-political realities of African societies and grapples with the complexities of ensuring that digital platforms comply with local laws and democratic constitutional orders.

Mr Yuri Behari-Leak (University of Cape Town)
Justice Needs a Human Face: Artificial Intelligence, Social Justice, and Access to Courts in South Africa

Abstract: South African courts face a deepening access to justice crisis characterised by prohibitive legal costs, physical inaccessibility, court backlogs, inadequate technology and severe under-resourcing. These pressures are particularly concerning for public law, public interest and social justice litigation aimed at addressing the enduring inequalities of apartheid, especially in cases involving socio-economic rights such as housing, water, food security, education and healthcare. Although the Constitution guarantees the right of access to courts, many litigants advancing social justice claims often encounter significant delays in having their matters heard. As global digitalisation accelerates, artificial intelligence ('AI') has been proposed as a potential solution to judicial inefficiency. Several jurisdictions such as the United States of America, China, Estonia, Brazil, Morocco, Kenya and Rwanda have started experimenting with AI tools to expedite judicial decision-making. This paper explores whether similar AI integration would be desirable in the South African judiciary with a focus on public law, public interest and social justice litigation. The paper begins by analysing South Africa's access to justice crisis and outlining how AI could support and enhance judicial efficiency. It then evaluates the comparative experiences of AI in other jurisdictions to identify potential benefits, concerns, and limitations of incorporating AI in South African courts. The central argument is that fully relying on AI for judicial decision-making is undesirable and incompatible with the rule of law and constitutional values. AI lacks the vital empathetic, contextual and creative human capacities needed for equitable social justice adjudication, and may compromise judicial independence, perpetuate bias and discrimination, undermine transparency and accountability, and threaten principles of administrative justice and procedural fairness. The paper concludes by proposing a hybrid human-AI model in which AI performs supportive and administrative functions that enhance judicial efficiency without replacing human judges or eroding judicial independence. Ultimately, this paper encourages critical reflection on the constitutional significance of human judicial decision-making in safeguarding the right of access to courts in South Africa today.

Dr Mugambi Laibuta (Kenya School of Law) *Technology, Surveillance, and the Erosion of Constitutionalism in Kenya*

Abstract: The Constitution of Kenya (2010) ushered in a transformative vision of constitutionalism anchored in the supremacy of the Constitution, separation of powers, accountability of public authority, and the protection of fundamental rights. It redefined state power as constrained, derivative, and answerable to the people. Yet, the rise of digital technology and the entrenchment of state surveillance have begun to erode these foundations. The paper will examine how the expansion of surveillance systems through biometric registration, digital identity, and communications monitoring has altered the balance between liberty and authority, threatening constitutionalism both as a principle of governance and as a lived democratic practice. Contemporary surveillance in Kenya is embodied in programmes such as the Huduma Namba digital ID system, the national CCTV surveillance infrastructure, and the IMEI registration regime. While justified in terms of security, service delivery, and tax compliance, these initiatives have tested the limits of constitutional legitimacy. In Nubian Rights Forum v Attorney General (2020), the High Court recognised that implementing Huduma Namba without adequate data protection safeguards risked violating privacy and equality rights under Article 31. In Katiba Institute v Communications Authority of Kenya (2025), the Court struck down mandatory IMEI registration, holding that it lacked statutory basis and failed the constitutional test of necessity and proportionality under Article 24. These cases indicate how surveillance policies, when detached from legal accountability, destabilise the structural logic of constitutionalism. Beyond constitutional violations, surveillance in Kenya has occasionally had lethal implications. Intelligence-driven monitoring of activists, journalists, and protesters has been linked to enforced disappearances, unlawful arrests, and extra-judicial killings by security agencies. The use of phone-tracking, facial-recognition CCTV, and intercepted communications has enabled pre-emptive targeting of dissenting voices, often outside judicial oversight. Surveillance data can facilitate intimidation and physical harm. Such outcomes expose the grave risk of transforming technological governance into an instrument of coercion rather than constitutional protection. The paper will argue that pervasive state surveillance corrodes constitutionalism in three interrelated ways. First, it transforms the State from a limited constitutional actor into an omnipresent observer, undermining the very notion of constrained power. Second, it weakens the rule of law by replacing transparent, predictable regulation with opaque executive discretion and technological opacity. Third, it diminishes constitutional culture by chilling speech, participation, and dissent, thereby hollowing out the civic foundations of democratic oversight. Ultimately, constitutionalism in Kenya's digital age depends on reaffirming the subordination of technology to law. A technology-aware constitutional order must embed legality, necessity, proportionality, and transparency into every surveillance regime. Strengthened judicial scrutiny, legislative clarity, and civic oversight are essential to preserving the Constitution's normative promise: that all power, however technologically enabled, remains limited, accountable, and exercised for the people.

