

Diggin' Deep Into Gold Fields: South Africa's Unrealized Black Economic Empowerment in the Shadows of Executive Discretion

Adam Kassner†

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† B.A., University of Virginia, 2013; J.D., Cornell Law School, 2016; Editor, *Cornell Law Review*, Volume 101. I owe thanks to Professor Muna Ndulo for his enthusiasm and steady guidance throughout our Law and Social Change: Comparative Law in Africa class. Thanks also to Theresa Bloom and all the other members of the *Cornell International Law Journal* who helped prepare this Note for publication.

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Introduction

Promoting good governance¹ is one of the more important objectives in South Africa—and Africa at large—to ensure continued economic development during the twenty-first century.² Former United Nations Secretary General Kofi Annan stressed, “[G]ood governance is perhaps the single most important factor in eradicating poverty and promoting development.”³ Many African countries are now defined by their nations’ transitions toward independence and, with that, their shifts toward “democratic” systems of governance. South Africa established a new racially integrated government in 1994 after prolonged domestic and international pressure precipitated the collapse of the country’s Apartheid regime. Black Economic Empowerment (BEE) is one of the primary initiatives undertaken by the democratically elected government of South Africa to mitigate the nationally institutionalized race gap in jobs, education, and industry ownership.

This Note argues that bad governance and corruption have encumbered economic and political progress in many areas, including the provision of basic public goods,⁴ and thus obfuscate numerous positive socio-economic rights protected in South Africa’s post-Apartheid Constitution.⁵ Many African countries breed corruption based on incentives for bureaucrats to gain from political office, in kind counteracting well-intended

1. “The good governance agenda is in a large measure predicated upon using the public law and policy framework to facilitate freedom of contract and exchange in the private sphere. It thus involves putting in place institutions which work under a predetermined discourse of legal rights and entitlements that presumably guarantee economic and political freedom.” James Thuo Gathii, *Retelling Good Governance Narrative on Africa’s Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971, 1034 (2000).

2. “The prospect of high sustained growth in Africa raises the possibility of the transformation of these countries from a reliance on primary agricultural production and mineral extraction which have characterized their economics for decades.” Richard Joseph, *Is Good Governance Necessary for Economic Progress in Africa?*, AFRICA PLUS (Aug. 4, 2013), http://africaplus.wordpress.com/2013/08/04/is-good-governance-necessary-for-economic-progress-in-africa/#_edn1. “The ultimate challenge is the creation of an impartial and universal state which treats all citizens fairly.” See *id.* (referring to the work of Professor Larry Diamond).

3. Okechukwu Oko, *The Challenges of Democratic Consolidation in Africa*, 43 NEW ENG. L. REV. 165, 186 (2009) (citing Frank Tenente, *Feeding the World One Seed at a Time: A Practical Alternative for Solving World Hunger*, 5 NW. U. J. INT’L HUM. RTS. 298, 312 (2007)).

4. Joseph, *supra* note 2 (summarizing the claims of Larry Diamond).

5. South Africa established an Interim Constitution in 1994 before finalizing its Constitution in 1996. The 1996 Constitution codified most of the Interim Constitution’s provisions unchanged. See S. AFR. (INTERIM) CONST., 1993.

redistributive policies like BEE. In such corrupt countries, “patterns of political behavior . . . reflect as their justifying principle that the offices of the existing state may be competed for and then utilized for the benefit of office-holders as well as that of their reference or support group.”⁶ Bureaucrats’ self-interested actions consequently divert resources earmarked to consummate citizens’ socio-economic rights. African developmentalist states must mitigate corrupt practices by changing the incentive system and instituting more stringent multi-institutional oversight of bureaucratic decision-making—especially in the awarding of government contracts to private companies. This begins with curbing improperly wielded executive discretion in dominant party democracies where opposition parties have yet to gain viability as an alternative to the status quo.

Part I of this Note will provide an overview of South Africa’s transition from Apartheid towards its new democratic government and political economy, of which BEE has been a central component over the last twenty years. It will track the development of black empowerment philosophy to the present day and reveal overarching issues in its implementation. Furthermore, it will present a case study of corruptive practices in the mining industry in response to BEE principles, regulations, and African National Congress (ANC) executive misconduct. The case study investigates the attempt by Gold Fields Limited to comply with BEE standards, providing insight into the potential for corruption within the parameters of the mining industry, and what tactics companies utilize to circumvent stringent compliance restrictions that apply to domestic industries beyond mining. Part II will critique the developments of BEE legislative policies, most importantly the Broad-Based Black Economic Empowerment Act (B-BBEE Act) and its Codes, including their progeny and amendments. In Part III, this Note will examine recent judicial decisions in South Africa that—by seeking to limit ministerial discretion, mitigate crippling corruptive practices within the country, and provide support to assert principles from international treaties within domestic South African institutions—have resulted in the liberal expansion of judiciary powers. Part IV delineates the four major international and regional conventions to which South Africa is a signatory to find instruments by which South Africa has agreed to limit corruption that can be given effect through constitutional provisions and judicial interpretations. This Note concludes by stipulating how South Africa can improve implementation of its BEE program by limiting corruption within all three government branches.

I. The Evolution of Black Economic Empowerment

A. BEE’s Origins

Black empowerment has been a common theme among South African activists throughout the twentieth century, whether framed by the ANC

6. Joseph, *supra* note 2.

leadership's goals, the ANC's evolving tactical documents,⁷ or other residual movements—for example, the ANC Youth League, the South African Students' Organization, or Black Consciousness. Dr. Dale T. McKinley notes:

BEE was framed by [the early ANC leadership's desire for a specific section of the black population to become an integral part of the capitalist system] but was mediated by the macro-nationalist politics of the ANC which provided a sense of collective (predominately racial) and de-classed 'ownership' over the emerging struggle against the racialised organisation of South African society.⁸

BEE was a policy enacted directly to counteract the National Party's (NP) policy of Apartheid, the legally institutionalized segregation of non-white groups in South Africa, and the general suppression of black advancement by Dutch and British colonizers since the seventeenth century.

Apartheid was a complex system designed to control the labor, movement, and education of Africans within clearly defined and segregated racial groups. From 1948 through F.W. de Klerk's election in 1989, the NP relegated the non-white population to vastly inferior conditions by preventing them from gaining access to jobs, education, and housing. The Bantu Education Act of 1953⁹ prevented non-whites from receiving more than the basic education needed to fill unskilled labor positions under white control or within their Bantustan homelands.¹⁰ The Group Areas Act¹¹ and the Natives Resettlement Act¹² relegated blacks to live in homelands representing miniscule portions of the country and further institutionalized the practice of migrant labor in mines, thus effectively ensuring that non-whites did not participate in urban life. Such Apartheid policies propelled the education and skill deficits rampant amongst the non-white population in South Africa at the cusp of the new universal democracy in 1994. Intrinsic economic and income inequality between the small, dominant white elite and the rest of the population depleted the country's human capital, as the government largely ignored most of its citizenry. These policies have had an enduring effect on the socio-economic fabric of South African society to this day.

Although BEE philosophy focused initially on elevating a portion of the black populace within the colonially imposed capitalist system, by the climax of anti-Apartheid protests in the 1980s, the calls for social and

7. See Dale T. McKinley, *The History and Character of 'Black Economic Empowerment'*, PAMBAZUKA NEWS (Mar. 9, 2011), <http://www.pambazuka.net/en/category/features/71539> (indicating that the ANC's 1969 Strategy & Tactics document suggested pursuit of a new black empowerment set against special colonialism in South Africa).

8. *Id.*

9. Bantu Education Act 47 of 1953 (S. Afr.).

10. See *id.*; MAMPHELA RAMPHELE, *ACROSS BOUNDARIES: THE JOURNEY OF A SOUTH AFRICAN WOMAN LEADER* 44 (1995) (reflecting that Minister of Native Affairs H. F. Verwoerd had felt that "'Bantu' children should not be shown green pastures where they would never be allowed to graze").

11. See Group Areas Act 41 of 1950 (S. Afr.).

12. See Natives Resettlement Act 19 of 1954 (S. Afr.).

material liberation evolved into a “de-racialised capitalism” within a greater political liberation movement against Apartheid.¹³ The ANC’s embrace of the colonial capitalist political economy, historically grounded in Apartheid’s authoritarian socio-economic relations, required the newly integrated government to pressure the status quo white corporate capital to incorporate new black investors, and divert institutional and capital government resources to facilitate a new black bourgeoisie through expansion of the BEE program.¹⁴ The newly elected ANC government invested in the “privatization/corporatisation of state assets, awarding of government tenders, the provision of seed capital and the threat of effective expropriation . . . through the unilateral imposition of quotas of black ownership in key sectors of the economy,”¹⁵ thus prompting the transfer of shares in white-dominated corporations to black owners.¹⁶

While the basic contours of democracy are apparent in South Africa from a distant glance (a constitution, democratic voting, a multiparty parliament, and bureaucratic institutions¹⁷), the country remains crippled by corruption, crony capitalism, and both ineffective and self-interested bureaucrats.¹⁸ Corruption and authoritarian rule have long characterized governmental relations within South Africa,¹⁹ and the ANC has perpetu-

13. See McKinley, *supra* note 7.

14. See *id.*

15. *Id.*

16. *Fool’s Gold*, THE ECONOMIST (Apr. 27, 2013), <http://www.economist.com/news/briefing/21576655-black-economic-empowerment-has-not-worked-well-nor-will-it-end-soon-fools-gold>.

17. South Africa is now a constitutional parliamentary democracy, vesting legislative authority in the Parliament. The National Assembly, one of two houses of the Parliament, chooses the President from amongst its members. The President appoints the twenty-five Cabinet Ministers, assigns their powers and functions, and may dismiss them at will. See *Government in South Africa*, BRAND SOUTH AFRICA, <http://www.southafrica.info/about/government/gov.htm#VJhDCsADI> (last updated Nov. 6, 2015). The ANC has held at least sixty-two percent of the votes—and consequently National Assembly seats—in every post-Apartheid election, thus ensuring the ANC can effectively govern the country unilaterally. See *generally A Look Back at National Election Results*, BRAND SOUTH AFRICA (May 8, 2014), <http://www.medioclubsouthafrica.com/democracy/3824-a-look-back-at-national-election-results> (providing election breakdowns since 1994).

