

https://dspace.org/

In search of Hercules: Democracy, constitutionalism and the South African Constitutional Court

Van Huyssteen, Elsa

1996-10-07
http://hdl.handle.net/10539/9914

Downloaded from a DSpace repository. https://dspace.org/



UNIVERSITY OF THE WITWATERSRAND

INSTITUTE FOR ADVANCED SOCIAL RESEARCH

SEMINAR PAPER
TO BE PRESENTED IN THE RICHARD WARD BUILDING
SEVENTH FLOOR, SEMINAR ROOM 7003
AT 4PM ON THE **7 OCTOBER 1996**.

TITLE: In Search of Hercules: Democracy, Constitutionalism and the South African Constitutional Court

BY: **ELSA VAN HUYSSTEEN**

NO: 410

In Search of Hercules : Democracy, Constitutionalism and the South African Constitutional Court

Elsa van Huyssteen

> "Hercules is the epitome of the mythical hero, the representative of the superhuman elements in the makeup of myth : the monster-slayer, the traveller on extraordinary journeys, giant in strength and stature, invincible, yet predestined to suffer great ordeals... just as his life bears the aspirations of humanity to be superhuman, so in the end he fulfils the hero's other supreme task of expressing an unavoidable destiny"[1].

1. Introduction

The Interim Constitution of South Africa which came into effect on 27 April 1994 established a new law-government relationship characterised by constitutionalism, a relationship which will be confirmed by the final Constitution. Constitutionalism subordinates the decisions and actions of a democratically elected legislature to the constitution and the body responsible for enforcing it.[2] In South Africa, this body is the Constitutional Court[3]. Constitutionalism is a fundamental element of liberal legal ideology, and a widely accepted model of liberal democracy, as it is argued that only in this way can certain rights which are fundamental to the successful operation of a democracy be protected from the transient will of the majority[4].

However, in both the African and the South African contexts the merits of constitutionalism are not that readily accepted. Okoth-Ogendo documents the "emphatic rejection of the classical notion of constitutionalism"[5] by the majority of African states, and Nolutshungu points out that the idea of constitutionalism was not one "easily found in the discourse of the South African liberation movement"[6]. And indeed when the eleven judges on the new South African Constitutional Court, in the first case before them, unanimously declared the death penalty unconstitutional[7], it provoked a public outcry and wide-spread condemnation of the decision as undemocratic and contrary to the will of the majority, accompanied by calls for a

---

[1]M. Senior, *Who's Who in Mythology* (London, 1985).

[2]P.J.J. Olivier, 'Constitutionalism in the New South Africa', in R.A. Licht and B. De Villiers (eds.) *South Africa's crisis of constitutional Democracy : Can the US Constitution help ?* (Cape Town, 1994).

[3]Section 98(2) in interim *Constitution of the Republic of South Africa* Act 200 of 1993. Of course, all courts in South Africa are bound by the constitution as the basic law of the land and will in this way enforce it (e.g. by ruling that the state had infringed the rights of an accused whose confession was extracted by means of coercion), but the Constitutional Court is the only court which is empowered to enquire into and pronounce on the constitutionality of legislation.

[4]F.H.Willhoite, *Power and Governments* (California, 1988), pp 123, 127.

[5]H.W.O. Okoth-Ogendo, 'Constitutions without constitutionalism : Reflections on an African political paradox' in I.G. Shivji (ed.) *State and Constitutionalism : An African Debate on Democracy* (Harare, 1991), p 5.

[6]S. Nolutshungu, 'The Constitutional Question in South Africa' in I.G. Shivji (ed.) *State and Constitutionalism : An African Debate on Democracy* (Harare, 1991), pp 93-94.

[7]*S v Makwanyane and another* CCT 3/94

referendum on the issue[8]. This illustrated that a large number of South Africans might not understand or like the system of constitutionalism, as they believe that democracy means that the majority gets what it wants. This tension between constitutionalism and popular democracy is noted by Dennis Davis when he asks : "can it not be argued that a body that has not been elected, and is not otherwise politically responsible to an electorate, is undermining democracy by telling a democratically elected body what it can and cannot do ?"[9]

This paper will argue that there is indeed a tension between constitutionalism and the aims of popular democracy, and that the commitment to constitutionalism on the part of all the significant political parties in South Africa is a central feature of the elite-pacted nature of the transition to democracy. Du Plessis and Corder note the growing enthusiasm, in the late eighties, for human rights and constitutionalism in National Party (NP) and government circles, as a result of the realisation that this can be a very effective way of protecting vested interests during and after the transition[10]. During the process of negotiations, the model of democracy proposed by the African National Congress (ANC) changed dramatically from an emphasis on a strong central state, popular democracy and a high degree of participation, to a commitment to decentralisation of power, liberal democracy and constitutionalism.

It will also be argued, however, that constitutionalism is not inherently incompatible with popular democratic ideology, and that it can in fact be a way of broadening the base of popular participation in government as well as a way of entrenching government accountability, especially in the arena of human rights. This view of constitutionalism accommodates the popular democratic demand for a central role for civil society in the process of democratisation and the subsequent consolidation of democracy[11]. The purpose of this paper is thus clearly not to condemn constitutionalism. On the contrary, it is based on an acceptance of the need for the protection of human rights and the development of a human rights culture in the context of the heterogeneous and historically strife-torn South African society. There is reason for concern, however, about the legitimacy of constitutionalism as a system of government in the eyes of the majority of South Africans, as illustrated by public reaction to the death penalty decision and other decisions that affect the criminal law[12], and it is therefore important to investigate the possibility of reconciling constitutionalism, as an institution of liberal democracy, and the aims of popular democracy in South Africa.

A central assumption of this paper is that the solution to the tension between constitutionalism and popular democratic ideology in South Africa lies in the concept of human rights,

---

[8]The Star, 15 February 1995: 5; The Star 28 June 1995 : 16; The Sunday Times, 11 June 1995 : 5; The Star, 23 September 1996.

[9]D. Davis 'Social Power and Civil Rights : Towards a New Jurisprudence for South Africa' in *The South African Law Journal*, 108, 1991, pp 462-463.

[10]L. Du Plessis and H. Corder, *Understanding South Africa's Transitional Bill of Rights* (Cape Town, 1994) p 32.

[11]See, e.g. R. Fine 'Civil Society Theory and the Politics of Transition in South Africa' in *Review of African Political Economy*, 55, 1991.

[12]For example the decision that allows accused access to police dockets - *Shabalala and others v Attorney-General (Transvaal) and another* CCT23/94.

particularly social and economic rights, as it can expand the base of civil society participation in government and entrench government accountability, but this will depend on the level of legal mobilisation[13] in civil society and, importantly, on the way in which the Constitution is interpreted. The South African Constitutional Court has been entrusted with the task of bringing the Constitution to life, and in the process the Court has the opportunity to entrench and maintain the new South African democracy. This role of the Court is, however, fraught with dilemmas, and its success will largely depend on the extent to which the Court balances the competing requirements of autonomy and accountability : "too much accountability and the [Court] becomes the tool of the democratic majority; too much autonomy and the [Court] loses the democratic legitimacy necessary to justify its powerful role"[14].

In order to explore this balancing act, Ronald Dworkin invented Hercules, a judge of "superhuman skill, learning, patience and acumen"[15]. Hercules rejects the idea "that judges must defer to elected officials, no matter what part of the constitutional scheme is in question" and will assume that the point of some provisions of the Constitution is to protect democracy, and of others to protect individuals and minorities against the will of the majority, "and he will not yield, in deciding what those provisions require, to what the majority's representatives think is right". On the other hand, Hercules will "refuse to substitute his judgement for that of the legislature when he believes the issue in play is primarily one of policy rather than principle", for example when the argument is about the best strategies for achieving the eradication of poverty[16]. These are the decisions faced by the South African Constitutional Court in its attempt to avoid the potential for tyranny or courtocracy inherent in a constitutional order such as South Africa's. The Court has the power to give effect to the new democracy and to protect it from abuses by providing an expanded forum for participation and by entrenching government accountability, but in order to do this it has to balance accountability to the public and autonomy from vested interests, including those of the majority. This is the monster that the Court must slay on its extraordinary journey, and the central focus of this paper is an investigation of the ways in which the Court has addressed this dilemma in its judgements to date. It will be argued that Hercules' "moral reading"of a constitution[17], which the Court has adopted in its judgements so far, could provide the Court with its autonomy while ensuring a measure of accountability, but that greater accountability, defined in a particular way, is essential if the Court is to earn and sustain the legitimacy needed to play a meaningful role in the consolidation of democracy in South Africa.