Legislation and Legislatures - Venue: Lecture Theatre 3

Chair: Mr Paul Hoffman SC (Accountability Now)

Dr Robert Greally (University of Bristol/New York University) *The Least Examined Branch: A Genealogy of Legislative Assemblies in Public Law*

Abstract: Constitutional democracy is impossible without a democratically elected legislative assembly. Although legislative assemblies are a ubiquitous feature of modern constitutional orders and their

presence alone cannot make a regime a constitutional democracy, nevertheless, the project of constitutional democracy is unimaginable without one. Frustratingly, public law scholarship has shown little interest in exploring the constitutional importance of legislative assemblies. This is evident in contemporary public law scholarship's excessive focus on the judicial and executive branches. Furthermore, when public lawyers have addressed legislatures, they have often depicted them as irrational bodies, complicit enablers of the executive and a threat to individual rights. This neglect and distrust has left contemporary public law ill-equipped to understand, explain and defend the constitutional importance of legislative assemblies at a time when the future of constitutional democracy is seemingly in doubt. Indeed, many of the issues confronting our constitutional democracies, such as declining political trust, rising polarisation, increasingly high-profile policy failures, and executive aggrandisement, are being exacerbated by the declining constitutional legitimacy and authority of our legislative assemblies. To defend constitutional democracy, we need to rehabilitate how public law thought understands, analyses and explains the constitutional importance of our legislative assemblies. Identifying and addressing the causes of this intellectual neglect and distrust is the first vital step. Only through rehabilitating our own self-understanding can public law scholarship effectively respond to the challenges facing our legislatures and the future of our constitutional democracies. Accordingly, this paper posits that the current distrust and neglect of legislative assemblies are the cumulative product of various claims within Anglo-American public law that have intentionally or unintentionally shaped our understandings of public law as a discipline and the place of legislative assemblies within it. The paper examines Anglo-American public law thought as an ongoing political discourse among a constellation of constitutional actors and academics regarding the nature and functioning of constitutions. Through an interpretative genealogical approach, the paper aims to critique and undermine this current dispositif of distrust and neglect within Anglo-American public law thought. The paper highlights how explicitly and implicitly anti-legislative assembly arguments that emerged during the emergence of constitutional democracy in the 18th century, the development of formal legal education in the 19th century, the consolidation of democracy, and the rise of socialism in the early 20th century, as well as debates about constitutional review and the tyranny of the majority after the Second World War, sowed the seeds of distrust and neglect towards legislative assemblies within contemporary public law. The paper concludes by arguing why we should not be bound by these anti-legislative assembly claims today.

Ms Marion Sandilands (University of Ottawa/Conway Litigation) *Corroding the Rule of Law through Law-Making: Examples from Canada*

Abstract: Legislation that cuts Courts out the picture while granting broad executive powers undermines the rule of law. The fact that the legislation is duly (and lawfully) adopted does not change this phenomenon, but it might hide it. Two Canadian provinces (Alberta and Quebec) have recently introduced legislation that undermines the rule of law in different ways. In Quebec, the governing party introduced Bill 1, Quebec Constitution Act, 2025. While it is called a "constitution", it actually undermines constitutionalism and the rule of law in many ways. For example, it prohibits a large swath of organizations from using public funds to challenge legislation on the basis that it infringes the Canadian Constitution (including the Canadian Charter of Rights and Freedoms). It also creates a "Conseil constitutionnel" – a council appointed by the legislature – to adjudicate constitutional matters. At the same time, it empowers a Minister to block federal initiatives deemed to be against the interests of the Quebec nation. In so doing, it undermines the role of Courts in adjudicating constitutional matters. In Alberta, following on the 2022 Alberta Sovereignty within a united Canada Act (SA 2022, c A-33.8), a

law that purported to give the legislature and executive the power to block federal laws it deemed unconstitutional or harmful (bypassing the usual process of referring the matter a Court), the governing party has introduced multiple bills invoking s. 33 of the Canadian Charter of Rights and Freedoms (the "notwithstanding clause") to prevent judicial review of certain laws on the basis of rights and freedoms—again, attempting to cut courts out of the picture. In a similar vein, the government has introduced Bill 14, a reform to the election laws, which would transfer power from a legislative officer (the Chief Electoral Officer) to the Minister of Justice, and which attempted to stop a court reference proceeding on the constitutionality of a proposed referendum question on separation. Although all this legislation may be duly (and legally) adopted by the legislature, it may nonetheless chip away at the rule of law. In particular, all this legislation shares one feature: it removes the role of courts in adjudicating important constitutional matters. At the same time, many of these bills also create broad and highly discretionary executive powers. While removing a major check on legislative power, it paves the way for ever broader executive power. This paper seeks to understand the lead-up to each of these laws in Alberta and Quebec. It will demonstrate how this type of law-making is having a corrosive effect on the role of courts and the rule of law in those provinces, and the integrity of the Canadian constitution in general. It will connect this trend to the trend worldwide of the decay and collapse of constitutional democracy.