18. See Nsongurua J. Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT’L L. 1209, 1220 (2003) (“[N]otwithstanding the introduction of multiparty rule, most sub-Saharan political systems are still characterized by old patrimonial tendencies, related to underlying political economies and cultures, which were hardly affected by the change in ideological tune.”); Oko, *supra* note 3, at 195 (“Corruption in the civil service is so widespread and involves common occurrences of delayed files, making wrong claims, favouritism, truancy, outright demand for bribes and abuse of office, among others.”).

19. The Apartheid government was unafraid to flex its police powers to oppress resistance movements, utilizing violence to eliminate anti-Apartheid protests. Incidents like the Sharpsville Massacre in 1960 and the Soweto Uprising in 1976 exacerbated the rift between the Inkatha Freedom Party and the ANC through township violence in the early 1990s. Numerous civil rights leaders were also detained or murdered. See Ivor Chipkin and Barbara Lipietz, *Transforming South Africa’s Racial Bureaucracy: New Public Management and Public Sector Reform in Contemporary South Africa* 12, <http://wiser.wits.ac.za/system/files/seminar/Chipkin2012.pdf>. See also Terrorism Act 83 of

ated this alarming trend since obtaining power. Corruption and a dearth of bureaucratic accountability inherently prevent the government from fulfilling its socially contractual obligations to its citizens, and betray the aims of BEE. While it is indisputable that BEE has substantially contributed to a small class of wealthy black leaders²⁰—many of whom possess sway within the government through their activities within the controlling ANC—the benefits generally have been limited to this politically connected subgroup of the population. Such limited BEE impact has failed to alleviate significantly the pre-1994 issues of severe income disparity,²¹ education deficit, and employment gaps normalized within South Africa. It is from this framework that the deficiencies in the BEE legislative scheme must be critically assessed.

B. Black Economic Empowerment in Practice

With a GDP that represents thirty percent of Africa's overall GDP and is four times as large as its sub-Saharan neighbors, South Africa drives economic growth throughout the continent.²² Mining has traditionally been one of South Africa's most integral industries, dating back to the initial Dutch colonization in the seventeenth century. To this day, South Africa maintains some of the largest reserves of key minerals—including gold, silver, platinum, steel, iron, diamonds, and aluminum—in the world, thus warranting the government's concentrated investment in mining and the backward linkages that contribute towards its industrialization.²³ Despite the arguably benevolent ambitions of many leaders in promoting BEE in a country with such vast natural resources, the government's implementation thus far has left much to be desired. The deficiencies result from the ample discretion allotted to some bureaucrats, the tying of black employment incentives to the awarding of government contracts (manifesting in ANC leverage) to those corporations that follow orders, and the entrenched elites who exploit such malfeasance for their own benefit.

1967 (S. Afr.) (granting the Minister of Justice discretionary power to detain people indefinitely).

20. For example, Cyril Ramaphosa, a union-boss-turned-tycoon and a top ANC leader, is now estimated to have a net worth of \$675 million. *Fool's Gold*, *supra* note 16.

21. South Africa's GINI coefficient—measuring the income disparity within a country on a scale of 0 to 1 (the higher the number, the more disparity)—of 0.7 is the highest in the world as of 2013. See Robin Woolley, *Transformation: A Reminder of Why We Are Doing This and a Reflection on the Revised Codes*, TRANSCEND CORP. ADVISORS (Sept. 2, 2014), http://www.transcend.co.za/resource-centre/blog/robin/transformation_a_reminder_of_why_we_doing_this_and_a_reflection_of_the_revised_b-bbee_codesFalse.html.

22. Taku Fundira, *Trade at a Glance: the BRICS' Engagement With Africa*, in BRICS: SOUTH AFRICA'S WAY AHEAD? 48, 78-84 (Ron Sandrey et al., 2013).

23. See *id.* at 78 (“[H]istorically, South Africa's trade policy was guided by three interrelated strategies, that is, import substituting industrialisation, the development of strategic industries (in arms, oil and coal)—due to imposed [international] sanctions—and the development of minerals-related exports.”). South Africa's industrial output and mineral production represent forty and forty-five percent, respectively, of Africa's total output. *Id.*

BEE deals now effectively necessitate political connections more than business skills, perpetuating a government-led de facto system of patronage rather than an equal opportunity meritocracy.²⁴ The emphasis on black ownership in State-owned enterprises' selection of suppliers, authorizations, and awarding of licenses in regulated sectors (particularly mining) penalizes those firms without sufficient ownership shares and jobs in black hands.²⁵ Even those firms that have "genuine compliance" do so by

using black management employees as 'insurance policies,' which allow companies to be recognized as compliant for the sake of the policy rules rather than meeting the goals and ultimately the purpose of [Broad-Based Black Economic Empowerment] to spread out economic control and allow empowered employees to be genuinely involved in business operations.²⁶

This reveals a fundamental flaw in the conception of black management and ownership quotas within the empowerment principles in South Africa: the National Party's egregious suppression of educational opportunities for non-white citizens throughout the Apartheid era has created a paucity of qualified workers from previously disempowered groups due to both an education deficit and a lack of investment in training that would enable such workers to compete within an increasingly complex global economy.²⁷

BEE also faces the issue of fronting, or corporations' deliberate circumvention of the B-BBEE Act and the Codes of Good Practice, usually based on misrepresentations of facts related to the black ownership and management requirements that dictate BEE compliance.²⁸ Corporations most commonly "front" by means of window-dressing,²⁹ benefit diversion,³⁰

24. See *Fool's Gold*, *supra* note 16.

25. "A contract between the state and a private business would in all likelihood be awarded to a [higher BEE] contributor." Henk Kloppers & Willemien du Plessis, *Corporate Social Responsibility, Legislative Reforms and Mining in South Africa*, 26 J. ENERGY & NAT. RES. L. 91, 99-100 (2008).

26. Elizabeth A. Hoffman, Note, *A Wolf in Sheep's Clothing: Discrimination Against the Majority Undermines Equality, While Continuing to Benefit Few Under the Guise of Economic Empowerment*, 36 SYRACUSE J. INT'L L. & COM. 87, 97-98 (2008). See *Fool's Gold*, *supra* note 16 (noting that Adcorp, a large employment agency, has observed that private companies now pay educated black workers twenty-three percent higher wages than equally qualified white workers in an effort to meet BBE regulations perpetuated by B-BBEE and the Codes).

27. See Gregory J. Millman, *Black Economic Empowerment Seen Hiking S. Africa Risk*, WALL ST. J. (Apr. 15, 2014), <http://blogs.wsj.com/riskandcompliance/2014/04/15/black-economic-empowerment-seen-hiking-south-africa-risk/>. See also COLIN MCCARTHY, UNIDO, PRODUCTIVITY PERFORMANCE IN DEVELOPING COUNTRIES: SOUTH AFRICA 43-44 (2005), http://www.unido.org/fileadmin/user_media/Publications/Pub_free/Productivity_performance_in_DC_South_Africa.pdf (arguing that South Africa's development route would not create jobs for the majority of working poor and unemployed citizens because of the country's focus on industries requiring higher-level skills in the context of education deficit).

28. *Fronting*, THE DEP'T OF TRADE AND INDUS., http://www.thedti.gov.za/economic_empowerment/fronting.jsp (last visited Nov. 29, 2015).

29. Window-dressing is where black people are appointed to an enterprise for tokenism, and are either discouraged or prevented from participating in the business operations of the corporation. *Id.*

and opportunistic intermediaries³¹—all of which are utilized by executives to retain control of the corporation's operations while the company still reaps the benefits of government contracts. Although the B-BBEE Amendment and the Revised Codes seek to address fronting by imposing penalties for such duplicitous activities,³² there are circumstances where a corporation's use of fronting "is almost impossible to monitor."³³ South African corporations will likely continue to find creative schemes to evade the government's tougher BEE standards.

When the Fraser Institute compiled its ranking of countries for policy potential in mining jurisdictions, it noted that South Africa's ranking of fifty-fourth was partially derived from one exploration company technical director's claim that "[i]n South Africa, the entire process of the administration of, and applying for, and awarding of, exploration rights is protracted, corrupt, arbitrary, inconsistent, and a nightmare."³⁴ While BEE has a historic foundation within ANC ideology, the ANC-led implementation has yet to yield the results necessary to uplift the non-white population after centuries of colonial suppression, and thus requires both alterations to its execution and more stringent oversight of its implementation.

C. The Gold Fields Case Study: (Selective) Black Economic Empowerment

Gold Fields Limited is one of the largest corporate investors in South Africa,³⁵ illustrating the continued centrality of the mining industry to South Africa's economic objectives. Furthermore, mining still accounts for nearly sixty percent of South Africa's export revenue and the employment of about half a million people directly—which does not even include those employed in related industries and backwards linkages.³⁶ The Gold Fields controversy epitomizes the turmoil that South Africa-based companies' boards of directors experience in simultaneously attempting to attract black equity ownership in accordance with government legislation and reg-

30. Benefit diversion is where the corporation's economic benefits from B-BBEE compliance do not "flow to black people in the ratio as specified in the relevant legal documentation." *Id.*

31. An opportunistic intermediary is a corporation that leverages another enterprise's favorable B-BBEE status through contractual agreements. The circumstances of the transaction generally include restrictions concerning the identity of the opportunistic intermediary's proprietary information (suppliers and clients), contractual terms that are not considered fair and reasonable, and other indicators of fronting activity. See *id.*

32. See discussion *infra* Part II.B-C.

33. Tashmir Singh, *South Africa: Will the Proposed Revision to the B-BBEE Codes of Good Practice Lead to Increased Fronting Activity?*, MONDAQ (Nov. 20, 2013), <http://www.mondaq.com/x/276074/Corporate+Commercial+Law/Will+The+Proposed+Revision+To+The+BBBEE+Codes+Of+Good+Practice>.

34. See Peter Leon, *Marikana, Mangaung and the Future of the South African Mining Industry*, 31 J. ENERGY & NAT. RES. L. 171, 177 (2013).

35. Other large corporate investors include MTN, Vodacom, Eskom, Sasol, SABMiller, Shoprite, Protea, Multichoice, Standard Bank, ABSA, and FNB. See Fundira, *supra* note 22, at 80.