2. From parliamentary sovereignty to constitutionalism in South Africa

We have seen a complete metamorphosis of the role of law in the South African state from

---

[13]See Mark Kessler 'Legal Mobilization for Social Reform : Power and the Politics of Agenda Setting' *Law and Society Review* 24/1, 1990

[14]D. Nicholson 'Ideology and the South African Judicial Process - Lessons from the Past' in *South African Journal on Human Rights* 8, 1992, p70.

[15]Ronald Dworkin, *Taking Rights Seriously* (London, 1977) p105.

[16]Ronald Dworkin, *Law's Empire* (London, 1986) p398.

[17]Ronald Dworkin, 'The Moral Reading of the Constitution' in *New York Review of Books*, March 21, 1996.

parliamentary sovereignty to constitutionalism, and from a flexible and non-supreme constitution to an inflexible and supreme constitution. This process has mirrored the transition from autocratic, brutal and repressive government to transparent, accountable and democratic government.

Okoth-Ogendo conceptualises a constitution as a "power map", which is concerned with the "creation, distribution, exercise, legitimational effects and reproduction of power"[18], and this power map will determine the distribution of power by *inter alia* establishing a particular type of relationship between the legal system and the government. For the purposes of this discussion, two categories of this relationship can be identified : parliamentary sovereignty and constitutionalism[19]. In a law-government relationship of parliamentary sovereignty, the legal system is subordinate to government. Under this system, "what Parliament says is law, without the need to offer justification to the courts"[20], and the courts simply apply laws made by the government. Nonet and Selznick argue that this type of relationship between the legal system and government in a society is often typical of a system of "repressive law" where "the hallmark of law becomes its association with, and subordination to, the requirements of government", and courts and legal officials are "pliable instruments of the government in power"[21]. In South Africa, law and the legal system played an important role in the maintenance of oppression and the repression of resistance. The policy of apartheid was executed largely by means of legislation[22], and resistance was suppressed by means of legislation[23] as well as by means of strategies like criminalisation and much-publicised political trials. The most fundamental element of this process was, however, the principle of parliamentary sovereignty. The law-government relationship in the South African state at the time was characterised by complete subordination of the legal system to government. This principle was fundamental to this era of oppression, as it meant that the courts could not test any legislation enacted by parliament and had to apply such legislation unquestioningly, which enabled the state to trample individual liberty without fear of judicial obstruction.

In contrast to this, constitutionalism means that government is subordinate to law and the legal system, particularly to a constitution as interpreted and enforced by the legal system. Central to all definitions of constitutionalism is the idea that it refers to a system where the exercise of power by the government is strictly limited by the constitution, and such limitation is enforced by an independent and supreme judiciary. In such a system, the constitution will therefore be a powerful document, which means that it will be inflexible or difficult to amend and supreme (the highest law of the land); and it will contain explicit rules about the source and exercise of governmental power. The two categories of parliamentary sovereignty and constitutionalism clearly represent two strongly contrasting forms of the relationship between

---

[18]Okoth-Ogendo, `Constitutions without constitutionalism... p 5.

[19]See F. Neumann, *The Democratic and the Authoritarian State* (New York, 1957) for a discussion of law-government relationships.

[20]E. Mureinik, `A Bridge to Where ? Introducing the Interim Bill of Rights' in *South African Journal on Human Rights*, 10, 1994, p 32.

[21]P. Nonet and P. Selznick, *Law and Society in Transition : Towards Responsive Law* (New York, 1978).

[22]e.g. the Group Areas Act 41 of 1951 and the Population Registration Act 30 of 1951.

[23]e.g. the Public Safety Act 3 of 1953.

the legal system and government : in the former, the constitution or power map is seen as one which facilitates the exercise of state power, and in the latter, the constitution places limits on the exercise of such power.

3. The tension between popular democracy and constitutionalism

The debate about what democracy really is, divides theorists into two broad categories which have been given many different labels : individualist, liberal, representative or Western vs collectivist, nonliberal, participatory, people's or popular democracy[24]. At the risk of over-simplification, liberal democratic ideology can briefly be described as individualistic, aimed at limiting the power of the state, and based on representation, while popular democratic ideology is collectivistic, aimed at eradicating inequality, a function usually seen as best performed by a powerful state, and based on participation[25], which is why contemporary theorists of democracy in Africa emphasise the importance of the role of civil society in successful democratisation and the consolidation of democracy[26]. The difficulties which beset attempts at reconciling the two can be seen as the result of the apparently conflicting ethical foundations of the two traditions of democratic ideology : the ethical foundation of liberal democracy is a particular conception of individual freedom, and that of popular democracy is similarly a particular conception of social equality[27].

Constitutionalism can be seen as the legal basis of liberal democracy, as it is aimed at limiting the power of the state and operates to protect the interests of individuals and minorities from the will of the majority, and in this way gives effect to freedom as the ethical foundation of liberal democracy. A constitution which organises societal power relations along popular democratic lines will provide for a powerful state (legally, at any rate) and will be aimed specifically at empowering the state to eradicate inequality (so providing for equality as the ethical foundation of popular democracy). In the case of the United States, for example, the constitution is often described as an attempt to entrench elite rights to private property and free enterprise, and in this way to limit the power of a democratically elected government by protecting the rights of numerical minorities against it [28], while the constitutions of states newly emerged from oppressive colonial rule are often aimed at providing the government with the power to eradicate inequality and therefore do not protect the rights of elites (e.g. property owners) against the state[29].

Liberal democracy in general, and therefore constitutionalism in particular, are criticised for

---

[24]M.N. Hagopian, *Ideals and Ideologies of Modern Politics* (New York, 1985); K. Graham, *The Battle of Democracy : Conflict, Consensus and the Individual* (1986); I.G. Shivji, *State and Constitutionalism : An African Debate on Democracy* (Harare, 1991).

[25]M.N. Hagopian, Ideals...

[26]e.g. R. Fine, Civil Society Theory...

[27]C. Gould, *Rethinking Democracy* (Cambridge, 1988) p 3.

[28]M. Parenti, *Democracy for the Few* (New York, 1983) p 72.

[29]M.Chaskalson, `Should there be a Property Clause ?' Paper presented at the Land, Property Rights and the New Constitution Conference, Sanbonani, May 1993.

being "democracy for the few"[30] : Barber argues that "an excess of liberalism has undone democratic institutions"[31] and he joins a large number of theorists[32] who have identified the failure of liberal democracy to allow substantial political participation. Liberal democracy is described as "thin democracy", as it is unable to realise the central values of democracy, namely participation, citizenship and political activity[33]. In addition, Parenti argues that constitutionalism, as a central institution of liberal democracy, can operate to entrench elite rights to private property and free enterprise and thus to limit the power of a democratically elected government by protecting the rights of numerical minorities against it[34].

In contrast to this, popular democracy emphasises participation by civil society in democratic processes. In an often cited speech, Murphy Morobe of South Africa's United Democratic Front argued, in 1987, that the "democratic aim" of the liberation movement was not merely to secure the right "to vote for a central government every four of five years", but "control over every aspect of our lives", from "national policy to housing, from schooling to working conditions, from transport to consumption of food". The liberation struggle is therefore about "direct as opposed to indirect political representation, mass participation rather than passive docility and ignorance, a momentum where ordinary people feel that they can do the job themselves, rather than waiting for their local MP to intercede on their behalf"[35]. This view of democracy sees meaningful participation by organisations of civil society in democratic processes as central. A 1995 survey of Cosatu union members indicates strong and enduring support for this view of democracy, as workers supported a "bottom up notion of democracy" which requires members of Parliament to operate on a direct mandate from their supporters on all issues that affect the supporters, to report back to supporters on decisions made in Parliament, and to be subject to recall by dissatisfied supporters[36]. Finally, a 1995 survey conducted by CASE[37] indicates that 64% of South Africans want to be part of the process of drawing up a constitution, and 73% of the respondents indicated that they would attend a local meeting about the Constitutional Assembly, responses that indicate a participatory notion of democracy.

