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CONSTITUTIONAL INTERPRETATION UNDER THE NEW SOUTH AFRICAN ORDER

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A dissertation submitted to the Faculty of Law, University of the Witwatersrand, Johannesburg, in fulfilment of the requirements for the degree of Master of Laws

Johannesburg, 1998

ABSTRACT

This thesis explores the democratic legitimacy of the power of judicial review. It discounts the countermajoritarian dilemma on the basis that constitutional democracy means more than majoritarianism, it entails judicial protection of other characteristics fundamental to democracy from invasion even by a majority government. Such characteristics include political processes and values which ensure the continuation of democratic rule. The Court may, however, be criticised if it exercises its power of judicial review in a manner which is undemocratic. I argue that the Court is obliged to exercise its power in a manner which respects the doctrine of separation of powers. In interpreting the Constitution, the Court is therefore obliged to show deference to Parliament by giving effect to the purpose of a constitutional provision. I conclude that the Court may only have recourse to the values which the legislature chose to include in the Constitution, except when the Court protects those political processes and values which ensure the survival of constitutional democracy.

Keywords:

Constitutional law - South Africa - judicial review - interpretation - purposive approach - separation of powers - countermajoritarian dilemma - democracy - values - original intent - fundamental rights

DECLARATION

I declare that this dissertation is my own unaided work. It is submitted for the degree of Master of Laws in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.



Adriane Janet Hofmeyr

4 December 1998

To David

sine qua non

ACKNOWLEDGEMENTS

I would like to express my thanks and appreciation to my supervisor, Jonathan Klaaren, who not only provided me with instructive and insightful support in formulating this thesis, but also managed, with gentle prodding, to ensure that I reached my self-imposed deadline. I was also fortunate enough to pick the remarkable brain of Alfred Cockrell, albeit for a brief discussion, and thus to confirm that it is okay to adopt what can be described as a conservative stance. Also, enormous thanks to Vicky Bronstein, who meticulously and thoroughly scrutinised my argument as summarised in Chapter 1 and offered constructive and valuable advice and encouragement in the last few days of this thesis. And finally I would like to acknowledge the kind assistance of Helen Fruhof, who helped me to acclimatise myself in my new working and academic environment.

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CHAPTER 1

INTRODUCTION

"Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes and not the person who first spoke or wrote them"[1].

"We are under a Constitution, but the Constitution is what the judges say it is"[2].

This thesis explores the democratic entitlement of the judiciary to impose its will on the government of a nation. Through the power of judicial review, the judiciary is able quietly and effectively to determine the manner in which a country is governed, because it has in theory the ability to give any meaning (or at least a wide variety of meanings) it chooses to the constitutional text which it is required to interpret. Constitutions by their nature constitute an attempt by a people to encapsulate and preserve their shared aspirations and political ideals. As Mohamed J said, "All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation"[3]. They are therefore phrased in notoriously vague and ideological terms. This "openness" of the constitutional text allows for interpretive

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[1] Bishop Hadley (1717) as quoted by Gambitta, May and Foster (eds); Governing Through Courts; Sage Publications; USA; 1981 at 10.

[2] US Chief Justice Charles Evans Hughs in his speech dated May 3, 1907, as quoted in Gambitta et al supra at 17. But note the contrary view of US President Andrew Jackson in 1932, as referred to in Du Plessis, L 'Legal Academics and the Open Community of Constitutional Interpreters' (1996)12 SAJHR 214 at 214, who said "Every public official takes an oath to uphold and support the Constitution, but not the Supreme Court's interpretation of it"

choices and these choices can and do "profoundly effect [sic] the outcome of constitutional disputes"[4].

The power of judicial review potentially gives judges the power to "interpret constitutional provisions in accordance with their own values or ideological preferences"[5]. Therefore, when the judiciary strikes down legislative enactments, the values and ideologies of a particular judge, or the judiciary as a whole, are potentially able to trump the values and ideologies of the other two branches of government, more particularly, the democratically elected and accountable legislature. The will of the majority, as expressed through Parliament, can therefore effectively be constrained by a handful of judges imposing their will on the government of that majority.