36. Leon, *supra* note 34, at 178.

ulations, while satisfying self-interested ANC politicians who control the discretionary decision-making process by which the government allots its contractual work to companies desperately in need of the business to maintain viability. In 2010, Gold Fields made a BEE deal to issue 600,000 shares and sell nine percent of its South Deep subsidiary mine—worth an estimated R2.1 billion (Gold Fields' largest asset)—to a black-ownership consortium.³⁷ Gold Fields sold this stake to comply with the BEE-based Mining Charter requirement that South African mining companies sell or cede at least twenty-six percent of their operations to “Historically Disadvantaged South Africans,”³⁸ yet executive oversight over the BEE deal led to considerable controversy.

Companies often sell ownership stakes at a discount and finance them with company loans to accommodate non-white ownership requirements. This process leverages the company in debt to attract black shareholders to qualify the company for government contracts with its improved BEE score.³⁹ While Gold Fields had initially opted for an employee share scheme—in which the company would provide an equity stake to black employees, serve as a trustee in running the company, and subsequently distribute profits—civil rights leader and former board chairwoman Dr. Mamphela Ramphele insisted, “The [South Africa] government . . . shoved the list of some of Invictus Gold's black economic empowerment shareholders down Gold Fields' throat, with an ultimatum that if the preferred names were not taken on board it would be denied a mining license.”⁴⁰ CEO Nicholas Holland affirmed Dr. Ramphele's claims, listing individuals in the Department of Mineral Resources (including former deputy director-general Jacinto Rocha) as those who had unfairly pressured him into

37. See Kevin Crowley, *Gold Fields Legal Chief Quits Amid SEC Probe Into Sale of Stake*, BLOOMBERG NEWS (Jan. 20, 2014), <http://www.bloomberg.com/news/2014-01-20/gold-fields-legal-chief-quits-amid-sec-probe-into-sale-of-stake.html>; Sikonathi Mantshantsha, *Was Gold Fields Negligent in BEE Deal?*, FIN. MAIL (Sept. 26, 2013), <http://www.financialmail.co.za/moneyinvesting/2013/09/26/was-gold-fields-negligent-in-bee-deal>.

38. Amendment of the Broad-Based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry, GN 838 of GG 33573 (20 Sept. 2010), <http://www.dmr.gov.za/publications/summary/108-mining-charter-downloads/128-amendedofbbseecharter.html> [hereinafter Mining Charter Amendment].

39. See *Fool's Gold*, *supra* note 16. Such practices were necessary where a company relied upon government contracts to maintain economic viability, and there were limited black entrepreneurs who could accumulate enough capital to make such investments. See *id.* The lack of black entrepreneurial capital is directly tied to the past Apartheid practices of limiting black educational opportunities that has created both human and monetary capital deficits within the black community. These issues are pronounced where there are required black ownership quotas in mining companies (and in other industries) that are difficult to satisfy without soliciting ANC politicians, who through self-interested transactions, funnel capital within the party—exemplifying the ironic results of BEE policy in perpetuating a new black elite.

40. Setumo Stone, *State gave Gold Fields no choice on BEE, says Ramphele*, BUS. DAY (Mar. 12, 2013), <http://www.bdlive.co.za/business/mining/2013/03/12/state-gave-gold-fields-no-choice-on-bee-says-ramphele>. See Mantshantsha, *supra* note 37 (reporting that members of the BEE consortium were awarded free shares and an upfront “dividend” worth about R73m despite having never contributed financially to the company).

accepting the BEE consortium terms.⁴¹ Following these government threats, Gold Fields capitulated to the ANC's demands to ensure it would be awarded its necessary mining licenses.

Gold Fields went so far as to hire the U.S.-based law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP to conduct an internal investigation of the company's actions, which the South African media has accused the company of initially ignoring and thereafter burying.⁴² While Gold Fields has been under investigation from the South African government, the U.S. Department of Justice, and the U.S. Securities and Exchange Commission for alleged corruption charges, it has been uncovered that

[a]mong those involved in the Invictus Gold deal are former deputy president Baleka Mbete, also [ANC] chairwoman;⁴³ Limpho Hani, wife of late South African Communist Party leader Chris Hani; Jerome Brauns SC, who represented President Jacob Zuma during his rape trial; former Springbok Ashwin Willemsse, and Mandla Msimang, son of [ANC] party stalwarts Mendi Msimang and the late Manto Tshabalala-Msimang.⁴⁴

Also involved were two Ministers of Parliament who worked on the minerals oversight committee tasked with "monitoring" the Department of Mineral Resources, which granted the necessary mining license to Gold Fields a month later in August 2010.⁴⁵ The Gold Fields case personifies the endemic corruption—encouraged and systematized by ministerial discretion and government procurement—that places South African companies' executives in the precarious position of choosing either to comply with the ANC's condemned tactics or potentially mortgage their companies' financial futures.

41. Mantshantsha, *supra* note 37. Jacinto Rocha, however, has denied such accusations of wrongdoing within the Department of Mineral Resources. Lindo Xulu & Jana Marais, *BEE deal "not forced" on Gold Fields*, BUS. DAY (Oct. 12, 2013), <http://www.bdlive.co.za/business/mining/2013/09/22/bee-deal-not-forced-on-gold-fields> ("Apart from informing Gold Fields that the 'once empowered, always empowered' principle didn't exist and that they needed to do another [BEE] deal, we never dictated to them on the nature of the deal and who to include.").

42. Christopher M. Matthews, *SEC Investigates Gold Fields for South African Deal*, WALL ST. J. (Sept. 12, 2013), <http://blogs.wsj.com/riskandcompliance/2013/09/12/sec-investigates-miner-gold-fields-for-south-african-deal/>.

43. Baleka Mbete holds a stake worth R25m in the Invictus Gold consortium that acquired ownership in Gold Fields. See Mantshantsha, *supra* note 37.

44. Stone, *supra* note 40.

45. Sikonathi Mantshantsha, *Defending Gold Field's BEE Deal*, FIN. MAIL (May 15, 2014), <http://www.financialmail.co.za/coverstory/2014/05/15/defending-gold-field-s-bee-deal>. State officials' abuse of power personifies "tenderpreneurship," in which connected businessmen and officials abuse their authority to secure government contracts and obtain economic advantages. See Nicolas Cook, *South Africa: Politics, Economy, and U.S. Relations*, CONG. RES. SERV. 1, 10 (Dec. 19, 2013), <http://fas.org/sgp/crs/row/R43130.pdf>.

II. Broad-Based Black Economic Empowerment: Winning the Battle But Not the War

A. The Broad-Based Black Economic Empowerment Act of 2003 (B-BBEE Act)

Criticisms of the black economic empowerment initiatives from 1994 through the early 2000s⁴⁶ came from both the new black elite and majority populations following the Johannesburg Stock Exchange collapse.⁴⁷ In response to such BEE failures, President Thabo Mbeki enacted the BEE Commission, which laid the foundation for the revamped B-BBEE Act in 2003.⁴⁸ While viewed by citizens as a progressive step towards ingraining BEE within South African economic policy, the legislation's holes hindered achievement of its lofty ambitions.

The B-BBEE Act established the Advisory Council tasked with counseling the government on BEE, reviewing the progress of BEE initiatives, advising on draft codes and strategy development, and "facilitat[ing] partnerships between organs of state and the private sector that will advance the objectives of [BEE]."⁴⁹ The Council is composed of the President, the Minister of Trade and Industry (MTI), Cabinet Ministers, and ten to fifteen members appointed by the President.⁵⁰ While the President "shall have regard" for maintaining appropriate expertise and representing "relevant constituencies,"⁵¹ the only discernible limitation on the President's selection of Council members is that he "shall follow an appropriate consultative process."⁵² The President's wide discretion to select Council members tasked with facilitating partnerships between the government and the private sector provides ample room for corruption. The Council even regulates itself by resolution, thus reinforcing the ANC's control over

46. BEE initiatives in South Africa included the South African Constitution of 1996, the Employment Equity Act of 1998, the Skills Development Act of 1998, the Skills Development Levy Act of 1999, the Preferential Procurement Act of 2000, the Public Finance Management Act of 1999, and the Municipal Finance Management Act of 2003.

47. The black bourgeoisie felt that the government, in promoting its neoliberal macroeconomic policy, was focused on facilitating the interests of the local white and international corporate capital rather than sustaining a black capitalist presence within these corporations. The black proletariat viewed the ANC's neoliberal policies (BEE) as responsible for high unemployment, increasing societal inequality, inefficient resource allocation, and "a betrayal of the redistributive principles and vision of socioeconomic equality of the liberation struggle." See McKinley, *supra* note 7. See also Irene-marié Esser & Adriette Dekker, *The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles*, 3 J. INT'L COM. L. & TECH. 157, 161 (2008) (observing that, as of 2005, white South Africans still controlled more than two-thirds of the companies listed on the Johannesburg Stock Exchange despite comprising only ten percent of the population, compared to black South Africans controlling merely four percent of companies).

48. Broad-Based Black Economic Empowerment Act 53 of 2003 (S. Afr.).

49. *Id.* §§ 4, 5.

50. *Id.* § 6(1).

51. *Id.* § 6(2).

52. See *id.* § 6(3).

implementation of the entire BEE process.⁵³

The B-BBEE Act allots significant discretion to the MTI to project his own standards and interpretations of BEE upon South Africa. The MTI may issue, with little public accountability and without Advisory Council deliberation,⁵⁴ “codes of good practice” that further interpretation of various B-BBEE definitions or entities, qualification criteria for preferential purposes, indicators of measurement for B-BBEE, weighting of indicators, guidelines for stakeholders in “relevant” sectors of the economy, and “*any other matter necessary* to achieve the objectives of [B-BBEE].”⁵⁵ The MTI also issues a strategy for B-BBEE (primarily dealing with its coordination, financing, and reporting standards) and may change or replace a strategy unilaterally.⁵⁶ The B-BBEE Act empowers the MTI with wide latitude to impose his will, and thus effectuate the ANC’s will, upon the BEE program without necessary checks and balances.