A second element of popular democratic ideology is its focus on the eradication of inequality. Liebenberg points out that "the struggle for political liberation in South Africa was inextricably linked to a struggle for the material conditions of a dignified human existence", and this is clearly reflected in the ANC's 1988 "Constitutional Guidelines for a Democratic South Africa", which proposed that "the state and all social institutions should be placed under a constitutional duty to eradicate the social and economic inequalities produced by apartheid"[38].

---

[30]Parenti, *Democracy...*

[31]B. Barber, *Strong Democracy* (California, 1984) p xi.

[32]e.g. C. Gould, *Rethinking...*; C. Pateman *Participation and Democratic Theory* (1970).

[33]Barber, *Strong Democracy...*

[34]Parenti, *Democracy...* p72.

[35]Cited in Shivji, *State and Constitutionalism...* pp37-38.

[36]D. Ginsburg et al., *Taking Democracy Seriously* (Durban, 1995) pp 44-45.

[37]CASE, *Bringing the Constitution and the People Together* (Johannesburg, 1995).

[38]S. Liebenberg, *Social Rights in the Constitution : Toward Effective Equality for Women in South Africa*, Unpublished paper 1995.

This theme is also central to the ANC's Reconstruction and Development Programme, which states that reconstruction and development can provide the social and economic empowerment essential to the consolidation of democracy[39]. The 1995 CASE survey again confirms the importance of this element of popular conceptions of democracy, as 57% of the respondents indicated that social and economic rights are the most important rights to be included in the final Constitution. It is in this arena that popular democratic ideology emphasises the role of a powerful state in the redistribution of resources required if inequality is to be eradicated, but this should not be seen as a contradiction of the popular democratic emphasis on civil society participation. Contemporary popular democratic ideology provides for a "dual-track strategy involving both state and civil society"[40].

It is clear that there is a tension between constitutionalism as an institution of liberal democracy and the aims of popular democracy and it is important to investigate the reasons for the central role it nonetheless assumed in the South African transition.

4. The South African transition and constitutionalism

The shape of a post-apartheid, democratic South Africa was negotiated by reformers in the ruling regime and moderates in the liberation movement, and the transition is thus one characterised by "pacts between adversarial elites"[41]. If measured against the vision of democracy represented in the liberation movement, the transition in South Africa has resulted in a considerably shrunken form of democracy. Adler and Webster[42] point out that "while activists bravely accept that half a loaf may be better than none, few started out with this goal in mind". This "half a loaf" is the result of the process of elite-pacting which brought about the transition, and which apparently inevitably requires concessions by pro-democratic forces. Transition theorists argue that this is inevitable as most parties to the negotiations soon realize that an insistence on radical democracy threatens the transition process as a whole and that it risks "provoking an antidemocratic reaction", which could plunge the country into a state of chaos. In this view, thin democracy i.e. liberal democracy, constitutionalism and the protection of elite interests, is the only possible outcome of a transition : for a democratic transition to succeed, "democracy itself must be limited"[43]. In the South African context of ethnic diversity and polarization, ethnically-based nationalist movements add impetus to the drive towards liberal democracy and a constitutional state based on human rights, as it is argued that "the politics of ethnicity... can be defused by the construction of institutions of a civic state"[44].

---

[39]ANC, *Reconstruction and Development Plan* (1994) p 121.

[40]Fine, Civil Society Theory... p 72.

[41]G.Adler and E.Webster, `Challenging Transition Theory : The Labor Movement, Radical Reform and Transition to Democracy in South Africa' in *Politics and Society*, 23/1, 1995, p 84.

[42]*ibid*, p 83.

[43]Przeworski in Adler and Webster, Challenging... p 84.

[44]R.Wilson, `The *Sizwe* will not go away : the Truth and Reconciliation Commission, Human Rights and nation-building in South Africa', paper based on public lecture presented at the Institute for African Studies, University of the Witwatersrand, Johannesburg, p 4.

This paper argues that the notion of constitutionalism constitutes a crucial element of the elite-pacted transition to democracy in South Africa. The emergence of the notion of constitutionalism as the preferred law-government power relationship in a post-apartheid South Africa has, however, not been documented and analysed. Sam Nolutshungu argues that the national liberation movement in South Africa always encompassed the idea that "liberation must lead to a new constitution that transfers power from the ruling oligarchy to the people at large, or that extends citizenship and political rights from the minority to all members of the population", and that will provide and protect fundamental human rights, but that the content of these rights and the mechanisms by which they would be protected were not the subjects of "elaborate debate". Furthermore, although the commitment to fundamental rights was very strong, the idea of constitutionalism, defined as the idea that the constitution itself, "rather than political arrangements, behaviour and culture", will ultimately protect these fundamental rights, was not one "easily found in the discourse of the South African liberation movement"[45]. Davis also points out that as constitutionalism is seen as an important element of liberal democratic ideology, it was met with considerable suspicion in the popular or socialist democratic ideology of the liberation movement[46].

The following is a brief account of the more important moments in the evolution of the final South African constitution, and it indicates the need for more thorough research particularly on the interests that impacted on the process of constitutional negotiations and how those resulted in the constitutionalist outcome of this process. The emergence of the notion of constitutionalism effectively illustrates the shift in ANC thinking during the negotiations process, as well as the extent of elite-pacting that underlies the transition to democracy in South Africa.

In 1988 the ANC published its "Constitutional Guidelines for a Democratic South Africa", a document which was to convert the "vision for the future" embodied in the Freedom Charter into a "constitutional reality"[47]. The Freedom Charter, adopted in 1955 by the Congress of the People at Kliptown near Johannesburg, was the result of months of wide consultation with a cross-section of the South African population. Corder and Davis argue that by the mid-1980's the Freedom Charter enjoyed "wide-ranging approval in all sectors of South African society", but by then it had become important to the ANC to indicate more clearly what the Freedom Charter would mean in practice, and a process of re-examination and reformulation of its constitutional demands was launched at the Kabwe Consultative Conference of 1985. This process, which was characterized by intensive discussion in all parts of the ANC, culminated in a draft document analysed and debated by the leadership and legal experts of the ANC at a Lusaka seminar in March 1988, which in turn resulted in the publication, in August 1988, of the ANC's Constitutional Guidelines[48].

---

[45]Nolutshungu, The Constitutional Question... pp 92-94.

[46]D. Davis, 'Post-Apartheid South Africa : What Future for a Legal System ?' *Acta Juridica*, 1987, pp 224-225.

[47]ANC,` Constitutional Guidelines for a Democratic South Africa' in the *South African Journal on Human Rights*, 5, 1989.

[48]H. Corder and D. Davis, `The Constitutional Guidelines of the ANC : A Preliminary Assessment' in *The South African Law Journal*, 106/1, p 635.

The Constitutional Guidelines were criticized by some observers as a "recipe for betrayal" which was aimed at appeasing "the liberal bourgeoisie, the representatives of international finance capital"[49], and as a less convincing democratic vision than the Freedom Charter *inter alia* because of its lack of a "more radical vision of South Africa's longer-term economic future"[50]. However, the document represented a notion of a South African democracy which, particularly when compared to the final outcome of the transition, remained relatively faithful to the vision of the Freedom Charter. Much was still to change during the following few years. In 1990, then State President F.W. de Klerk unbanned the ANC, PAC and the SACP and released political prisoners including Nelson Mandela. The process of multi-party negotiations to plan for the transition and the new constitution started in 1991 when the Conference on a Democratic South Africa (CODESA) was set up. Although this process eventually broke down, the "Declaration of Intent" signed by all parties (except for the Bophuthatswana Government) in 1991 and reaffirmed in 1992 already appears as a model of liberal democracy, with an emphasis on constitutionalism and classic civil and political rights and no mention of participation and equality.