The openness of the constitutional text, which places the judiciary in this particularly powerful position, is the cause of a much-debated dilemma. This dilemma relates to the fundamental nature of judicial review and questions whether and how such a power can be justified in a democracy. The debate, predominantly taking place in the US, revolves around the issue of justifying a power which allows an unelected and unaccountable judiciary to overturn acts of an elected and accountable legislature. The argument runs that such a concept is contrary to the principles of democracy because it limits the manner in which the majority is able to rule. It is consequently known as the countermajoritarian dilemma. It appears at first glance that the power of the judiciary to strike down acts of the legislature and executive is undemocratic and therefore unjustifiable. However, as I discuss later in this Introduction, I argue that judicial review is in fact justifiable in a constitutional democracy on

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[3] *S v Makwanyane* 1995 (6) BCLR 655 (CC) at para 262.
[4] Marcus, G 'Interpreting the Chapter on Fundamental Rights' (1994) 10 SAJHR 92 at 92.
[5] Smith, N 'The Purposes behind the Words - A Case Note on *S v Mhlungu*' (1996) 12 SAJHR 90 at 97.

the grounds that majoritarianism is not the be all and end all of democratic rule.

However, having accepted that the power of judicial review is legitimate, the judiciary may still open itself to criticism for the *manner* in which it exercises its power over the other two branches of government. In other words, although ideologically the judiciary is justified in exercising authority over the legislature and executive, there must exist some limitations on the manner in which it does so. If no such limitations exist, because of the open-ended nature of constitutional interpretation, a judge is able to impose his or her own set of beliefs or ideologies or values on an elected Parliament. There is a generally acknowledged need to avoid "the danger that judges themselves might stray beyond their constitutionally delegated spheres of authority and thereby serve personal impulse rather than the Constitution"[6]. If the judiciary is entitled to impose any value choices onto the interpretive process and in this sense is given *carte blanche* when it interprets the Constitution, the result will sooner or later be a government by judiciary. This "politicisation of the judiciary"[7] has been criticised as being undemocratic. It cannot be denied that in a constitutional democracy the judiciary to some extent plays a political role - it is after all the judiciary's duty to act as independent referee who keeps political actors to the basic rules of the political game, as enshrined in the Constitution[8]. But the question inevitably arises as to how much political involvement on the part of the judiciary is justifiable. The question is particularly relevant in a society as diverse as South Africa's. As has been noted, "the task of defending judicial review becomes more difficult as fundamental beliefs and values cease to be widely shared" and "when half a nation believes in Locke and half in Filmer and Marx, the result in not law

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[6] Tribe, L; American Constitutional Law; The Foundation Press; New York; 1988 at 12.
[7] Du Plessis, L and De Ville, J 'Bills of Rights Interpretation in the South African Context (1): Comparative Perspectives and Future Prospects' (1993) Stell L R 63 at 81.
[8] Du Plessis and De Ville ibid at 81.

but philosophy"[9]. It is proving to be a difficult task to identify the widely shared fundamental beliefs and values of South Africans, who encompass all the cultural and religious diversity one would expect from a "rainbow nation". But if any branch of government were to be the best suited and entitled to do so, surely it would be the duly elected and accountable legislature.

Bearing in mind the existence of these limitations on the manner in which the judiciary can impose its will on its partners in government, and the fact that, as I contend, the judiciary is obliged to show deference to Parliament, the issue of judicial activism arises. When is the judiciary not obliged to show deference to Parliament? Situations will inevitably arise where the judiciary will be expected to carry out its constitutional obligations with courage and without fear, favour or prejudice. It will in such circumstances be expected to invoke its power of judicial review in order to constrain majoritarian wishes. What principles guide the Court when it does so, and which ensure that it exercises its power in a manner consistent with democratic principle?

The questions which therefore need to be addressed are: what limitations exist on the manner in which a judge may exercise the power of judicial review, which limitations must effectively restrict the introduction of personal choice into the process of constitutional decision making? What values or principles is a judge entitled to have recourse to when he or she engages in constitutional interpretation? When is a judge entitled to disregard its deference to Parliament, and strike down legislative enactments on the basis on values not to be found on the Constitution?