The effects of the B-BBEE Act crystallized from 2004 to 2008 when it became “the dominant feature on the mergers and acquisitions landscape in South Africa.”⁵⁷ ANC leadership, however, utilized the legislation’s wide ministerial discretion to its own ends, thus preventing BEE from either significantly mitigating the severity of income disparity or elevating a large swath of the non-white population. South African civil rights activist Archbishop Desmond Tutu critically pondered, “What is black empowerment when it seems to benefit not the vast majority [of the black population] but an elite that tends to be recycled?”⁵⁸ Moeletsi Mbeki, political economist and younger brother of former President Thabo Mbeki, decried BEE as

53. See *id.* § 7(3). Council resolutions must come after “consultation” with the MTI, another member of the controlling political party (ANC). See *id.*

54. See *id.* § 9(5) (requiring only that the MTI issue the Codes by publishing them in the Gazette for public comment for a period of sixty days without necessitating the implementation of such feedback into Codes revisions).

55. See *id.* § 9(1) (emphasis added).

56. See *id.* § 11(1) (“A strategy . . . must provide for an integrated, co-ordinated and uniform approach to broad-based black economic empowerment by all organs of state, public entities, the private sector, non-governmental organisations, local communities, and other stakeholders.”). The MTI also may implement regulations “with regard to any matter that it is necessary to prescribe in order to ensure the proper implementation of [B-BBEE].” *Id.* § 14.

57. Esser & Dekker, *supra* note 47, at 167. The authors state:

The potential effectiveness of [compliance with the general scorecard] can be seen from the several important B[-]BBEE transactions in 2005. For example Tiger Brands (a food conglomerate) struck a deal in terms of which 4% of its shares (worth R729m) will be transferred within the next 10 years to its staff who are 80% black. Edcon (a retail conglomerate) set aside R455m for a staff empowerment scheme. Mvela Group acquired 25% of the health care group Afrox. Old Mutual, Nedcor and Mutual & Federal increased black shareholding by 12,75% in a R7,2bn deal for the benefit of black controlled entities owned by black clients. ABSA sold 10% to a consortium led by Mvelaphanda Holdings. Standard Bank and the Liberty Group sold 10% worth R5,6bn to Tutuwa Consortium.

Id.

58. Tutu Warns of Poverty “Powder Keg”, BBC NEWS (Nov. 23, 2004), <http://news.bbc.co.uk/2/hi/africa/4035809.stm>.

“legalised corruption.”⁵⁹ Such criticisms placed pressure on the government to revise B-BBEE by passing the recent Amendment.

B. The Broad-Based Black Economic Empowerment Amendment Act of 2013

In response to the public's denigration of B-BBEE's shortcomings, South Africa passed the Broad-Based Black Economic Empowerment Amendment Act (B-BBEE Amendment).⁶⁰ The B-BBEE Amendment has now established a Commission to play an oversight and advocacy role regarding BEE policy, including the investigation of complaints concerning B-BBEE transactions (for example, fronting practices and abuse) through subpoena powers and court applications to restrain alleged breaches of B-BBEE Acts.⁶¹ The Commissioner, who heads the Commission and must have “suitable qualifications and experience,” is mandated to ensure that the Commission is “impartial and perform[s] its functions without fear, favour or prejudice.”⁶² Notwithstanding the B-BBEE Amendment's attempt to bolster the Commissioner's independence to oversee BEE practices and limit ministerial discretion, the Commissioner is still appointed by the MTI⁶³—and can also be removed by the MTI—thus making it susceptible to ANC influence and intrinsically blunting the Commission's impact in the context of historical executive abuse.

Not only may the government now ban companies from engaging in future government contracts for contravening BEE policies, but the B-BBEE Amendment provides the government and public entities with a statutory right to cancel *any* contract or authorization awarded to companies that falsify information on their B-BBEE status.⁶⁴ The B-BBEE Amendment also introduced various criminal offenses for illegal practices designed to circumvent B-BBEE requirements. Such offenses may result in substantial firm-wide and individual fines, including up to ten years of imprisonment.⁶⁵ Although the B-BBEE Amendment reflects a meaningful legislative

59. Magnus Taylor, *Moeletsi Mbeki on South Africa: 'Black Economic Empowerment is Legalised Corruption'*, AFRICAN ARGUMENTS (Sept. 13, 2012), <http://africanarguments.org/2012/09/13/moeletsi-mbeki-on-south-africa-%E2%80%99black-economic-empowerment-is-legalised-corruption-%E2%80%9D-%E2%80%93-by-magnus-taylor/>. See also McKinley, *supra* note 7 (“[C]ontemporary BEE in South Africa has become, more than ever, the prime practical vehicle for elite accumulation, rent seeking and corruption as well as the conceptual cover for extreme inequality.”).

60. Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 (S. Afr.) [hereinafter B-BBEE Amendment Act].

61. *Id.* § 13B.

62. *Id.* § 13C.

63. See *id.*

64. *Id.* § 13A.

65. See *id.* § 13O (stating that the government can also fine firms up to ten percent of total revenue for a year and can ban firms from contracting with government and public entities for up to ten years). Werksmans Attorneys view the affirmative obligations imposed on the South African government to take the Codes into account in procurement policies and issuing licenses as a significant change from the workings of the B-BBEE. See Werksmans Attorneys, *Amendments to the BBEE Act and the Codes Explained*, LEX AFRICA, <http://www.werksmans.com/wp-content/uploads/2014/02/04>

effort to limit ministerial and corporate discretion regarding BEE principles, there are ways to improve oversight capabilities further and shield BEE implementation from political abuse—most significantly by providing either minority political parties or independent commissions with audit and oversight capabilities.

C. Codes of Good Practice on Black Economic Empowerment

B-BBEE requires that “every organ of state and public entity” reasonably apply relevant codes of good practice issued by the MTI through the *Gazette* when developing criteria for issuing licenses, concessions, preferential procurement policies, sales of state-owned enterprises, and entering into partnerships with the private sector.⁶⁶ Former Minister Mandisi Mphahla wielded such appropriated power by publishing the inaugural Codes of Good Practice on Black Economic Empowerment⁶⁷ (the Codes) on February 9, 2007. Most notably, the Codes grade a company with scorecard rankings “that not only affect[] their own ability to win government contracts but can also affect the competitiveness of their supply chain partners, because the ranking of a company’s suppliers affects a company’s own ranking.”⁶⁸ On October 11, 2013, Minister Rob Davies issued a new Codes of Good Practice⁶⁹ (the Revised Codes) to amend the Codes in effect since 2007. While Minister Davies initially intended to implement the new code by October 11, 2014, he extended the transitional period another six months to run through April 30, 2015.⁷⁰

The Revised Codes “introduc[e] a number of welcome compromises and concessions, particularly for smaller companies.”⁷¹ The turnover threshold for Qualifying Small Enterprises (QSEs) was raised from between R5m and R35m to between R10m and R50m.⁷² Exempt Microenterprises (EMEs), now consisting of businesses earning less than R10m in total revenue, automatically acquire status as a “Level Four Contributor” with a B-

0002-WERKSMANS-bbbee-booklet.pdf, at 6 (“Government policy has to date been based on the ‘voluntarist’ principle that the manner in which a firm applies BBBEE is to be decided by the individual firm. . . . [T]he [B-BBEE Amendment] framework introduces penalties in certain circumstances. This is an important departure from previous Government policy.”).

66. B-BBEE Amendment Act, *supra* note 60, §§ 10(a)-(d).

67. Codes of Good Practice, GN 112 of GG 29617 (9 Feb. 2007).

68. Millman, *supra* note 27.

69. Codes of Good Practice, GN 1019 of GG 36928 (11 Oct. 2013) [hereinafter Codes of Good Practice 2013], https://www.thedti.gov.za/economic_empowerment/docs/code_gud_practice10102013.pdf.

70. Amended Codes of Good Practice, GN 226 of GG 37453 (18 Mar. 2014), https://www.thedti.gov.za/economic_empowerment/docs/codes/Gov_gaz_37453.pdf.

71. Nigel Payne, *New BBBEE Codes Well Received*, HR FUTURE, <http://www.hrfuture.net/bee/new-bbbee-codes-well-received.php?Itemid=77> (last visited Nov. 29, 2015). *Cf.* Robyn Armstrong & Rita Spalding, *Revised DTI Codes Pave the Way for New Phase of B-BBEE*, ACC (July 5, 2014), <http://www.lexology.com/library/detail.aspx?g=294f6a11-4c9f-4c12-8e05-3e985f0732cc> (concluding that the Revised Codes “appear[] to be the start of a new, more stringent era of black economic empowerment”).

72. Codes of Good Practice 2013, *supra* note 69, § 5.1.

BBEE recognition level of one hundred percent,⁷³ thus allowing entrepreneurs to focus on developing profitable companies that provide employment opportunities without concerning themselves with potentially inefficient and expensive regulation compliance during the nascent phase of their enterprises. Furthermore, annual verification of B-BBEE performance against the scorecards no longer needs to be assessed by verified agents, thus mitigating compliance costs for QSEs and EMEs by enabling such enterprises to obtain sworn affidavits on an annual basis confirming their annual total revenue (R50m or less) and their level of black ownership.⁷⁴

The Revised Codes modified the generic scorecard by consolidating the Codes' original seven elements into only five elements: (1) ownership; (2) management control (which now includes the previous employment equity element); (3) skills development; (4) enterprise and supplier development (a consolidation of the previous preferential procurement and enterprise development scorecards); and (5) socio-economic development.⁷⁵ Priority is placed on ownership, skills development, and enterprise and supplier development, where failure to attain forty percent sub-minimum targets will automatically downgrade Large Enterprises (LEs) and QSEs one level in B-BBEE rating.⁷⁶ LEs that choose to focus on other B-BBEE requirements, besides the now-compulsory black shareholding requirements, will be "seriously and adversely impacted" because of the automatic two-level downgrade for failure to attain the ten percent minimum black ownership target.⁷⁷

The QSE scorecard has been discarded, and QSEs are now measured in terms of all five elements. QSEs are only required to comply with the minimum threshold requirements for the compulsory "ownership" element and *either* of the other two priority elements—"skills development" or "enterprise and supplier development"—in order to avoid the penalty of being downgraded one level.⁷⁸ LEs must comply with all three priority elements—as opposed to QSEs' need to attain merely two—thus demon-

73. *Id.* §§ 4.1, 4.2. About ninety-five percent of companies fall into the EME category. Singh, *supra* note 33. The Revised Codes scorecard is included in Figure 1 in the Appendix.