Official, public and representative negotiations resumed in March 1993, in the form of the Multi-Party Negotiations Process (MPNP), and by June the basic process for the drafting and adoption of a new Constitution for South Africa had been established : the MPNP would draft and adopt an Interim Constitution to form the basis of government after the elections in April 1994 and until this elected, representative body in its capacity as the Constitutional Assembly had drafted a final Constitution. The Interim Constitution would, however, contain a number of Constitutional Principles from which the new Constitution would not be allowed to deviate. The Interim Constitution entrenched the basic principles of liberal democracy and constitutionalism, particularly the supremacy of the constitution which formally shifts power from the legislature and the executive to the judiciary. It also entrenched the right to private property and did not cater for significant second- and third-generation rights. The Interim Constitution thus represented a dramatic shift in ANC thinking from the popular democratic ideology of the Freedom Charter and Constitutional Guidelines to liberal democratic ideology. The ANC's Constitutional Guidelines[51] provides that "[s]overeignty shall belong to the people as a whole and shall be exercised through one central legislature, executive and administration", while the Interim Constitution shifts this power to the judiciary, an institution which is not even mentioned in the Guidelines. Contrary to the popular democratic ideology of the liberation movement, the Interim Constitution is a monument to liberal democracy, and this clearly indicates the degree of elite-pacting which informed its drafting, particularly in the light of the enthusiasm of the National Party, Democratic Party and capital for constitutionalism.

5. Can constitutionalism be reconciled with popular democracy ?

A central assumption of this paper is that constitutionalism is not inherently incompatible with

---

[49]L.Mqotsi, `ANC's Constitutional Guidelines : A Recipe for Betrayal' *in Frontline Worker*, 1988 p 14.

[50]D.Glaser, `Democracy, Socialism and the Future' in *Work in Progress*, 56/57, 1988, p 30.

[51]ANC, Constitutional Guidelines... p 130.

popular democratic ideology, as long as it can be disentangled, in practice, from its reputation as an institution of liberal democracy aimed at protecting elite interests from the claims of the masses. Popular democratic ideology does not demand that parliament is supreme, as there are no guarantees that parliament will in practice be the voice of the people, but that the state sets about doing what the disadvantaged majority wants it to do, which is to eradicate inequality and expand popular participation in policy formulation. Democracy in South Africa is expected to resolve the conflicts that persist in civil society, satisfy the aspirations of ordinary people demanding a say in the running of the new South Africa, and accommodate "the demands emanating from civil society for greater equality at the social, economic and political levels"[52]. The Constitutional Court and constitutionalism can play a role in the achievement of this.

The site for the reconciliation of constitutionalism with the aims of popular democracy is the concept of human rights. A Bill of Rights protects fundamental human rights and in this way establishes the respect for life and dignity and tolerance of diversity essential to a democratic culture, and provides the rights to freedom of expression, free and fair political activity and freedom of association which are essential to legitimate opposition and truly competitive elections. This is, however, not enough. Popular democratic ideology demands, more than civil and political rights, a government which can effect the redistribution of resources which is often the focus of struggles which establish popular democracies, which means that a representative and legitimate Bill of Rights in the context of a popular democracy has to include social and economic rights. As Liebenberg points out, "there is clearly no automatic relationship between legal rights and social benefit to the most disadvantaged in society", but the opportunities for such groups to obtain redress for social and economic disadvantage can be maximised by providing a legal channel in addition to the political. A justiciable Bill of Rights which includes social and economic rights can therefore in effect expand the opportunities for political participation by disadvantaged groups as well as provide a forum where the "justifiability of government action or inaction to address the social and economic priorities of disadvantaged groups can be tested"[53]. A Bill of Rights which guarantees all three generations of rights, i.e. political and civil rights, social, economic and cultural rights, and rights to development and of minorities, can ensure the development and protection of a human rights culture fundamental to a democratic society, guarantee the conditions for truly democratic political activity, and facilitate the attainment of substantive race, class and gender equality. The only way in which such a Bill of Rights can survive is by establishing a law-government relationship characterised by constitutionalism, as government, which is after all a body constituted for the purpose of exercising power, cannot be the judge of whether its own actions and legislation conform to a Bill of Rights[54]. In this way, constitutionalism can provide opportunities for the expanded role of civil society in democratic processes and entrench government accountability.

The realisation of this potential will, however depend on the level of mobilisation in civil

---

[52]Ginsburg et al., *Taking Democracy Seriously...* p 104.

[53]Liebenberg, *Social Rights...* p3.

[54]J.M. Didcott, 'Practical Workings of a Bill of Rights' in J. Van der Westhuizen and H. Viljoen (eds.) *A Bill of Rights for South Africa* (Durban, 1988) p 53.

society as well as on the way in which the Constitution is interpreted. Adler and Webster argue that "a mobilized civil society and powerful social movements"[55] can play a meaningful role in the consolidation of a kind of democracy that can satisfy many of the aspirations of popular democracy. Civil society can be defined as "the codeword for the associational life of a society that exists somewhere between the individual actions of each person (...the private realm) and the organisations and institutions constituted by the state (or public realm)". Civil society is where "ordinary everyday citizens who do not control the levers of political and economic power, have access to locally-constituted voluntary associations that have the capacity... to influence and even determine the structure of power and the allocation of material resources"[56]. This presupposes a civil society which is organised and mobilised to play such a role in societal power relations, as well as a power structure which allows room for such a role for organisations of civil society. The Constitutional Court itself has the potential to become a powerful forum for participation in political processes by disadvantaged and marginalised groups. The Constitutional Court's lenient requirements for *locus standi* provides the basis for such participation, but the realisation of this potential will to a large extent depend on the interpretation of the Constitution by the judges on the Court. As pointed out earlier, setting up the Bill of Rights and the Constitutional Court only provides form, and the substance of the Bill of Rights lies in its interpretation. As Parenti and other commentators on the US Supreme Court have noted, a Bill of Rights can all too easily become like the Bible, which "the devil himself can quote ... for his own purposes"[57]. The South African Bill of Rights can only be a legitimate representative of the aspirations of the majority of South Africans if it is interpreted by the Court in a way which makes it so.

6. The interpretation of a constitution

The interpretation of legal texts, and particularly constitutions, has been documented and debated by countless legal scholars, but has only fairly recently become the focus of social scientists. The debate over interpretation long focused on the degree to which there is an independent, stable meaning of a legal text, like a statute, which can be found if certain rules of interpretation are adhered to, and to what extent the interpreter of a statute needs to take factors external to the text into account. At the risk of over-simplification, two categories of opinion can be identified in this debate. The literal or textual approach to interpretation is based on the assumption that legal text is stable in the sense that there is one true meaning locked up in the text, and that this meaning can be found by adhering to certain rules of interpretation and ignoring all factors external to the text itself. This can be distinguished from the more purposive, contextual approach to interpretation, which is based on the assumption that there is no one true meaning to be found and that the result of interpretation will largely depend on what the interpreter brings to the process as well as factors external to the text. Examples of such factors are the purpose of the legislature, the context of the legislation, and social and political policy considerations[58].

---

[55]Adler and Webster, Challenging... pp 76-77.

[56]Fine, Civil Society Theory... p 72.

[57]Parenti, *Democracy*... p307

[58]C.J. Botha, *Statutory Interpretation* (Cape Town, 1991) p 13.

The first approach has been criticised widely, particularly for its potential to produce procedural justice at the expense of substantive justice. Intellectual trends and movements like Critical Legal Studies (CLS), postmodern legal theory, and literary theory applied to legal texts, have led to a widespread acceptance of the instability of legal texts[59], or the notion that there is no one true meaning contained in a stable legal text, but that it is a matter of interpretation which rests on a variety of factors external to the text itself. This has caused constitutional interpretation to become one of the more controversial elements of constitutionalism, as it vests great power in the judges who are entrusted with the task of proclaiming the "true" meaning of the Constitution and rule accordingly. Dworkin provides examples of this controversy from the American context, where it usually manifests itself in debates over activist vs passivist judges. Passive judges, so the argument goes, "show great deference to the decisions of other branches of government, which is statesmanlike", while active judges "declare these decisions unconstitutional whenever they disapprove of them, which is tyranny"[60]. Several American presidents have thus promised the electorate that they will appoint passive judges to the Supreme Court, as these judges will leave the Constitution alone and respect rather than defy the people's will[61]. Dworkin argues that such politicians are often disappointed, because the distinction between active and passive judges is a false one as interpretation is always constructive. He defines "constructive interpretation" as a "matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong". This does not mean that an interpreter can make of an object or practice anything s/he wants it to be, because the history or shape of it "constrains the available interpretations" : constructive interpretation is "a matter of interaction between purpose and object"[62]. Applied to a Bill of Rights, this means that an interpreter of the text will, within the constraints of the history (including the social context) and shape (including the structure, contents and purpose) of the document, impose on it a purpose in order to make of it the best possible example of this type of document. This means that interpretation will depend on the interpreter's view of the history and social context of the Bill of Rights, the particular view of the shape of it, and, very importantly, the view of what constitutes the best example of this type of document. This view of the process of constitutional interpretation makes it clear that factors external to the constitutional text itself have a fundamental impact on the result of interpretation.