I have indicated the issues with which this thesis is concerned, namely, the democratic entitlement of the judiciary to trump the majoritarian wishes of the

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[9] Louis Hartz 'The Whig Tradition in America and Europe' (1952)46 Am Pol Sci Rev 989 at 997, quoted in Tribe at 14.

legislature, whether judicial review is countermajoritarian, what limits a judge's discretion, what or whose values play a determining role in constitutional interpretation, and when is political interference on the part of the judiciary justifiable. I attempt to address these issues by rolling them into a theory of constitutional interpretation which effectively declares that the judiciary will only retain its democratic credibility if it shows a certain amount of deference to the legislature. Then, having emphasised the importance of deference to Parliament, I suggest circumstances in which the Court is entitled to restrain majoritarian wishes and strike down the acts and actions of Parliament and the executive. The Chapters which follow deal with each of these issues in the following manner:

One cannot begin to address the issues facing constitutional interpreters unless one has an understanding of the jurisprudential background to interpretation in South Africa in the period leading up to the introduction of the interim Constitution[10] and its justiciable Bill of Rights in 1994. Hence, in Chapter 2, I give a brief history of statutory interpretation and offer a fairly uncontroversial explanation for the difficulties which the South African judiciary is having in adjusting to its new constitutional obligations. The difficulties arise from the fact that South Africa's legal history is seeped in the English tradition of parliamentary sovereignty. The judiciary is struggling to break out of this mindset of slavish deference to Parliament and to embrace its new role as watchdog of government. Although it has emphasised the dramatic break from the past which the interim and final Constitutions[11] introduced, the Constitutional Court itself has to date failed to articulate clearly a comprehensive theory of constitutional interpretation. Alfred

[10] The Constitution of the Republic of South Africa Act No 200 of 1993 ("the interim Constitution"), which came into effect on 27 April 1994.
[11] The Constitution of the Republic of South Africa Act No 108 of 1996 ("the final Constitution"), which came into effect on 4 February 1997.

Cockrell called the Constitutional Court's approach "rainbow jurisprudence"[12] and concluded, in his thorough analysis of the early Constitutional Court judgments, that at that time there was "an absence of a sufficiently rigorous jurisprudence of substantive reasoning in the judgments of the Constitutional Court"[13].

Chapter 3 gives an account of the so-called countermajoritarian dilemma, which I argue is no dilemma at all. Laurence Tribe refers to this dilemma as the "general puzzle of why majority will should be constitutionally constrained"[14]. These arguments are predicated on the idea that majoritarianism is the most fundamental aspect of democratic rule. Because judicial review enables an unelected judiciary to nullify policies formulated by an elected legislature, it is argued that judicial review is undemocratic. There is a consequent fear that judicial review could "stultify popular efforts to transform society"[15] and it is therefore seen as a restriction upon democratic politics[16]. However, it is still acknowledged that to reject independent review would undermine the legitimacy of the constitutional vision. Therefore various theories have developed which attempt to overcome the countermajoritarian dilemma. One argument in favour of judicial review contends that, because the Constitution is the document of "the people", the people themselves have consented to constrain themselves. In other words, the Constitution is a "political pact by which society has sought to constrain the wishes of the

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[12] Cockrell 'Rainbow Jurisprudence' (1996) 12 SAJHR 1. He calls it "rainbow" for two reasons: such wishy-washy statements "flit before our eyes ..., beguiling us with their lack of substance"; and such statements seem to deny the existence of deep conflict in the realm of substantive reasons (at 11).

[13] Cockrell at 37

[14] Tribe, L; American Constitutional Law; The Foundation Press; New York; 1988 at 12.

[15] Davis, D 'Administrative Justice in a Democratic South Africa' (1993) Administrative Law Reform 21 at 24.

[16] Dennis Davis points out that this approach of equating democracy with majoritarianism is attractive to many South Africans, perhaps because of our history of undemocratic oppression of the majority by a racial minority - Davis, D 'Administrative Justice in a Democratic South Africa' (1993) Administrative Law Reform 21 at 22.

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majority"[17]. This idea is also captured in arguments to the effect that "we the people" formulated a constitutional choice which binds the more limited authority of government[18].

However, I argue in favour of judicial review on the grounds that constitutional democracy is a specific kind of democracy which embraces more fundamental aspects than majoritarianism. Constitutionalism means that there are characteristics fundamental to democracy which cannot be amended or destroyed even by a majority government.[19] As Robert Bork put it, "[t]here are some things a majority should not do to us no matter how democratically it decides to do them"[20]. Such characteristics include political processes (for example, the right of individuals to participate in the political process equally and without limitations based on talent, ability or economic resources) as well as certain values (for example, the rule of law and separation of powers). Thus the power of judicial review not only contributes to, but is also necessary in order to perfect and to maintain, democratic political processes and values. As Ettienne Mureinik concludes, the Bill of Rights is a "potent weapon for bringing about democracy"[21]. And the duty is placed on the judiciary, as the most suitable branch of government, to ensure that such processes and values are preserved against incursions by government. I conclude that merely because the power of judicial review is countermajoritarian does not render it undemocratic. Judicial review is therefore justifiable in a constitutional democracy.