74. See Codes of Good Practice 2013, *supra* note 69, §§ 4.5, 5.3.3. This also creates a potential oversight problem of smaller companies, which now can more easily dupe the government about fulfillment of scorecard measures—thus providing room to exacerbate corruptive practices. These are also the companies most motivated to cheat statistics given their reliance on threshold B-BBEE categorizations for a competitive advantage. See Payne, *supra* note 71.

75. See Codes of Good Practice 2013, *supra* note 69, § 8.1; Webber Wentzel, *Draft Revised BBBEE Codes* (Oct. 2, 2012), <http://www.webberwentzel.com/wwb/content/en/ww/ww-opinion-and-perspective?oid=37439&sn=Detail-2011&pid=32709>. The Scorecard's weighting of the categories is presented in Figure 2 of Appendix.

76. See Codes of Good Practice 2013, *supra* note 69, § 3.3.3.

77. See Wentzel, *supra* note 75. The newly amended South African Mining Charter has increased the target ownership levels for mining companies' BEE compliance to twenty-six percent by 2014. Mining Charter Amendment, *supra* note 38.

78. See Wentzel, *supra* note 75; Codes of Good Practice 2013, *supra* note 69, § 3.3.2.2.

strating the government's more stringent practices for established companies with high revenues.⁷⁹

Overall, the Revised Codes have simultaneously given EMEs further leniency to avoid overregulation with extra time to incubate their enterprises, while placing higher expectations on LEs to implement BEE objectives. Verushca Pillay, Director of the Corporate and Commercial Practice at Cliffe Dekker Hofmeyr, concluded, "It will generally be more difficult for enterprises to achieve and possibly retain their current (and possibly, favourable) B-BBEE contributor status ratings under the [R]evised Codes as a result [of] the priority elements and the increase in weightings attached to the BEE compliance levels."⁸⁰ Critics remain skeptical of the Revised Codes and the government's attempt to push for greater compliance with BEE objectives by noting, "the change will be futile unless it is followed by an equally significant change in sector-specific transformation charters."⁸¹ Such charters have thus far remained unchanged.

D. Mineral and Petroleum Resources Development Act (MPRDA) and Amendment Bill

The MPRDA complements the BEE scheme in governing South Africa's development of its ample natural resources. The MPRDA was designed to force gas and oil mining companies to "compile a social or economic strategy plan to address . . . the results of past or present discrimination, transformation of the mining industry, skills development and the socio-economic development of communities that host the mine or supply labour to the mine."⁸² The government followed up by enacting the MPRDA Amendment Bill (MPRDA Amendment) in 2012 to curtail the MPRDA's "vague and ambiguous provisions,"⁸³ which fed into the exploitation of BEE and socio-economic objectives.

The MPRDA Amendment is a source of controversy, highlighted by the bill's passage in the South African Parliament without President Zuma's stamp of approval. The MPRDA Amendment elucidates the view that the

79. Codes of Good Practice 2013, *supra* note 69, § 3.3.2.1.

80. *BEE Revised Codes of Good Practice Transitional Period Extended to End April 2015*, CLIFFE DEKKER HOFMEYR (Mar. 19, 2014), <http://www.cliffedekkerhofmeyr.com/en/news/press-releases/2014/BEE/bee-revised-codes-of-good-practice-transitional-period-extended-to-end-april-2015.html>. A comparison of the point systems used in the Revised Codes and the Codes reflects the more stringent level of BEE-compliance in the Revised Codes in Figure 1 of the Appendix.

81. See Armstrong & Spalding, *supra* note 71.

82. Kloppers & du Plessis, *supra* note 25, at 93-94. The Act is intended for "the promotion of economic growth and advancement of the social and economic welfare of all South Africans through mineral and petroleum resource development." *Id.* See also Peter Leon, *Creeping Expropriation of Mining Investments: An African Perspective*, 27 J. ENERGY & NAT. RES. L. 597, 613-14 (2009) ("The Act gives effect to section 25(4)(a) of the South African Constitution, which . . . requires that reform measures be implemented to bring about equitable access to all South Africa's natural resources.").

83. See Leon, *supra* note 34, at 190.

minerals of the country “still belong[] to government and the citizens,”⁸⁴ by providing the government with a twenty percent “free-carry interest” in all new exploration and production rights for the oil and gas industry.⁸⁵ Furthermore, Parliament amended Section 11 of the MPRDA to require prior written approval from the Mineral Resources Minister (MRM) for the cession or sale of any interest in mining and prospecting rights, by deleting the exemption for mining companies listed on stock exchanges.⁸⁶ The concurrent expansions of state custodianship over petroleum resources and increased ministerial discretion “have conferred extensive new public law powers of control on the [MRM].”⁸⁷

While former MRM Susan Shabangu dismissed concerns that ministerial discretion would be arbitrary, she conceded that “[the MPRDA Amendment] will make sure the [MRM] continues to exercise, *in a discreet way*, his or her right in making South Africa a thriving environment.”⁸⁸ The MPRDA Amendment—if it goes into effect—represents a governmental power-grab to profit off of the country’s natural resources to the detriment of both rural community rights and public discourse.⁸⁹ This inherently places more power in the hands of the MRM, and thus provides leeway for

84. Leandi Kolver, *DMR renews focus on Mining Charter compliance*, MINING WEEKLY (July 3, 2014), <http://www.miningweekly.com/article/dmr-to-focus-on-mining-charter-compliance-improving-miners-lives-2014-07-03> (describing Minister Ngoako Ramatlhodi’s intent to give more effect to the Mining Charter in corporate governance of the mining industry).

85. See Zandile Mavuso, *MPRDA Concerns Linger as Industry Awaits President’s Verdict*, ENGINEERING NEWS (May 23, 2014), <http://www.engineeringnews.co.za/print-version/concerns-about-mprda-amendment-bill-linger-as-industry-awaits-presidents-verdict-2014-05-23-1>; Natasha Odendaal, *Ramatlhodi raises MPRDA Amendment Bill concerns*, MINING WEEKLY (June 19, 2014), <http://www.miningweekly.com/article/ramatlhodi-raises-mprda-amendment-bill-concerns-2014-06-19> (“The Bill . . . included an ‘uncapped’ further participation clause enabling the State to acquire up to a further 80% at an agreed price or under a production sharing agreement.”).

86. Otsile Matlou, mining director for the law firm Edward Nathan Sonnenbergs, concluded, “Should the amendment become law, shares of listed [petroleum mining] companies will effectively cease to be tradable.” See *MPRDA detrimental to SA’s mining industry*, MINING WEEKLY (Mar. 8, 2013), <http://www.miningweekly.com/article/mprda-detrimental-to-sas-mining-industry-2013-03-08>; Leon, *supra* note 82, at 624.

87. See Leon, *supra* note 82, at 627.

88. Allan Seccombe, *Ministerial discretion will not be arbitrary, says Shabangu*, BUS. DAY (Feb. 11, 2013) (emphasis added), <http://www.bdlive.co.za/business/mining/2013/02/11/ministerial-discretion-will-not-be-arbitrary-says-shabangu>.

89. See Leon, *supra* note 34, at 196 (“The [Amendment] Bill is replete with instances of vague and uncertain language and amplifies, rather than eliminates, the uncertainty created by the MPRDA.”). See also Mavuso, *supra* note 85 (reporting that the Land Access Movement of South Africa coordinator felt that there was collusion between the government and the private sector on issues related to mineral wealth and natural resources in rural areas). Hogan Lovells attorney Warren Beech believes the MPRDA Amendment being placed on hold by MRM Ngoako Ramatlhodi is a “positive move” for the mining industry. See *Delays in MPRDA Amendment approval is positive for South African Mining Industry*, LEXICOLOGY (Feb. 4, 2015), <http://www.lexology.com/library/detail.aspx?g=5e3054ff-4c86-48a0-9b64-2d91b4e066a3>.

potential corruptive practices paralleling the executive abuses observed in the government's enforcement of South Africa's other BEE-related laws.⁹⁰

III. Trickle-Down Corruption: Under-Enforcement and Executive Abuse

A. African National Congress Corruption

South Africa has signed domestic legislation⁹¹ and international treaties through which it is capable of enforcing anti-corruption measures and mitigating the endemic corruption present in both the private and public sectors.⁹² Corruption extends from enforcement agencies (like the police) to the most powerful figures within the executive branch, thereby limiting rectification, as “robust institutional responses appear to be hamstrung by intra- and inter-institutional manoeuvring which deflects as well as subverts the integrity of efforts to control and regulate anti-corruption enforcement.”⁹³ The South African President—who has been a member of the ANC since the introduction of universal democratic elections in 1994—may wield indirect control over enforcement mechanisms through his political appointees (such as department ministers), who are given tremendous discretion in their own right to implement the President's agenda.⁹⁴ While beloved civil rights activist and former President Nelson Mandela ethically guided the ANC's authority to bring about incremental development, his recent death symbolizes the dawn of a new era in which the ANC's power must be monitored closely and checked.

President Jacob Zuma—himself the subject of 783 counts of corruption that were dropped⁹⁵—has overseen a tumultuous regime that has faced numerous corruption charges encompassing the abuse of public funds,

90. Public concern over ministerial discretion is amplified considering the newly appointed MRM, Ngoako Ramatlhodi, has an occupational history that includes allegations that he received bribes from a social grants contractor. He also went on record criticizing South Africa's Constitution in 2011. See Chantelle Kotze, *New Minister has his work cut out for him as raft of issues require his attention*, MINING WEEKLY (July 4, 2014), <http://www.miningweekly.com/article/new-minister-has-his-work-cut-out-for-him-as-raft-of-issues-require-his-attention-2014-07-04-1>.

91. See generally Viothan Naidoo, *The Politics of Anti-Corruption Enforcement in South Africa* 4-5 (prepared for the XXII IPSA World Congress of Political Science, July 2012), http://paperroom.ipsa.org/papers/paper_10573.pdf (listing South African statutes and regulations passed by Parliament to combat corruption).

92. There are also numerous agencies that share anti-corruption responsibilities. See *id.* at Table 1 (charting the ten agencies that shared responsibility in 2001).