But what is the basis for constructing the constitution ? Dworkin elsewhere calls this a "moral reading" of a constitution[63]. The moral reading does not mean that judges have absolute power to impose their own ideas on the public. The constitution expresses "abstract moral requirements", and the moral reading thus "brings political morality into the heart of constitutional law". The moral reading of a constitution involves identifying moral principles underlying the words of the constitution, including the intention of framers to do so. It takes into account the history of constitutional practice, including precedent, and it takes into account the structure of the entire constitution. This makes it clear that only certain

---

[59]K.L. Scheppele, 'Legal Theory and Social Theory' in *Annual Review of Sociology* (California, 1994).

[60]Dworkin, *Law's Empire* p 369.

[61]Dworkin, The Moral Reading... p 47.

[62]Dworkin, *Law's Empire* p 52.

[63]Dworkin, The Moral Reading...

interpretations are possible when law as integrity[64] is observed, as only one interpretation will place the constitution, democracy and the nation in the best possible light, and every judge has to know when to rely on his or her own judgement about that[65]. The moral reading thus clearly condemns both the "passivist" judge who assumes that a constitution grants citizens no rights except concrete rights that flow uncontroversially from the language alone, as this does not fit with existing constitutional culture and the "activist"judge who ignores text, history, precedent, and traditions of political culture, and imposes personal views of what justice demands on the public[66].

The central assumption of this argument is that a constitution can only be interpreted with reference to certain principles external to the constitution itself. The analysis is critical in the sense that it investigates the often hidden or denied external factors which impact on legal and, particularly, constitutional intepretation. It is not, however, critical in the sense that it disapproves of this element of constitutional interpretation. On the contrary, it is assumed that constitutional interpretation can only be a creative and dynamic process on this basis. This argument is supported by Davis[67] who points out that in order to identify the political ideals that fashion and give content to the South African Bill of Rights, and to justify their powers of review, the judges on the Constitutional Court have to engage in an exercise of political theory. Acknowledgement and critical analysis of the factors that impact on the process of interpretation is, however, essential, as a pretension to "neutrality" can be dangerous in the sense that it could facilitate the undetected operation of a hidden agenda and "on the whole, those lawyers who are unconscious of their legal ideology are apt to do more harm than their conscious colleagues"[68]. It is therefore important to identify the external factors that impact on constitutional interpretation. These factors impact on interpretation both in the process of the judge constructing a personal set of principles of constitutional interpretation, and in the process of applying that set of principles to each case. This argument does not suggest that these processes are arbitrary, and it does not suggest that constitutional interpretation is necessarily subject to an individual judge's personal whim, tastes and political opinions (although a commentator like Parenti[69] would argue that it often is the case). It does, however, indicate an element of constitutionalism which could militate against its claims to legitimacy.

7. Dilemma of the Court : Accountability v Autonomy

Such legitimacy can only be established if the Court succesfully addresses the dilemma of accountability v autonomy. The Court has explicitly adopted a moral reading of the Constitution and has on that basis proclaimed its autonomy from specific interests. It has also in many judgements indicated an awareness of the requirement of accountability, and has

---

[64]See Dworkin, *Law's Empire.*

[65]Dworkin, Moral Reading... pp 46-48.

[66]Dworkin, *Law's Empire* pp 371, 377-378.

[67]D. Davis, 'Democracy - It's influence upon the Interpretation of the Constitution' in *South African Journal on Human Rights*, 10, 1994.

[68]Friedman in G. Barrie, 'The Challenge of the SA Judiciary in the 1990's' in *Tydskrif vir die Suid-Afrikaanse Reg*, 4, 1989, p 518.

[69]Parenti, *Democracy...*

attempted to claim a measure of it.

The dominant reasoning of the Court has been that the Constitution was drafted by means of legitimate and representative negotiations by representatives of all the people of South Africa and that it is therefore an expression of the general will, and that their decisions on the basis of the Constitution are accountable to the public in that way. There are two important difficulties with this argument. I have argued elsewhere[70] that the Constitutional Assembly (CA) and the process of the writing of the final constitution were, instead of an attempt to let "the people" actually write the Constitution, central elements in strategies aimed at establishing the legitimacy of the outcome of the transition and promoting national unity. The main threats to the consolidation of liberal democracy in South Africa, namely ethnic nationalism, elite discontent, grassroots militance, and powerful organisations of civil society, were addressed by attempts to create, consolidate and legitimise a civic state characterised by constitutionalism, and the Constitutional Assembly and writing of the final Constitution played a crucial role in this process. The main objective of the CA was to "produce a consensus constitution that reflects the concerns and values of as broad a cross-section of both the political spectrum and society as a whole as possible", and it was to accomplish this by launching the largest public participation programme in the history of South Africa[71]. The emphasis on participation was a clear attempt to legitimise the outcome of the transition as embodied in the Constitution : as Hassen Ebrahim, Executive Director of the CA pointed out, "the legitimacy of the constitution lies in ownership of it by the people"[72]. In particular, popular participation in the writing of the final Constitution was aimed at lending legitimacy to constitutionalism. One of the CA slogans, "You've made your mark, now have your say"[73], for example, clearly implies that "you" will write the new Constitution, and if it contains "your" opinions and values, constitutionalism doesn't really diminish popular power and participation. However, it appears that the Constitution is not particularly representative of the attitudes and values of ordinary South Africans, as submissions to the CA and opinions expressed in the media indicate a rejection of abortion, strong opposition to pornography and strong support for the death penalty, all of which will be thwarted by the new Constitution.

The second difficulty with this claim to accountability is that, as pointed out earlier, the interpretation of the Constitution, and particularly of the Bill of Rights, can never be a "neutral" or "objective" process, and each judge on the Constitutional Court will employ an own particular set of values in terms of which to interpret and enforce the Constitution. Judges are instructed by the interim Constitution (in Section 35) to apply certain values in the process of interpretation, but individual judges will understand these concepts differently, and each judge's understanding will be determined by his/her values. What does "freedom" mean? And "ubuntu"?

---

[70]E. Van Huyssteen, 'By the people, for the people ? The SA Constitutional Assembly and the writing of the final Constitution', paper presented at the SASA Conference Durban, July 1996.

[71]Constitutional Assembly, *Adoption Day*, 1996, CA Home Page on the WWW at http://www.constitution.org.za

[72]Constitutional Assembly, *Annual Report*, 1996, CA Home Page...

[73]Constitutional Talk, Special Newspaper Supplement, 1995.

Nicholson identifies three sets of values which will impact on a judge's interpretation of the Constitution[74]. The first is "societal" values. These values include ideas about what exactly concepts like democracy, freedom and equality entail. A judge's notion of "democracy", for example, can have a fundamental impact on the process of interpretation, as it will determine what the judge considers to be a reasonable and justifiable limitation on a right in a democratic society. Similarly, a judge's notion of "equality" will determine his or her judgement on issues of affirmative action or quota systems. The limitations clause also provides that a right cannot be limited in such a way that the "essential content" of the right in question is negated. Woolman argues that the essential content of a right is negated when the limitation on the right makes it "impossible for the right to serve its intended social function"[75], and this is clearly once again a judgement which will depend on the judge's view of the "intended social function" of a particular right, for example the right to freedom of expression. If a judge sees the social function of this right as promoting a forum of ideas in order to uplift society, he/she may well not tolerate pornography.

The second category of values is "legal values". South African judges traditionally have Western liberal or bourgeois legal values, which stress "justice, fairness, equality, human dignity and personal freedom, while presenting law and the courts as the champion of the individual against the state". These values have, of course, to a large extent been incorporated into the Constitution, and the extent to which each judge adheres to these legal values will certainly influence the process of interpretation. When considering a limitation of the right to freedom of expression in the interest of the state, for example, a judge who is a passionate proponent of these liberal legal values will tend to require a greater degree of justification from the state than another.