Mr MP Fourie-Viljoen (Constitutional Court of South Africa) *Invalidation of Legislation on Public Participation Grounds: Constitutional Tensions and Remedies*

Abstract: This paper will examine the constitutional tensions created by the invalidation of legislation on the grounds that it was enacted through a flawed process of public participation. This examination will focus primarily on the jurisprudence of the Constitutional Court regarding public participation challenges, as well as the subsequent jurisprudence regarding suspension of invalidity periods being extended. Sections 59(1)(a) and 72(1)(a) of the Constitution place obligations on the National Assembly and the National Council of Provinces (collectively, Parliament) to facilitate public involvement in the legislative process. Parliament's obligations under these sections, and the alleged failure to fulfil them, trigger the exclusive jurisdiction of the Constitutional Court, and have been the subject of five cases decided by the Court.[1] The Court has exercised its remedial powers in these cases to both strike down impugned provisions, and, in Mogale, to declare the entire Traditional and Khoi-San Leadership Act 3 of 2019 unconstitutional and refer it back to Parliament for re-enactment. Challenging legislation on the basis of a flawed public participation process has, in this way, become an effective way of challenging legislation without having to directly challenge the impugned legislation's substance for constitutional compliance. Predictably, given the success of this approach, a number of cases recently brought directly to the Constitutional Court have seen controversial legislation being challenged, not only substantively, but also on the basis that Parliament failed to sufficiently facilitate public participation.[2]This paper examines a number of pertinent constitutional issues that arise from public participation challenges to legislation. First, public participation challenges are indirect challenges, in that such challenges might lead to the invalidation of legislation that is, not only substantively constitutionally compliant, but in fact furthers the objects of the Bill of Rights. This results in a tension between the importance of participative and consultative processes in our participatory democracy, and the substantive vindication of constitutional rights. Second, as happened in Mogale, the Constitutional Court regularly exercises its remedial powers to suspend declarations of invalidity and refer legislation back to Parliament to be re-enacted. This, however, interferes with the ordinary constitutional separation of powers, in that the Court not only adjudicates on the outcome of legislative functions, but also actively directs such functions. Finally, as

evidenced in Mogale, the practical implementation of legislation important for the vindication of constitutional and other rights, may create a situation where the Court has limited leeway in not granting extensions to Parliament for the re-enactment of such legislation. This could perpetually keep in place legislation that has been declared constitutionally invalid. The paper then seeks to conceptualise possible solutions to the above tensions, by examining: (1) how, if at all, the substantive content and purpose of legislation should impact the Constitutional Court's interpretation of the Parliament's public participation obligations, (2) to what extent the factual implementation of legislation should inform the Court's exercise of its remedial powers in successful public participation challenges, and (3) how the Court's remedial powers could be utilised to remedy flaws in public participation processes without unduly interfering with Parliament's legislative functions.

[1] Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC); Land Access Movement of South Africa v Chairperson of the National Council of Provinces 2016 (5) SA 635 (CC); South African Veterinary Association v Speaker of the National Assembly 2019 (3) SA 62 (CC); Mogale v Speaker of the National Assembly 2023 (6) SA 58 (CC) ("Mogale"); South African Iron and Steel Institute v Speaker of the National Assembly 2023 (10 BCLR 1232 (CC).[2] These include, inter alia, challenges to the National Health Insurance Act 20 of 2023, the Public Procurement Act 28 of 2024, and amendments to the National Environmental Management: Biodiversity Act 10 of 2004.

13:30 – 15:00 – Closing Plenary Keynote: Public Law and the Future of Constitutional Democracy

Venue: Lecture Theatre 1

Chair: Prof Cora Hoexter (University of the Witwatersrand)

Deputy Chief Justice Dunstan Mlambo (Constitutional Court of South Africa)

Prof Geneviève Cartier (University of Sherbrooke)

Prof Sir Jeffrey Jowell KC (Blackstone Chambers)

Closing remarks: Prof Hugh Corder and Prof Jason Varuhas

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The Millennium Foundation

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