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[17] Davis, D 'Democracy - Its Influence on the Process of Constitutional Interpretation' (1994) 10 SAJHR 103 at 107.
[18] Ackerman We the People (1991), quoted in Davis, Chaskalson and De Waal at 2.
[19] Davis, Chaskalson and De Waal ibid at 2.
[20] Bork 'Neutral Principles and Some First Amendment Problems' (1971) 47 Ind LJ 1 at 2-3, as quoted in Davis, Chaskalson and De Waal ibid at 9.
[21] Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31 at 48.

Even though the power of judicial review itself is justifiable in a democracy, I argue that the judiciary may nevertheless be criticised if it exercises the power in a manner which is inconsistent with democratic principles. I contend, fairly uncontroversially that, in order to avoid being labelled undemocratic, or as some would call it, countermajoritarian, the Court must exercise its power of judicial review in a manner which is most consistent with democratic principles. Provided that the judiciary respects the principles of democracy, and avoids the temptation of engaging in aspects of government to which it is not democratically entitled, the judiciary's exercise of judicial review in a given case will be justifiable in a democratic state. Democratic principle therefore acts as a limiting factor on the manner in which the judiciary exerts its authority over its partners in government. What does this mean? It means essentially that the judiciary must adopt a model of constitutional interpretation which is in line with one of the most fundamental principles underlying democratic rule, which I argue is the doctrine of separation of powers[22].

The doctrine of separation of powers and the roles which it, together with the constitutional text, creates for the three branches of government is tackled in Chapter 4. I argue that the judiciary must first and foremost respect the principles implicit in this doctrine. This means that the Court, when called upon to give meaning to a constitutional provision, must have respect for the different roles, functions and capacities of the three branches of government to which each is democratically entitled. After examining the application of this doctrine in South Africa[23], I argue that the interrelationship between the doctrine of separation of powers and the Constitution[24] assists in determining

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[22] Carpenter, G; Introduction to South African Constitutional Law; Butterworths; Durban; 1987; at 12.
[23] I look particularly at the Constitutional Court judgments in *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) and *Executive Council, Western Cape Legislature v President of Republic of South Africa & Others* 1995 (10) BCLR 1298 (CC).
[24] The interim and final Constitutions.

the roles of each branch of government. I conclude that the role of the judiciary is, firstly, that of arbitrator of disputes (its traditional role) and, secondly, watchdog of government (its extended role resulting from its constitutional power to strike down actions of Parliament and the executive). It is not the role of the judiciary to make laws, which role is constitutionally entrusted to Parliament, nor to carry out or administer such laws, which role has been entrusted to the executive[25].

I then argue that the role of the Court, namely, that of independent arbitrator of disputes and watchdog of government, acts as a limitation on judicial power. The judiciary's share of power in the constitutional scheme of government relates to dispute resolution and not to the administration of government. It is obliged to respect the role of the legislature, as maker of laws and formulator of policy. For the judiciary to attempt to assume the role of the legislature would be undemocratic, and would therefore justify any criticism levelled against the judiciary for the manner in which it exercises its power of judicial review. The judiciary is not democratically or ideologically entitled to "legislate on matters of great social and political concern"[26]. This would effectively undermine both respect for and credibility of the judiciary in the eyes of both the elected and the electorate. By adhering to the principles underlying the doctrine of separation of powers, namely, by respecting that each branch of government has differing democratic roles and entitlements, the Court's exercise of its power of judicial review will be justifiable.

Bearing in mind the fine line between independence, on the one hand, and showing deference to Parliament as the democratically elected branch of government, on the other, I also look at the notion of independence of the judiciary as an integral feature of separation of powers. The independence of

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[25] Mohamed J in *Western Cape* at para 137.
[26] Sachs J in *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at para 178.

the judiciary is critical to the functioning of a healthy democracy, and ultimately determines whether or not the Court is able to fulfil its constitutional obligations impartially and without prejudice, fear or favour. A court beholden to the political majority of the day is not in a position to protect the citizen from abuses of public power. I conclude that it remains to be seen whether South Africa's Constitutional Court will be essentially independent, as I do not believe that it has to date been faced with any hard choices vis-à-vis the national government.