Nicholsons' third category refers to values about the role and functions of judges in the legal system and in society, and this also includes a judge's theory of interpretation. This set of values will determine whether a judge employs a literal approach to the interpretation of legislation, which usually means assigning minimum relevance and importance to the social context of legislation, or a more contextual or purposive approach which enables a judge to consider the purpose or context of legislation. Certain judges believe in considering a wide range of sources and authority in the process of interpretation, including factors like the history, social context, purpose and spirit of legislation, and in this way can come to creative conclusions. In the context of the Constitutional Court's interpretation of the constitutional text, these values will have an important impact on how each individual judge interprets the Constitution. The Constitution does prescribe an explicitly contextual and purposive approach to interpretation, and this will have a profound impact on an individual judge's interpretation of the text, but individual judicial values will have an influence on how this applies in practice.

This discussion creates the impression that the process of interpretation of the South African Constitution will be determined entirely by the individual judges' societal, legal and judicial values. However, the judges of the Constitutional Court have demonstrated a sensitivity to

---

[74]D. Nicholson, `Ideology and the South African Judicial Process...

[75]S. Woolman, ` Riding the Push-me Pull-you : Constructing a test that reconciles the conflicting interests which animate the limitation clause' in *South African Journal on Human Rights*, 10, 1994, p 74.

the tension between their role and the requirements of the new democratic dispensation, and this will also have an influence on the principles of constitutional interpretation which they will construct as well as the way in which they apply these in each case. In this process, they will have to face the competing requirements of accountability and autonomy.

A completely autonomous Court will simply interpret the Constitution in terms of its principles and with regard only to factors connected to it, like its history and spirit. This will result in the desired end of protecting individual rights against abuse at all costs, but if the Court's decisions continuously contradict the will of the majority and no attempt at justification is made, the Court will lose the legitimacy needed if it is to play any role in the consolidation of democracy in South Africa. Mureinik argues that the new Constitution provides the basis for a new "culture of justification - a culture in which every exercise of power is expected to be justified"[76]. He is referring to exercise of government power, but the same can be argued in the case of the Court's exercise of its power. A measure of accountability is essential if the Court is to be seen as legitimate in a new democratic dispensation.

Cameron points out that "there are nuances to accountability : in the democratic sense one cannot simply regard accountability as subjugation to the popular will from moment to moment"[77]. If accountability on the part of the Constitutional Court does not mean handing down judgements that faithfully reflect the will of the majority, what does it mean ? How can it be ensured ? Dugard emphasises the importance of public scrutiny and criticism of judicial decision-making, and argues that the media and the legal profession should play a leading role in this process[78]. To this end, it is important that judgements are well motivated and well publicised. Nicholson argues that the Constitutional Court should, in the process of making a decision, consider the evidence of non-legal experts like social scientists on the values and attitudes of the public, as well as hear the arguments which are representative of public opinion and "listen to the views of those likely to be affected by their decisions"[79]. Finally, Cameron believes that the Court should maintain "a constant sensitivity to the overall goals which the [Constitution] is designed to serve"[80], which means that the Court can be accountable to the people of South Africa by promoting the Constitutional goal of creating an open and democratic society based on freedom and equality. This argument again does not take into account the possibility that the judges' interpretation of such a society may well differ substantially from that of the majority of South Africans.

These measures to ensure accountability are contained in the moral reading of the Constitution as advocated by Dworkin. This reading does, after all, require a judge to read the Constitution as a whole and in the context of the democracy which created it. It would appear, however, that the judges' reading of the new South African democracy and its political culture and

---

[76]E. Mureinik, 'A bridge to where..., p32.

[77]E. Cameron, 'Judicial Accountability in Practice' in A. Du Toit (ed.) *Towards Democracy : Building a culture of accountability in South Africa* (IDASA, 1991) p 183.

[78]J. Dugard, 'Ideals of Democratic Accountability and the Judiciary' in A. Du Toit (ed.) *Towards Democracy...* pp 180-181.

[79]Nicholson, 'Ideology... p 71.

[80]E. Cameron, Judicial Accountability... pp 196-197.

practices is not one shared by the majority of South Africans. Hercules has no need for justification of his decisions, but in the South African context of a fragile transition and a process of consolidating democracy, the Court needs to account for its reading of the Constitution and for its decisions on that basis.

The judgements handed down by the Court to date reflect the judges' sensitivity to the tension between their role and the requirements of the newly established democratic dispensation, as well as the way in which they grapple with popular democratic ideology. Several of the Court's judgements since its establishment have indicated both great courage and a commitment to meaningful democracy[81], but Cockrell[82] warns against the danger to the Court of getting tied up, in an attempt to justify its decisions, in "wishy-washy statements of 'rainbow jurisprudence'" at the expense of the development of a "rigorous jurisprudence of substantive reasoning" which would allow them to weigh up competing values rationally and fairly. He does, however, identify several instances of such rigorous substantive reasoning in the work of some of the judges, and this points to the possibility of the Court becoming a forum for meaningful participation.

8. Hercules on Olympus[83]

The judges on the Constitutional Court have explicitly adopted a moral reading of the Constitution, which means that they construct the Constitution on the basis of its structure and text as well as its history, spirit and context, and on the basis of their interpretation of South African political culture and practice. They have demonstrated an awareness of the need to balance autonomy with accountability, and attempt to locate this balancing act in their moral reading of the Constitution. The focus of this paper is to investigate the ways in which they construct this reading of the Constitution as well as how they justify, firstly, the moral reading, secondly, their power, and thirdly, the content of their decisions. In other words, on which basis do they claim legitimacy ? How are they doing on the autonomy-accountability scale ?

The Constitutional Court's judgements so far indicate that they attempt to justify their approach to interpretation or the moral reading, their power, and the content of their decisions on four fundamental and interlinked bases, each of which is central to Dworkin's understanding of the moral reading of a constitution. The first of these bases of justification is the text of the constitution. The text of the Constitution in this sense includes its preamble and postscript, interpretation (s35) and limitations (s33) clauses as well as the sections of the Constitution relevant to the particular case. More than that, however, the actual text is seen in the context of its history, which means that debates around the drafting of a clause could also be taken into account under certain circumstances. The second basis of justification is the argument that the Constitution represents the will of the people of South Africa, as it is the result of legitimate and representative negotiations. The third basis of justification is a notion

---

[81]e.g. in the case of *Executive Council, Western Cape Legislature and others vPresident of the RSA and others CCT 27/95* where the Court invalidated proclamations issued by the President.

[82]A. Cockrell, 'Rainbow Jurisprudence' in *South African Journal on Human Rights*, 12/1, 1996.

[83]Olympus is Dworkin's high Court entrusted with constitutional interpretation, see Law's Empire p 379.

of the true meaning of democracy and the Court's responsibility to protect democracy defined in this way. The fourth basis of justification is an identification of the values underlying the Constitution (many of which are made explicit in the text of the Constitution) as well as the vision of a future South Africa embodied in and underlying the Constitution.

Each of these bases of justification can be identified in the judgements of the Court to date. Although they have been discussed separately for the purposes of analysis, they are all clearly interlinked and the discussion of the judgements that follows will reflect that. The decision to abolish the death penalty will be used as a basis for the discussion, as it is one of the first, most controversial and most comprehensive (each of the eleven judges wrote a separate concurring judgement) judgements handed down by the Court. In this judgement the judges also deal extensively with the four grounds of justification for their approach to interpretation, their power and the content of the decision, and the judgement thus illustrates Court's approach to the accountability vs autonomy dilemma well.