93. *Id.* at 1. See Cook, *supra* note 45, at 8 (“Public corruption levels are high, partly due to weak, abuse-prone financial and procurement systems; lack of capacity to monitor for and sanction abuses; and unequal wealth distribution.”).

94. Senior officials then foster a culture of fear that prevents junior officials from blowing the whistle on corrupt acts. See Naidoo, *supra* note 91, at 8 (citing a 2003 Public Service Commission report that details senior officials' abuse of authority by harassing and dismissing employees who report unfair labor practices).

95. See Jeremy Kutner, *In South Africa, corrupt prosecutors an ever-larger problem*, CHRISTIAN SCI. MONITOR (Jan. 2, 2014), <http://www.csmonitor.com/World/Africa/2014/0102/In-South-Africa-corrupt-prosecutors-an-ever-larger-problem>. Zuma's corruption allegations

from improvement of his rural Nkandla residence⁹⁶ to improper awarding of government contracts.⁹⁷ In early 2013, the Congressional Research Service reported, “Zuma stated that if a businessman joins the ANC, ‘your business will multiply. Everything you touch will multiply.’”⁹⁸ A 2011 survey by Transparency International recorded that sixty-eight percent of urban South Africans thought the police were “extremely corrupt,”⁹⁹ while Nhlanhla Mkhwanazi, South Africa’s former police chief, “admitted that he had been instructed many times . . . by ‘powers beyond us’ not to pursue certain cases.”¹⁰⁰ Amid the executive branch’s disinterest in curtailing its corruption within the context of South Africa’s parliamentary democracy, the judiciary branch has assumed greater responsibility.

B. The Judiciary Strikes Back

Given the corruption that consumes the South African government, courts recently have taken important steps to limit the President’s previously unchecked executive discretion to control, both directly and indirectly, the means of law enforcement. One such instance concerned President Zuma’s reinstatement of Richard Mdluli as the head of the crime intelligence section of the South African Police Commission (SAPS) following the prosecutor’s dropping of charges against Mdluli that included murder, attempted murder, intimidation, kidnapping, money laundering, fraud, theft, and corruption.¹⁰¹ Judge John Murphy of the North Gauteng

stemmed from a prosecution that led to the conviction of Zuma’s financial advisor for financial crimes, including charges related to a 1999, circa \$4.9 billion government arms deal with several large European firms. . . . [A]fter extensive legal proceedings the charges were dropped in 2009, in part due to alleged interference by [President] Mbeki in the case in a manner prejudicial to Zuma.

Cook, *supra* note 45, at 5.

96. See generally David Smith, *Jacob Zuma accused of corruption “on a grand scale” in South Africa*, THE GUARDIAN (Nov. 29, 2013), <http://www.theguardian.com/world/2013/nov/29/jacob-zuma-accused-corruption-south-africa> (alleging that President Zuma misappropriated millions of government dollars worth of upgrades for his Nkandla residence in KwaZulu-Natal under the guise of security infrastructure).

97. President Zuma’s regime embodies the ANC’s inherited “institutional legacy of corruption” from the National Party’s Apartheid regime “based on conditions of secrecy, oppression and authoritarian rule.” See Naidoo, *supra* note 91, at 3. The ANC has a history of abusing discretion since coming to power, seen in particular in the “Arms Deal” controversy concerning the South African government’s strategic procurement programme. A Joint Investigation Report, authored by the Auditor-General, the National Prosecuting Authority, and the Public Protector, observed interference and non-cooperation from executive institutions “which was most notably enabled by an orchestrated attempt within the governing ANC to forestall the momentum of the investigation, which effectively reduced the depth of the probe and force of its findings and with it the independent investigatory standing of the agencies concerned.” *Id.* at 12.

98. Cook, *supra* note 45, at 10.

99. *Something very rotten*, THE ECONOMIST (June 23, 2012), <http://www.economist.com/node/21557385>.

100. Kutner, *supra* note 95. Just over a month after Mkhwanazi declared his intent to clean up the police ranks, he was removed from his post. See *Something very rotten*, *supra* note 99.

101. See Kutner, *supra* note 95; *Something very rotten*, *supra* note 99 (arguing that “Mdluli, then still head of the police crime intelligence unit, had given a secret report to

High Court in Pretoria, who deemed the prosecutor's withdrawing of the charges against Mdluli "illegal, irrational, based on irrelevant considerations and material errors of law, and ultimately so unreasonable that no reasonable prosecutor could have taken it,"¹⁰² ordered the police to resume the Mdluli proceedings and had the Directorate for Priority Crime Investigation (DPCI) file a complaint against the prosecutor responsible for dropping the charges.¹⁰³

Another flexing of judicial muscle concerned political appointees heading the National Prosecuting Authority (NPA), an organization responsible for instituting and conducting criminal proceedings on behalf of the State.¹⁰⁴ The Constitutional Court invalidated the tenure of Menzi Simelane as head of the NPA, describing President Zuma's appointment as "irrational" given clear evidence of Simelane's dishonesty.¹⁰⁵ Furthermore, the Constitutional Court dismissed personal relationships as a proper justification to overlook specific credentials of a political appointee, potentially adding a reasonableness criterion to the appointment of certain government employees.¹⁰⁶

The landmark case that imposes limitations on executive discretion in the enforcement of anti-corruption legislation is *Glenister v. President of the Republic of South Africa and Others*.¹⁰⁷ The case vindicates combating corruption as a national priority, embracing South Africa's ratified international treaties as viable sources for enforcing the South African government's obligations to run independent anti-corruption agencies. The Directorate of Special Operations (DSO, or "Scorpions"), an independent department housed within the NPA, contained a combination of investigative and prosecutorial functions that contributed "to the motivation employed by the government to restructure the DSO which effectively led to its dissolution in 2009."¹⁰⁸ In 2005, President Mbeki convened the Khampepe Commission to review concerns about the Scorpions' opera-

Mr[.] Zuma, alleging a plot by senior party members to remove him as leader of the ruling African National Congress" to secure Zuma's loyalty).

102. Kutner, *supra* note 95.

103. *See id.*

104. *See generally About the NPA, THE NAT'L PROSECUTING AUTH. OF S. AFR.*, <https://www.npa.gov.za/node/8>.

105. *See Democratic Alliance v. President of South Africa and Others* 2013 (1) SA 248 (CC) at paras. 86-88 (S. Afr.) ("The President too should have been alerted by the adverse findings of the Ginwala Commission against Mr[.] Simelane and ought to have initiated a further investigation for the purpose of determining whether real and important questions had been raised about Mr[.] Simelane's honesty and conscientiousness."); Kutner, *supra* note 95.

106. *See Democratic Alliance v. President of South Africa and Others* 2013 (1) SA 248 (CC) at para. 88 (S. Afr.) (concluding that President Zuma should have initiated further investigation into Menzi Simelane's credentials "despite his knowledge of Mr[.] Simelane as a person"). Simelane, however, was replaced by Nomgcobo Jiba, who was suspended from the NPA for trying to block the prosecution of disgraced former police commissioner Jackie Selebi, thus exemplifying the limits of judicial policing of executive appointees without further reform. *See* Kutner, *supra* note 95.

107. *Glenister v. President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (S. Afr.).

108. Naidoo, *supra* note 91, at 13.

tions, which created many cases implicating ANC politicians, including the SAPS commissioner and Jacob Zuma (President of the ANC Congress at the time).¹⁰⁹ Zuma's transferring of the DSO to the South African Police Service's jurisdiction—and relabeling the unit as the Directorate for Priority Crime Investigation (DPCI, or “Hawks”)—thus effectively eliminated the unit's independence because of its newfound accountability to an ANC-appointed commissioner. The unnecessary reforms to the most effective anti-corruption unit in South Africa spurred public criticism alleging that the ANC translucently acted to protect senior officials from being investigated for corrupt practices.¹¹⁰

The *Glenister* court determined that “failure on the part of the state to create a sufficiently independent anti-corruption entity infringes . . . the rights to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights” because corruption erodes the rights asserted in the Bill of Rights and the duties imposed on the State in section 7(2) of the Constitution.¹¹¹ The State's obligation to create an independent anti-corruption entity is “constitutionally enforceable” by the court because “it is sourced from our legislation and from our domesticated international obligations and is therefore an intrinsic part of the Constitution itself [through section 231] and the rights and duties it creates.”¹¹² Notably, the court's holding placed an emphasis on the terms of international agreements, construing that the State's international obligation to create a domestic independent anti-corruption entity derived from “the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law, and their domestic legal impact” through sections 39(1)(b) and 7(2).¹¹³ The majority summarized its position by stating, “the statutory framework creating the DPCI offends the constitutional obligation resting on Parliament to create an independent anti-corruption entity, which is both intrinsic to the Constitution itself and which Parliament *assumed* when it approved the relevant international instruments, including the UN Convention [Against Corruption].”¹¹⁴

The court also provided criteria to evaluate an agency's independence within its rejection of the ANC's indirect dismantling of the Scorpions. The two most egregious limitations placed on the DPCI were “the absence of secure tenure protecting the employment of the members of the entity and in the provisions for direct political oversight of the entity's functioning.”¹¹⁵ DPCI members need special protection to mitigate potential threats from senior officers when undertaking politically unpopular inves-

109. Melea Lewis & Philip Stenning, *Considering the Glenister Judgment: Independence Requirements for Anti-Corruption Institutions*, 39 S. AFR. CRIME QUART. 11, 12 (2012), <http://www.ajol.info/index.php/sacq/article/viewFile/101418/90605>.

110. Naidoo, *supra* note 91, at 14.

111. *Glenister* 2011 (3) SA 347 (CC) at paras. 198–200.

112. *Id.* at para. 197.

113. *See id.* at para. 201.

114. *Id.* at para. 248 (emphasis added).

115. *Id.* at para. 213.

tigations or prosecutions.¹¹⁶ The court opined, “[T]he power of the Ministerial Committee to determine guidelines appears to be untrammelled. . . . [S]enior politicians are given competence to determine the limits, outlines and contents of the [DPCI’s] work. That in our view is inimical to independence.”¹¹⁷ The extensive power senior politicians wielded created a conflict of interest, which inevitably stymied the agency’s work and thus eradicated its required independence.