A discussion on any constitutional issue would be incomplete without some discussion on relevant comparative experiences from abroad. Hence, in Chapter 5, in order to substantiate my argument that the judiciary is not entitled to participate actively in the administration of democratic government, I look at the examples set by and comparative experiences of the USA and India. The US Supreme Court, although not quite having reached the levels of controversy which the Indian Supreme Court managed to attain, has still been the subject of much criticism for the manner in which it systematically and routinely encroaches into the legislative and executive arena. The issue of democratic legitimacy of the Supreme Court therefore remains the subject of heated debate among legal and political academics in the US, even if on a somewhat theoretical level. I look particularly at the arguments of Robert Nagel[27] and Robert Bork[28], who, although proposing different solutions, point out how the Supreme Court has gone too far. I conclude that one of the foundational lessons which can be learned from the US is that a judiciary can expect severe criticism if it embroils itself too heavily in the political shenanigans of government. In a more volatile political climate such as South Africa's, an activist Court may expect to receive more

[27] Nagel, RF; Constitutional Cultures - The Mentality and Consequences of Judicial Review; University of California Press; California; 1989.
[28] Bork, Robert; The Tempting of America : The Political Seduction of the Law; New York; The Free Press; 1990.

than only criticism, and a call for its removal from the political landscape altogether is not inconceivable[29]. The experience of the Indian Supreme Court is perhaps far more pertinent to South Africa. The Indian Parliament, newly established after the withdrawal of Britain from India, carried tremendous popular and moral support. When the Indian judiciary deliberately and systematically chose to confront the Indian legislature and to interpret its new-found Constitution in a manner which conflicted dramatically with Parliament's interpretation thereof, the issue of the Court's democratic legitimacy rose its head, to the extent that the Indian Supreme Court was almost done away with. The result of such confrontation was not a country with a Supreme Court seen as being the champion of people's rights, but rather a Supreme Court seen as the last bastion of elitism. The experience of India sharply illustrates that fears relating to the legitimacy of the Court's position in South Africa are well-founded, and that they need to be taken into account when the South African judiciary exercises its power of judicial review.

Before proposing a particular model of constitutional interpretation, I first confirm that constitutional interpretation is indeed different to the interpretation of ordinary legislation, that a Constitution is *sui generis*, and that it therefore requires its own set of interpretive principles. Secondly, I discuss the models of interpretation which are enjoying some popularity in constitutional circles at the moment. Hence, in Chapter 6, after a look at the *sui generis* nature of constitutional interpretation, I take a look at the current models of interpretation, together with reasons why I believe that each on its own is inadequate. I also incorporate relevant South African case law, particularly the Constitutional Court's judgments, in order to get an idea of what direction our judiciary is taking. I argue that none of the existing models

[29] Fears have been voiced that, should the ANC obtain the requisite two-thirds majority in the 1999 general elections, it may make substantial amendments to the Constitution.

of constitutional interpretation, which have developed in comparative jurisdictions and locally, offers a complete model of interpretation ensuring that the judiciary exercise its power of judicial review democratically.

Briefly my arguments run as follows: Beginning with the doctrine of original intent, a model based on a search for the intention of the original drafters, I argue that this ultimate form deference to Parliament on its own falls short for a number of reasons. Firstly, from a practical perspective it is difficult to determine exactly who intended what at the time of ratification of the constitutional text, and secondly, it is too formalistic in that it does not take into account the fact that the Constitution is a value-laden document, unlike ordinary legislation. Even Robert Bork's attempts to improve the original intent doctrine by arguing that the Court should seek the "public understanding" of the provision at the time of its ratification (rather than the drafters' private understandings), fails to resolve these criticisms levelled at original intent. I then take a look at the political process theory of John Hart Ely, in terms of which the role of judicial review is seen primarily to remedy dysfunctions in the political process. Here the role of the Court determines not that the Court must merely give effect to original intent, but that the Court is only entitled to engage in judicial activism to reinforce the democratic processes[30]. Ely essentially argues that a Court is only entitled to interfere in order to protect political processes (only political) and to prevent prejudice (which he attempts to defined in a value-neutral manner). The primary objection to this approach is its attempt to deny the value-laden nature of judicial review. As Tribe[31] argues, Ely's theory is "deeply flawed" because of its attempt to read the entire Constitution as having a central non-substantive aim of perfecting democracy by reinforcing the effective workings of representative government. In other words, it places too much emphasis