All the judges explain and justify their approach to interpretation in detail. Chaskalson P starts his judgement with an overview of the provisions of the Constitution which he deems to be relevant to the process of interpretation, as well as an outline of his approach to interpretation. In this regard, he refers to the supremacy of the Constitution, and quotes from the postscript to substantiate his view that the Constitution is aimed at establishing a new, democratic and human rights-oriented society. He also indicates that the best approach to interpretation is one which is "generous" and "purposive", "gives expression to the underlying values of the Constitution", and takes into account the history and context of the Constitution[84]. He clearly believes that the role of the judge in such a matter is not to merely literally interpret the text of the Constitution, but to have regard to a wide range of external factors, including the history, context, spirit, and goals of the Constitution, and he provides substantial evidence that this is an internationally accepted approach to interpretation[85]. Both Justices Mahomed[86] and O'Regan[87] echo this view when they argue that both the memory of the violent, oppressive, authoritarian and racist past of the South African society, and the vision of a new, democratic and egalitarian society embodied in the Constitution, should inform the process of interpretation of the Constitution. Justice Langa[88] argues that factors external to the Constitution are of great importance in the process of interpretation, as the Constitution itself is very much a product of its history and social context. In this regard, Langa J refers specifically to the South African history of violence, retaliation and vengeance, and argues that the South African state, by reason of its "role in the conflicts of the past" and its "punishments which did not testify to a high regard for the dignity of the person and the value of every human life", became part of the degeneration of South African society into one where "respect for life and for the inherent dignity of every person became the main casualties". He believes that the new Constitution provides a framework "in which a new culture must develop and take root", and that this culture is one based on the values of a "more mature society", which

---

[84] *S v Makwanyane and another* CCT/3/94 at 4-7.

[85] *ibid*, at 10-14.

[86] *ibid*, at 174.

[87] *ibid*, at 211.

[88] *ibid*, at 158-162.

include a respect for human life and dignity. In this regard, he lays great emphasis on the concept of "ubuntu", the achievement of which is named in the postscript of the Constitution as one of its goals.

Justices Langa, Madala[89], and Mokgoro[90], all emphasise the importance of this concept as a source of authority for the interpretation of the Constitution, as it is seen as a value fundamental to the Constitution. Madala J believes that the concept of ubuntu "carries in it the ideas of humaneness, social justice and fairness", and these judges argue that this is a value fundamental to African society which has been incorporated into the Constitution and which should therefore have an important influence on the process of interpretation.

In *S v Zuma and others*[91], Kentridge J argues that "it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean" and that "... regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are to be fully understood". In *S v Mhlungu and others*[92] Mahomed J argues that literal interpretation would "negate the very spirit and tenor od the Constitution" (which includes a "ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action") and "invade" the "widely acclaimed and celebrated objectives" of the Constitution. He insists that the Court "...must strive to avoid such a result if the language and context of the relevant provision, interpreted with regard to the objectives of the Constitution, permits such a course"[93]. In the same case, Sachs J argues that "[w]e need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country..". He also argues that interpretation will "take the form of a principled judicial dialogue" between members of Court, with other courts, "legal profession, law schools, Parliament, and, indirectly, with the public at large"[94].

In *S V Williams*[95] Langa J asserts that the Court has a role to play in the promotion and development of a new culture founded on the recognition of human rights and to ensure that the rights, "particularly of the weakest and the most vulnerable, are defended and not ignored". He acknowledges that interpretation requires value judgements, and that these must reflect "our own experience and circumstances as the South African community". This does not mean that "public opinion, on its own" is determinative of constitutional issues, but that a purposive approach to interpretation must place rights in their context, a context which includes political negotiations, crime rates and violence.

---

[89] *ibid*, at 166-167.

[90] *ibid*, at 202-203.

[91] 1995 (4) BCLR 401 (SA) at para 17G

[92] 1995 (7) BCLR 793 (CC)

[93] Ibid at para 8.

[94] Ibid at para 127-129.

[95] CCT 25/94.

The judges also explain and justify their power to rule on these issues. In *Makwanyane*, Chaskalson P argues the Court's jurisdiction in the death penalty issue, justifying the fact that the Court, and not Parliament, as an elected body, will decide on this issue. He points out that although the death penalty was the subject of considerable debate during the drafting of the Constitution, the authors of the document expressly did not make specific provision for this issue in the text, and he argues that this is a clear indication that the intention was to leave this decision to the interpreters of the Constitution. He also emphasises that the Constitution was the product of extensive multiparty negotiations, in order to indicate the democratic nature of the process that led to the final document, and perhaps to argue for the idea that the Constitutional Court, in this indirect way, does have a democratic mandate for its decisions. Finally, he emphasises the need for the Court to approach this task with courage and conviction, as shrinking from it would mean a return to parliamentary sovereignty[96]. In several other cases, the Court has dealt with the issue of the powers of the Court and the legislature respectively as well as the shift from parliamentary sovereignty to constitutionalism. In *Coetzee v The Government of the Republic of South Africa and others; Matiso v The Commanding Officer, Port Elizabeth Prison and others*[97] the Court argued that policy choices belong to Parliament and that it "would be invidious for us to pre-empt the issue by making an order keeping the present system alive pending legislative modifications". In the *Executive Council of the Western Cape Legislature* case, Chaskalson P emphasises the supremacy of the Constitution, and the Constitution as the foundation for establishment of a fundamentally different, new order. In such an order, the Court has to guard against control over legislation passing from Parliament to the executive, but he emphasises that "our role as justices of this Court is not to `second guess' the executive or legislative branches of government or interfere with affairs that are properly their concern. We have also made it clear that we will not look at the Constitution narrowly. Our task is to give meaning to the Constitution and, where possible, to do so in ways which are consistent with its underlying purposes and are not detrimental to effective government".

Sachs J also emphasises the powers of parliament and central role of parliament in our democracy. Parliament should not be seen as merely the "creature" of the Constitution, and the limitation on delegation enforced by the Court in their judgement in this matter flows from majesty and not impotence of parliament. He argues that legislative authority is entrusted to parliament because "the procedures for open debate subject to ongoing press and public criticism, the visibility of the decision making process, the involvement of civil society in relation to committee hearings, and the pluralistic interaction between different viewpoints which parliamentary procedure promotes, are regarded as essential features of the open and democratic society contemplated by the Constitution". The constructive nature of the interpretation of the Constitution is, however, emphasised by the dissenting judgement of Madala J and Ngoepe J in which they argue that purposive interpretation would find justification for the President's actions in this case, particularly in the context of a crisis developing in the context of local government elections.

---

[96] *Makwanyane* at 12-18.

[97] 1995 (4) SA 631(CC)

The *Certification* judgement[98] also contains a comprehensive discussion of the justification of the Court's powers. The jugement opens with the acknowledgement that "[j]udicial `certification' of a constitution is unprecedented and the very nature of the undertaking has to be explained. To do that, one must place the undertaking in its proper historical, political and legal context; and, in doing so, the essence of the country's constitutional transition, the respective roles of the political entities involved and the applicable legal principles and terminology must be identified and described". The Court also in that judgement emphasises that the impartiality of the decision on the certification of the Constitution is safeguarded by the appointment and dismissal mechanisms as well as the composition and the powers of the Court and Judicial Services Commission.

The requirement of accountability necessitates that the Court deals with the issue of public opinion on matters before them. In *Makwanyane*, the judges deal with the issue of popular opinion in detail, as the extensive public support for the death penalty formed an important part of the retentionist argument. Chaskalson P argues that "public opinion may have some relevance to the enquiry", but if this were to be the decisive factor, "there would be no need for constitutional adjudication", and we would have returned to a system of parliamentary sovereignty and retreated from the new order established by the Constitution. He points out that the reason for establishing a system of constitutionalism was to "protect the rights of minorities and those who cannot protect their rights adequately through the democratic process", including the "social outcasts and the marginalised people of our society". He also argues that only if there is "a willingness to protect the worst and the weakest amongst us", all of us can be "secure that our own rights will be protected". If the government were the judge of their own actions, there would be no need for a Constitution[99]. Chaskalson P here reveals a view of democracy as a system where the rights of individuals and minorities are protected against the will of the majority, and which is based on a particular set of values.

All the judges addressed this issue in their judgements, and all concluded that the autonomy of the judges of the Court from the will of the majority or public opinion is fundamental to the successful operation of the Court. The reasons individual judges give for this conclusion do, however, differ subtly. Firstly, Justice Kriegler's brief judgement insists that no-one's opinion, not even his own, matters, as the task of the Court is to determine "what the Constitution says", and that the decision should not be made on the basis of morals, ethics or philosophy, but on the basis of law[100]. This argument is echoed by Justice Madala, who asserts that it "not necessary or even desirable" to canvass public opinion on constitutional matters", as these have to be decided on the basis of the Constitution itself[101]. Secondly, in contrast to this, other judges, like Chaskalson P and Mokgoro J believe that a central element of a constitutional democracy is the protection of minorities and the weak from the will of the majority, and that merely reflecting the will of the majority in all decisions would pervert this element of democracy.