Through these recent adjudications, the Constitutional Court has accentuated anti-corruption enforcement as a national priority while taking steps to mitigate unhindered patronage and executive discretion. The judicial interpretation of international treaties lends another tool by which the South African government may create affirmative obligations—in giving meaning to provisions in the Constitution and Bill of Rights—to strengthen its institutions in the face of antithetically entrenched ANC politicians and their executive discretion.¹¹⁸

IV. Combatting Corruption En Masse

A. The South Africa Constitution and Incorporation of International Law

The South Africa Constitution section 39(1) states: “When interpreting the Bill of Rights, a court, tribunal, or forum . . . (b) *must consider international law*; and (c) may consider foreign law.”¹¹⁹ It later reads, “Customary International law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”¹²⁰ These constitutional provisions, and others similarly apparent in fellow African countries like Kenya and Zambia, underscore South Africa’s understanding that there is a need for common international solutions to solve universal crises in the context of globalization, liberalization, and regionalism.¹²¹ Such realizations have encouraged African nations to incorporate aspects of international and foreign law where courts have determined it is necessary to “promote the spirit, purport and objects of the Bill of Rights,”¹²² in manners not inconsistent with the countries’ own interpretations. Incorporation of international law equips the South African courts with tools to enforce more strictly international principles asserted through treaties and

116. See *id.* at para. 226.

117. *Id.* at paras. 230–34.

118. “The courts are critical monitors of legality of governmental actions, which no lawful government acting in good faith should seek to evade The judiciary must be allowed to exercise its constitutional functions, including the power of judicial review of executive and legislative acts, which is necessary for democratic governance.” Udombana, *supra* note 18, at 1272–73.

119. S. AFR. CONST., 1996, § 39(1) (emphasis added).

120. *Id.* § 232.

121. See Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439, 440 (2012).

122. S. AFR. CONST., 1996, § 39(2).

conventions where domestic action fails to yield satisfactory results.¹²³

The effect of these South African constitutional provisions is that “instruments which contain rules considered to be customary international law are automatically applicable in . . . South Africa[] as part of national law and must therefore be taken into account in any interpretation of the constitution.”¹²⁴ When considering international law within interpretation of the South Africa Constitution, courts are required to consult all sources of law that are recognized by article 38(1) of the Statute of the International Court of Justice.¹²⁵ Such explicit references to international and foreign law within the Constitution warrant a more progressive approach to constitutional and statutory interpretation, especially in a newly democratic country with developing bureaucratic institutions.

Countries, like South Africa, containing high levels of corruption are motivated to sign international treaties because “international donor agencies and organizations, including the World Bank, European Union, and International Monetary Fund, emphasize good governance as a predicate for cooperation with, or assistance to, African countries.”¹²⁶ More recently, however, there are constitutional arguments that South Africa may be obligated to give more force to its international agreements pertaining to corruption because the siphoning off of government money, otherwise earmarked for the citizenry, prevents the State from “tak[ing] reasonable legislative and other measures, *within its available resources*, to achieve the progressive realisation” of rights like healthcare, food, water, and housing—which are all enunciated in the Constitution.¹²⁷ Corruption’s innate draining of the pool of available resources¹²⁸ may jeopardize the government’s

123. See Fombad, *supra* note 121, at 464 (“The fact that many constitutions expressly or implicitly provide for references to international or foreign law combined with the growing convergence of constitutional law principles and standards necessitates a more liberal and progressive approach to constitutional adjudication.”); *Glenister v. President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (S. Afr.).

124. Fombad, *supra* note 121, at 445. Furthermore, South Africa has a duty to further a good faith effort to embody the standards to which they have contracted in signing international treaties, decrees, declarations, and agreements. See Eustace Chikere Azubuike, *The Place of Treaties in International Investment*, 19 ANN. SURV. INT’L & COMP. L. 155, 176–78 (2013) (“[T]he principle of *pacta sunt servanda* . . . has been described by the International Law Commission as ‘the fundamental principle of the law of treaties’ . . . [I]t is not merely consent that binds the State but the legal system that makes it mandatory for a State not to dishonor its consensual obligation.”). See also S. AFR. CONST., 1996, § 233 (“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”).

125. Hoffman, *supra* note 26, at 110 (listing available sources of law in article 38(1), including international conventions, international customs, the general principles of law recognized by civilized nations, and judicial decisions).

126. See Oko, *supra* note 3, at 187.

127. This is a recurring phrase utilized within the Constitution in reference to the government’s obligations to fulfill certain socio-economic rights. See S. AFR. CONST., 1996, §§ 26, 27 (emphasis added).

128. See Kutner, *supra* note 95 (“A special federal investigating unit estimates that South Africa loses about \$3 billion annually to corruption and fraud.”); Taylor, *supra* note 59 (“The public sector has become a cash-cow for a political elite rather than a provider of good public services.”).

ability to give effect to the positive obligations imposed by the Constitution, while simultaneously violating the State's negative obligation not to interfere with the exercise of civil, political, and socio-economic rights.

B. South Africa in the World: The Big Four Conventions

South Africa is currently a party to four major conventions: The United Nations Convention Against Corruption (UNCAC), the African Union Convention on Preventing and Combating Corruption (AUCPCC), the Organisation for Economic Co-operation and Development Anti-Bribery Convention (OECDABC), and the Southern Africa Development Community Protocol Against Corruption (SADCPAC). Following the Constitutional Court's reasoning in *Glenister*, these four international conventions' principles and tangible goals may be constitutionally enforceable and have a domestic legal impact based on the Constitution's careful wording. Thus, closer examination of the conventions may provide grounds for strengthening certain anti-corruption apparatuses in the country.

1. *The United Nations Convention Against Corruption (UNCAC)*

UNCAC is the most expansive international agreement combating corruption worldwide, binding 172 state parties, including South Africa as of November 22, 2004.¹²⁹ The document requires all signatories to adopt domestic provisions to strengthen measures for combatting corruption; facilitating international cooperation; and promoting integrity, accountability, and proper management of public affairs and property.¹³⁰ The all-encompassing convention holds countries accountable to implement domestic measures to prevent numerous types of corruption (including money laundering and conflicts of interest) by codifying provisions to weaken corruption's deleterious effects: public management of public finances, legal disclosure requirements, international cooperation, asset recovery, technical assistance, and information exchange. Signatories even acknowledge that corruption's crippling negative externalities disproportionately affect the poor.¹³¹ UNCAC considers corruption to be a "transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it *essential*."¹³² Beyond these doctrinal assertions, the United Nations expressly outlines obliga-

129. *United Nations Convention Against Corruption Signature and Ratification Status as of September 5, 2014*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

130. United Nations Convention Against Corruption art. 7, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC], https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

131. See *id.* at iii ("Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.").

132. *Id.* at pmb1. (emphasis added).

tions for signatories to implement practices that give effect to bureaucratic transparency and accountability.

UNCAC mandates that each state must establish independent anti-corruption bodies and install an accountable rule of law¹³³—this is the duty that is enforced by the Constitutional Court in *Glenister*.¹³⁴ Another key provision requires each state to “adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and . . . other non-elected public officials,” based on efficiency, transparency, and merit, and performed through proper selection and training procedures.¹³⁵ UNCAC contemplates the procurement and management of public finances by requiring governments to distribute information publicly regarding procedures for the awarding of government contracts, the use of objective criteria in selections, and the implementation of *effective* domestic review and appeal systems.¹³⁶ The domestic transparency overhaul includes having signatories periodically publish information about administrative practices, as well as institute procedures to allow the general public access to information detailing the government’s decision-making process.¹³⁷

UNCAC further restricts relationships between the private and public sectors by obligating states to prevent conflicts of interest “by imposing restrictions . . . on the professional activities of former public officials or on the employment of public officials by the private sector,” where the activities relate to officials’ public sector duties during their tenure.¹³⁸ Concerning those public officials who are convicted of committing corrupt acts, UNCAC advocates for States to establish procedures to disqualify perpetrators from holding public office or office in a State-owned enterprise for a period of time.¹³⁹ Beyond these specific provisions, UNCAC encourages States to adopt domestic legislation and agencies to characterize various forms of corruption as criminal offenses, and to provide the means to prosecute and prevent such corruption.¹⁴⁰

2. *OECD Anti-Bribery Convention (OECDABC)*

The Organisation for Economic Co-operation and Development Anti-

133. *See id.* at art. 5, 9-10.

134. *See supra* Part III.B. The duty to maintain an independent law enforcement body that specializes in combating corruption is detailed further in UNCAC, *supra* note 130, at art. 36.

135. UNCAC, *supra* note 130, at art. 7, 10 (attempting to limit patronage, cronyism, and conflicts of interest in government).

136. *See id.* at art. 9, 12 (emphasis added).

137. *See id.* at art. 10, 13.

138. *See id.* at art. 12, 14. If South Africa effectively implemented this regulation, this would give rise to violations against members of the Department of Mineral Resources who were “sold” an ownership stake in the Gold Fields BEE deal.

139. *Id.* at art. 23, 30. This expands beyond the B-BBEE Amendment’s new restrictions by removing crooked politicians from the desirable patronage network within the government.

140. *See id.* at art. 65 (“Each State Party shall take the necessary means . . . to ensure the implementation of its obligations under this Convention.”).

Bribery Convention builds on the foundation laid by UNCAC,¹⁴¹ offering more subjective guidelines in some corruption topics. The OECDABC urges enterprises to adjust customary due diligence practices by “taking into account the particular bribery risks facing the enterprise,” like geographical and industrial sectors of operation.¹⁴² It also mentions that States should maintain appropriate oversight of agents to ensure that remuneration is for legitimate services only, going so far as to produce lists of agents engaged in connection with public bodies and State-owned enterprises for easy production to the authorities.¹⁴³ The Council Recommendation suggests that member countries revisit the adequacy of external audit requirements on companies, taking measures to assure independence and proper reporting procedures.¹⁴⁴

The Council Recommendation pushes government agencies to incorporate appropriate internal company controls, ethics, and compliance programs when making decisions for granting “public advantages, including public subsidies, licences, [and] public procurement contracts.”¹⁴⁵ It also specifically notes that enterprises should “[n]ot make illegal contributions to candidates for public office or to political parties or to other political organisations.”¹⁴⁶ Thus far, South Africa has failed to implement the reforms expressed in OECDABC according to a March 2014 report published by Transparency International, which indicated that South Africa has never initiated a single prosecution involving foreign bribery.¹⁴⁷ Such reforms, however, potentially provide further means for courts to limit corruptive practices.