[30] Kentridge and Spitz at 11-22.
[31] Together with Dorf in On Reading the Constitution (1990).

on the procedural aspects of the Constitution. A similar objection is raised to Michael Klarman's version of the political process theory. Klarman argues that, if the correct processes are in place and are adhered to by government, there is no need for judicial intervention as all citizens would then be adequately represented in Parliament and their rights therefore protected. Cass Sunstein's version of the political process approach, however, acknowledges the substantive nature of judicial review. He argues that constitutional interpretation inevitably calls for reliance on interpretive principles, external to the Constitution itself and requiring some kind of justification independent of the Constitution[32]. He concludes that such principles should be derived from "the general commitment to deliberative democracy"[33]. Although Sunstein has drawn into the interpretive process the notion of substantive values, he still limits his model to the protection of democratic processes. This, I argue, is not broad enough to allow the Court in the South African context to protect individual rights not related to "deliberative democracy". Neither Ely, Klarman nor Sunstein acknowledge that the ability to cast a vote freely and fairly is not the only calculation necessary to ensure a political voice[34].

At the other end of the spectrum are the arguments based on ethics or fundamental values. These models of interpretation are preoccupied with the value-laden nature of constitutional review. As Ronald Dworkin puts it, "the process of interpretation is designed to discover the fundamental principles on which the character of society is predicated"[35]. In terms of these models, the Court is required to give content to the inevitably open-textured and indeterminate constitutional provisions by looking to sources of guidance

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[32] Sunstein, C in The Partial Constitution (1993) at 11.
[33] Sunstein at 123.
[34] Richard Posner 'Democracy and Distrust Revisited' (1991) Va LR 641 at 648, quoted in Davis, Chaskalson and De Waal at 18-19.
[35] Dworkin, R Life's Dominion (1993), quoted in Davis, D 'Democracy - Its Influence on the Process of Constitutional Interpretation' (1994) 10 SAJHR 103 at 107.

other than the constitutional text. Value-based theorists differ on what these sources should be. Dworkin argues that, in the US context, legal issues and moral issues are fused[36] and that his rights thesis does not advocate or presuppose any "ghostly entities like collective wills or national spirits"[37]. However, his model and those also advocating morality as an independent ground for decision-making are criticised for not offering any limitations on a judge's discretion. They are criticised on the grounds that once a "modality ... of decisionmaking was transformed into an external and ideological referent, it lost the legitimating force it hitherto contributed"[38]. The critical question is seen as being whether a theory which "jettisons original intent" inevitably leads to the consequence that "the Constitution is exactly what we want it to be"[39]. I argue that the answer to this question is no, that a judge's discretion can be limited in other ways besides original intent. This is where the purposive approach comes in.

The most popular model of interpretation in South Africa at present is the purposive approach, a form of value-based approach which emphasises the need to look at the purpose of a constitutional provision. This approach, as with the value-based interpretive model, seeks to emphasise the role of values, but adds to the interpretive equation the notion of seeking out the purpose of the constitutional provision in order to ascertain its meaning. The emphasis is on the purpose of a constitutional provision, as ascertained by referring to a number of factors emanating from the constitutional text. These factors include the character and larger objects of the Constitution itself, the language chosen to articulate the specific right or freedom, the historical origins of the concept enshrined, and, where applicable, the meaning and

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[36] Dworkin, R Taking Rights Seriously (1977) at 185.
[37] Dworkin, R Taking Rights Seriously at xi.
[38] Philip Bobbitt Constitutional Interpretation (1991) at xiii.
[39] Richard Posner (1986) Michigan LR 551, quoted in Davis, Chaskalson and De Waal at 108.

purpose of the other specific rights with which it is associated within the text[40]. Although this approach can be commended for acknowledging the value-based nature of judicial review, it can be criticised at this stage of its development in South Africa because of its vagueness. It is by no means settled amongst judges, practitioners and academics alike as to what is meant by the purposive approach. There is no consensus on whether the ordinary meaning of the text can be departed from in favour of its purpose[41]. Nor is there any agreement on the source of the values to which a judge can have recourse, more particularly, whether values need to sourced within the Constitution or can be sourced from an external source[42]. To the extent that the purposive approach allows for an "all things considered" approach to value judgments, the purposive approach has been criticised along the same lines as the pure value-based models[43].