---

[98]CCT23/96.

[99]*ibid*, at 60-63.

[100]*ibid*, at 50.

[101]*ibid*, at 173.

Justice Sachs'[102] argument has important implications for the autonomy/accountability dilemma. He believes that judges should "take account of the traditions, beliefs and values of all sectors of South African society", but argues that the Constitution already reflects these values, as it emerged from "an inclusive process in which the overwhelming majority were represented". On this basis, the judges of the Constitutional Court have a duty to interpret the Constitution on the basis of the values enshrined in the Constitution without regard to transient majority opinion.

The issue of public opinion is also raised by Chaskalson P in his discussion of his decision that the death penalty is cruel, inhuman and degrading punishment (prohibited by Section 11(2) of the Constitution). He rejects the Attorney General's argument that this decision must be based on the community's view of what cruel, inhuman and degrading punishment entails, and instead argues that this must be evaluated within the meaning of the relevant section (11(2)) of the Constitution[103]. Whether this can ever be established purely in the constitutional sense of these words is, however, debatable. It appears to be a decision which will inevitably be determined by the individual judge's values. Is this appropriate in the context of an accountable Court in a democratic dispensation ? The answer to this lies in the values assumed to be the foundation of democracy. In the context of Chaskalson's view of democracy, the practice of cruel, inhuman and degrading punishment (defined in the widest possible sense) would render a society undemocratic as it would negate the values essential to a democracy. Justice Didcott [104] addresses this issue more explicitly. He argues that a decision on whether a punishment is cruel, inhuman and degrading will always be a value judgement, but points out that the Constitution itself does provide guidance as to the values that can be used in this judgement. He believes that the Constitution is animated by an "altruistic and humanitarian philosophy" which are the norms and criteria against which these kinds of issues can be measured, and that interpretation should be true to "the civilised, humane and compassionate society to which the nation aspires and has constitutionally pledged itself". In this way, while Didcott clearly rejects bowing to majority opinion, he indicates that the Court can be seen as accountable to the will of the people when it is faithful to the values incorporated into the Constitution drafted by the people's representatives. Justice Kentridge echoes this argument in his judgement[105]. Justice Mahomed[106] also argues that the Constitution articulates "the shared aspirations of a nation" and commits that nation to a new and dramatically different future, and Justice O'Regan sees the Constitution as "a monument to this society's commitment to a future in which all human beings will be accorded equal dignity and respect"[107].

Of course, a decision that the death penalty is cruel, inhuman and degrading punishment is not enough. The Constitution allows for limitations on the fundamental rights, subject to certain

---

[102] *ibid*, at 229.

[103] *ibid*, at 19.

[104] *ibid*, at 123-124.

[105] *ibid*, at 143-144.

[106] *ibid*, at 174.

[107] *ibid*, at 222.

conditions. Once again, these are a matter of interpretation. The Attorney General argued that the limitation which the death penalty places on the right not to be subjected to cruel, inhuman and degrading punishment is reasonable and justified on the grounds that it has a unique deterrent effect and is therefore essential in a society with a violent crime rate as high as ours. Chaskalson P rejected this argument on the basis that the deterrence of the death penalty has not, and probably cannot, be proven, and that it is therefore not reasonable or justifiable within the context of an open and democratic society based on freedom and equality[108]. This is, of course, a value judgement, and one that Chaskalson P makes on the basis of his own view of democracy, freedom and equality. His legal values are evident when he discusses one pertinent reason for declaring the death penalty unconstitutional : the fact that it is arbitrary and unequal. His emphasis on the arguments that the imposition of the death penalty is necessarily an arbitrary process, as our law vests wide discretion in the presiding judge and there is an element of chance at every stage of the process, reveals his regard for the principles of fairness and equality. He also points to argument heard by the Court on the racial and class bias of the death penalty, and questions the possiblility of ensuring equality before the law under these circumstances. Justice Ackermann's judgement is the most vivid reflection of these legal values, as his contribution is motivated by a belief that the element of inequality and arbitrariness which is inevitable to the imposition of the death penalty needs additional emphasis. He argues that the value of equality is one of the most fundamental in the new Constitution, and that it permeates every aspect of the Constitution. The arbitrary and unequal nature of the death penalty therefore renders it incompatible with the Constitution[109].

The death penalty judgement and several of the other judgements clearly indicate that the tension between constitutionalism and popular democracy is a major concern of the judges on the Constitutional Court. This issue is addressed in a similar fashion by all the judges. While they acknowledge the importance of public opinion on the matters before the Court, they insist that the Constitution would be worthless if it did not have an autonomous body, which is not subject to the will of the democratic majority, to guard and enforce its provisions. Their justification for this stance lies, *inter alia*, in a particular view of democracy. In this view, democracy is not merely a matter of casting a vote. It also refers to a system of basic values of which a respect for human life and dignity are the foundation, it requires the protection of rights essential to the successful operation of a democracy, including the rights to freedom of expression and association, and it strives towards substantive equality of all members of that society. The accountability of the Constitutional Court will therefore lie in its fidelity to these values and aims, and not in a reflection of the will of the majority. They argue that the Constitution clearly indicates its goals : democracy, freedom, equality, unity, reconciliation, peace, and reconstruction. It also appoints the Constitutional Court as the guardian of the Constitution, its Bill of Rights, and its goals.

The preceding discussion has indicated that this role is a problematic and controversial one fraught with dilemmas, and that the very notion of constitutionalism embodied in the Court is one which has an uneasy relation with the aims of popular democracy. In the light of these factors, can the Court achieve the representivity and legitimacy it needs to enable it to play a

---

[108] *ibid*, at 102.

[109] *ibid*, at 105-106.

meaningful role in the new South African democracy ? It was argued earlier that constitutionalism can be saved from its liberal democratic connotations and reconciled with the aims and aspirations of popular democracy. As Nolutshungu has pointed out, the discourse of the South African liberation movement was always characterised by a strong commitment to the notion of human rights, and it was argued earlier that popular democracy is characterised by a commitment to social and economic equality. The South African Constitutional Court can be accountable to the people whose struggle gave birth to it by interpreting the Bill of Rights in a way which would promote the achievement of these aims and in this way contribute substantially to the consolidation of democracy in South Africa. In this conceptualisation, constitutionalism can be seen as the essence of democracy, as it incorporates both a celebration of the values fundamental to popular democracy (including substantive equality) and a cynicism about the abilities or commitment of a body which is, like government, constituted for the purpose of the exercise of power, to protect those values.

South African society has recently and dramatically emerged from a brutal, authoritarian, violent and oppressive past, and it can acutely appreciate the virtues of an opposite relationship between law and government. An accountable and compassionate Constitutional Court will provide the basis for the transformation of South African society into the vision articulated by the postscript of the Constitution : "a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".

9. Is Hercules a tyrant ?[110]

The Constitutional Court's judgements, discussed above, indicate that the judges address the accountability vs autonomy dilemma by justifying their approach to interpretation or the moral reading, their power, and the content of their decisions on four fundamental and interlinked bases, each of which is central to Dworkin's understanding of the moral reading of a constitution. These include the text and its context, the drafting of the Constitution, the meaning of democracy and the Court's responsibility for it, and finally the values and vision for the future underlying the Constitution. Dworkin argues that the moral reading of the Constitution does not mean that judges become tyrants who, as unelected and unaccountable rulers impose their views on the public, but that it allows a Court to give effect to the best of a nation, its democracy and its Constitution :

"Hercules is no usurping tyrant trying to cheat the public of its democratic power. When he intervenes in the process of government to declare some statute or other act of government unconstitutional, he does this in the service of his most conscientious judgement about what democracy really is and what the Constitution, parent and guardian of democracy, really means.... if Hercules had renounced ...the responsibility to decide when he must rely on his own convictions about his nation's character, he would have been a traitor not a hero of judicial restraint."[111]

---

[110]Dworkin, *Law's Empire*, p 397.

[111]*Ibid*, p 399.