141. Org. for Econ. Co-operation and Dev. (OECD), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, at pmb1. (Nov. 26, 2009), <http://www.oecd.org/daf/anti-bribery/44176910.pdf> [hereinafter Council Recommendation] (“Recognising that the OECD Anti-Bribery Convention and the United Nations Convention against Corruption (UNCAC) are mutually supporting and complementary.”).

142. *Combating Bribery, Bribe Solicitation and Extortion*, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES para. 4 (2011), <https://mneguidelines.oecd.org/2011CombatingBribery,BribeSolicitation&Extortion.pdf>.

143. *Id.* Appropriate oversight could come from a variety of mechanisms, for example by requiring that State agents provide tax returns, account for discretionary decisions, and disclose conflicts of interest from political or familial connections.

144. Council Recommendation, *supra* note 141, at (X)(B)(i)-(ii). This could be more stringently enforced in South Africa to invalidate the B-BEE Amendment’s relaxation of required external auditing requirements for QSEs and EMEs, which could breed corruption in motivated companies that abuse such leniency. See discussion *supra* Part II.C.

145. See Council Recommendation, *supra* note 141, at (X)(C)(vi).

146. *Combating Bribery, Bribe Solicitation and Extortion*, *supra* note 142, at para. 7. This is especially important in South Africa where “it is ‘routine’ for government officials to guide companies to preferred partners under Black Economic Empowerment ownership initiatives.” Millman, *supra* note 27 (quoting Beatrice Hamza Bassey, partner at Hughes Hubbard & Reed’s global anti-corruption practice).

147. SA *Failing to Implement OECD Convention*, CORRUPTION WATCH (Oct. 23, 2014), <http://www.corruptionwatch.org.za/sa-failing-to-implement-oecd-convention/>.

3. *Southern Africa Development Community Protocol Against Corruption (SADCPAC)*

Most tellingly, SADCPAC was enacted with an express purpose of “strictly enforcing legislation against all types of corruption,”¹⁴⁸ which may be read as an intention for ratifying States to maintain an expansive view of corruption measures in the context of domestic adjudication. Besides outlining the basic contours of anti-corruption policy and stressing its gravity, SADCPAC imputes affirmative obligations on signatories to adopt preventative measures. The most important preventive measure contemplated by the SADC is the strengthening of systems of government procurement of goods and services “that ensure transparency, equity and efficiency of such systems,”¹⁴⁹ and serve as “deterrents to the bribery of domestic public officials.”¹⁵⁰ States Parties are obligated to harmonize domestic policies and legislation to attain these anti-corruption goals.¹⁵¹ Otherwise, SADCPAC closely parallels the objectives and remedies outlined by UNCAC and OECDACB.

4. *African Union Convention on Preventing and Combating Corruption (AUCPCC)*

Similarly to UNCAC and the OECD, the AU contemplates strengthening independent national anti-corruption authorities and adopting measures to improve internal accounting and auditing “in particular, in the . . . procurement and management of public goods and services.”¹⁵² The AUCPCC also urges that States Parties “commit themselves” to establishing an internal committee tasked with monitoring a code of conduct for public officials, who must undergo training in ethics.¹⁵³ Generally, the AUCPCC echoes initiatives (such as adopting legislative and other measures to combat corruption at large, and fostering continental and international cooperation¹⁵⁴) stated in the other three international conventions.

Given the international consensus that corruption is an issue that requires transnational cooperation, South Africa should show more deference to its international agreements combatting corruption when considering how to apply anti-corruption standards to its domestic dilemmas. The South Africa Constitution specifically contemplates incorporating interna-

148. SADC Protocol Against Corruption pmb., (Aug. 14, 2001), http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf.

149. *See id.* at art. 4(1)(b).

150. *Id.* at art. 4(1)(h). These initiatives require that companies maintain clean accounting books and “have sufficient internal accounting controls to enable the law enforcement agencies to detect acts of corruption.” *See id.*

151. *See id.* at art. 7(1).

152. African Union Convention on Preventing and Combating Corruption art. 5(3)-(4), July 11, 2003, 43 I.L.M. 5 [hereinafter AU Corruption Convention], http://www.au.int/en/sites/default/files/treaties/7786-file-african_union_convention_preventing_combating_corruption.pdf. *See discussion supra* notes 143-44 (arguing for application of more stringent auditing controls to BEE implementation).

153. *See* AU Corruption Convention, *supra* note 152, at art. 7(2).

154. *See id.* at art. 11, 19.

tional law within its own legislative, executive, and judicial processes to give full effect to the Bill of Rights. Corruption's disproportionate negative externalities on the poor also arguably invoke issues of "human dignity, equality and freedom," which the State is obligated to "respect, protect, promote and fulfil[l]" by constitutional mandate.¹⁵⁵ This interpretation would furnish the courts with another justification to limit executive discretion for decisions that, while possibly legal in South African jurisprudence, would otherwise fail international standards for anti-corruption measures given effect through the four conventions to which South Africa is a party.

There are a number of provisions present within the four conventions that afford South African courts an opportunity to expand the judiciary's role in policing unbridled discretionary executive powers. Domestic judicial enforcement of these provisions could radically alter the incentive system for companies like Gold Fields to comply with government threats in awarding government contracts, while holding executives accountable for their corrupt actions. Most importantly, these treaties provide South Africa with the potential to empower citizens to monitor their government's actions where the ANC, or any future dominant political party, is unwilling to deviate from the status quo.

Conclusion

South Africa finds itself at a crossroads following the death of its revolutionary leader, Nelson Mandela, a man who symbolized black empowerment within his idealism and reconciliation. Going on twenty years of universal democracy, the nation still faces many of the same challenges it did at the abrogation of Apartheid—both economically and politically. Although parliamentary democracies have flourished throughout the world, particularly in Europe and the traditional "West," the effectively combined powers of the executive and legislative branches in South Africa's dominant party democracy¹⁵⁶ have armed endemically corrupt ANC leaders with the means to sustain their unhindered practice of executive abuse behind the curtains of institutional memory.¹⁵⁷ Despite Parliament's efforts to pass new legislation to realize BEE principles beyond the politically connected black elite, the B-BBEE Act, Codes, and MPRDA (and their progeny) all provide enough ministerial or senior official discretionary powers for ANC leaders to convolute BEE-related objectives to the benefit of self-interested ANC members.

South Africa's Constitution, uniquely borrowing from German,

155. See S. AFR. CONST., 1996, §§ 7(1)–(2).

156. See *A Look Back at National Election Results*, *supra* note 17.

157. See Raymond Suttner, *Party Dominance "Theory": Of What Value?*, 33 *POLITIKON* 277, 289 (2006) (arguing that the ANC may conflate state and party in various appointments where people do not necessarily merit such placements, thus impeding the functioning of bureaucratic institutions).

French, and English models of constitutional law,¹⁵⁸ was written more than 200 years after the United States Constitution. Its framers understood the dangerously polarized South African citizenry—socially, politically, and economically—and included provisions that imposed positive obligations upon the government to consummate numerous socio-economic rights that had previously been denied to the majority of its citizens. Furthermore, the framers prophetically understood that international norms codified by treaties could serve as powerful tools to protect vulnerable citizens from a dominant political party in a country with a history of authoritarianism.¹⁵⁹

The strong and independent South African judiciary—following recent adjudications that charged corrupt prosecutors, enforced political appointee credentials against the President's will, and imposed international standards to effectuate domestic anti-corruption obligations¹⁶⁰—has proven to be the most effective governmental branch in combatting corruption. By introducing meaning into the Constitution's express provisions for socio-economic rights and purposeful incorporation of international law provisions, the courts have actualized the framers' intent by circumventing legislative holes previously filled by ANC-controlled executive preferences. While most of the adjudications limiting executive discretion have centered around corruption within law enforcement mechanisms, the same justifications and constitutional arguments can be applied to realize citizens' rights to express socio-economic rights. Corruption has proven to be an endemic issue in South Africa that affects the government's ability to fund programs empowering citizens in every phase of life, thus necessitating stricter scrutiny from the courts, continued progress from legislature bills, and responsible enforcement from the executive branch—beginning with the President and his ministers.

158. See Fombad, *supra* note 121, at 466 (“The South African 1996 constitution is an example of cross-systemic fertilization with borrowings from the English Westminster model and the German and French civil law constitutional systems.”).

159. See discussion *supra* note 19.

160. See discussion *supra* Section III.B.

Appendix

Figure 1:

B-BBEE Status	Old BBSEE Codes Point Required	Amended B-BBEE Codes Points Required	B-BBEE Recognition Level
Level One Contributor	≥ 100 points	≥ 100 points	135%
Level Two Contributor	≥ 85 but < 100 points	≥ 95 but < 100 points	125%
Level Three Contributor	≥ 75 but < 85 points	≥ 90 but < 95 points	110%
Level Four Contributor	≥ 65 but < 75 points	≥ 80 but < 90 points	100%
Level Five Contributor	≥ 55 but < 65 points	≥ 75 but < 80 points	80%
Level Six Contributor	≥ 45 but < 55 points	≥ 70 but < 75 points	60%
Level Seven Contributor	≥ 40 but < 45 points	≥ 55 but < 70 points	50%
Level Eight Contributor	≥ 30 but < 40 points	≥ 40 but < 55 points	10%
Non-Compliant Contributor	< 30 points	< 40 points	0%

Nicolene Schoeman-Louw, *BBBEE Compliance: Why it is Relevant Now!*, ENTREPRENEUR MAG. (Aug. 14, 2014) <http://www.entrepreneurmag.co.za/advice/doing-business-in-sa/bee/bbbee-compliance-why-it-is-relevant-now/>.

Figure 2:

Element	Weighting	Code series reference
Ownership	25 points	100
Management Control	15 points	200
Skills Development	20 points	300
Enterprise and Supplier Development	40 points	400
Socio-Economic Development	5 points	500

Codes of Good Practice, GN 1019 of GG 36928, § 8.1 (11 Oct. 2013), https://www.thedti.gov.za/economic_empowerment/docs/code_gud_practice10102013.pdf.