A further model of interpretation is beginning to emerge in South Africa. This model seeks to emphasise the relationship between institutions of government, and is therefore referred as the structural or institutional approach[44]. By structural is meant that the judiciary must draw rules of interpretation from the relationships between structures of government and must recognise and respect the roles, functions and independence of the three institutions of government. This approach is intended to supplement the value-based approach. Although I do not intend to deal with this model in

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[40] *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321.

[41] For example, Mohamed J was reluctant to do so in *S v Mhlungu.* This problem is not particularly pertinent to the interpretation of the Bill of Rights because these provisions are inevitably indeterminate and therefore no departure from ordinary meaning is usually required.

[42] This issue is probably more of a stumbling block for interpreters of the US Constitution. The South African Constitution incorporates to a large degree a wide spectrum of values and it is therefore easier, whatever approach is chosen, to attribute your choice of values to the constitutional text.

[43] Anton Fagan 'Constitutional Adjudication in South Africa' D Phil Thesis in Law submitted to Oxford University 1997.

[44] For example, see Klaaren, J 'Structures of Government in the 1996 Constitution : Putting Democracy Back into Human Rights' (1997) 13 SAJHR 3. This model enjoys some popularity in the US - Philip Bobbitt Constitutional Interpretation (1991) at 12 and 15.

great detail, I do agree with the conclusion, namely, that the institutional structures of government need to be recognised and respected by the judiciary when its engages in constitutional review. From a pragmatic perspective, the Court should avoid handing down judgments, particularly on socio-economic rights issues, with which it knows the legislature or executive cannot comply[45]. Relevant here is the issue of judicial remedies, which I conclude dictate to a large degree how the Court should decide on an issue.

My proposal for an appropriate model of constitutional interpretation is contained in Chapter 7. It is predicated on the fact that, what the quest for democracy leads to, as determined by the doctrine of separation of powers, is a need for the judiciary to show defence to Parliament when it exercises its power of judicial review. This implies that a judge's discretion in the interpretive process must be limited in some manner. A judge is not democratically entitled to invoke any set of values when he or she gives meaning to a constitutional provision. One method of achieving this is to reduce or limit the judiciary's role in the process of constitutional review by adopting a model of constitutional interpretation which incorporates the principles inherent in the doctrine of separation of powers, most importantly the principle that the judiciary must respect the legislature as maker of laws. I therefore argue in favour of a model of constitutional interpretation which limits a judge's discretion by enforcing respect for the role of the legislature as democratically entitled lawmaker.

Briefly, my argument will run as follows: Firstly, this means that the judiciary must respect the language used by the legislature in the constitutional text[46]

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[45] The experience of the Indian Supreme Court's public law approach brings this point home. My emphasis is not on this third implication, which is central to some approaches such as Jonathan Klaaren's structural approach - Klaaren, J 'Structures of Government in the 1996 Constitution : Putting Democracy Back into Human Rights' (1997) 13 SAJHR 3.

[46] See for example, Mohamed J in *Western Cape* at para 136, Kriegler and Didcott JJ in *Du Plessis* and Kentridge AJ at para 33.

and must as far as possible attribute to such language its ordinary meaning[47]. The ordinary meaning of a constitutional provision must be sought in the light of the context of that provision[48], as well as the character and origin of Constitution itself[49]. That a plain reading of the text is a starting point has repeatedly been articulated by the South African Constitutional Court, although not always followed[50]. This "grammatical interpretation" focuses on the literal meaning of words without attributing finality to them[51].

Emphasising the ordinary or plain meaning of a constitutional provision is not that useful when interpreting provisions such as those contained in the Bill of Rights. Most of the rights contained therein are vague and broadly phrased and therefore can hardly be said to have a plain or ordinary meaning. In the case of such indeterminacy, the second feature of this model of interpretation is applicable. It provides that, where the language of the text is too broadly phrased to be capable of an ordinary meaning (in other words, the meaning is indeterminate), or (and this may be somewhat controversial) where the plain interpretation leads to a meaning which the judge believes to be contrary to the values in or underlying the Constitution[52], the Court is entitled to have regard to the *ratio legis* or purpose of the constitutional provision in question. The purpose of a constitutional provision is sought by referring to

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[47] Fagan, A 'Constitutional Adjudication in South Africa' Doctoral thesis dated 1997 and Fagan, A 'In Defence of the Obvious - Ordinary Meaning and the Identification of Constitutional Rules' 1995 (11) SAJHR 545.

[48] Chaskalson P in *Western Cape* at para 34.

[49] For example, see Kentridge AJ in *Mhlungu* at para 14, quoting Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319 (PC) at 328-9: "... take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument".

[50] For example, see Mohamed J's judgment in *S v Mhlungu* 1995 (7) BCLR 793 b(CC)..

[51] Du Plessis, L and De Ville, J 'Bills of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects' (1993) Stell L R 356 at 357. Du Plessis and De Ville call this "systematic interpretation"- ibid at 357.

[52] In order to avoid "textual sterility", as Woolman and Davis note Madala J in *Du Plessis* warns against (at para 157) - Woolman, S and Davis, D 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions' (1996) 12 SAJHR 361.

the language used, the legislative history and the context of the provision within its particular section and within the Constitution as a whole.

It is clear that, during the above interpretive processes, the Court will be faced with value choices. In other words, in determining whether the ordinary meaning of a provision is contrary to the values in or underlying the Constitution, or in determining the *ratio legis* of a particular provision, it is clear that a value judgment on the part of the judge is called for. But this decision cannot be made in an "all things considered"[53] manner. The values to which the Court gives effect must be those values which are apparent in or underlie the Constitution itself[54]. Such values cannot be sourced outside the Constitution, be it from the judge's own sense of what it right or from what he or she perceives the general public to feel is right. In other words, I argue that the Court cannot have recourse to concepts such as morality as independent sources of constitutional values[55]. The Court's function is to enforce the constitutional rules, and it is not entitled to source its rules from anywhere less concrete than the Constitution itself. The doctrine of separation of powers demands that the judiciary respect the legislature as democratically entitled lawmaker. The legislature has chosen to preserve certain foundational values in the Constitution. The judiciary is democratically obliged to respect the legislature's choice and to enforce them. The difference between the value systems in the US and in India illustrates that underlying value systems make a difference to constitutional interpretation. Whereas the US Constitution is interpreted predominantly to protect

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[53] Fagan, A 'In Defence of the Obvious - Ordinary Meaning and the Identification of Constitutional Rules' 1995 (11) SAJHR 545.

[54] Mohamed J in *Du Plessis* at para 75. Professor Cockrell also argues along similar lines - Cockrell, A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1. This is a point of departure from academics such as Dennis Davis, Stuart Woolman and Jonathan Klaaren.

[55] In the South African context, this leaves the field wide open. Our Constitution expressly incorporates a wide spectrum of values. As Mureinik puts it, the Bill of Rights itself operates as a "compendium of values" - 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31 at 32. But the point remains, constitutional values must be justified by their existence in the Constitution.

individual rights, the Indian Constitution is interpreted with an emphasis on community or group rights. The German Constitution also talks of "important community interests"[56].

No discussion on constitutional interpretation in South Africa would be complete without a look at the limitations clause and the two-stage enquiry which it introduces into the interpretive process. The Constitution expressly allows the Court to interfere with state activity where it finds that the state has acted unreasonably and unjustifiably[57]. As Mureinik has described the (interim) Bill of Rights, it is a "bridge from a culture of authority to a culture of justification"[58]. The first stage looks at the meaning and scope of the right in question and ascertains whether the action complained of breaches the right so defined. If it does, then the second stage ascertains whether such breach is reasonable and justifiable, and therefore nevertheless constitutional. The second stage in essence involves a proportionality test between the state's conduct, its objectives and its effects. What the Court is essentially doing is striking a balance between deference (allowing the democratic process of an elected Parliament to take its natural course), while ensuring that the framework of values as contained in the Constitution continue to form the broad context within which social, political and economic activity takes place[59]. I argue that whatever model of interpretation is applied during the first stage must also be applied to the limitations clause during the second phase.

As ultimately my argument rests on the contention that it is Parliament's function to ensure that the Constitution reflects the public will, I also look at

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[56] *S v Makwanyane* at para 108.
[57] Section 36 of the final Constitution.
[58] 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31 at 32.
[59] Davis, D 'Democracy - Its Influence on the Process of Constitutional Interpretation' (1994) 10 SAJHR 103 at 112.

the issue of constitutional amendment. My argument is essentially that if the Constitution is growing outdated then it is the function of Parliament, not the Court, to bring it up to date. The procedures laid down by our Constitution, although more onerous than those relating to the amendment of ordinary legislation, are nevertheless not quite as onerous as the procedures in some constitutional democracies. My argument would therefore not be as sustainable in the United States where amendment procedures are extremely strenuous. But in South Africa, where for all intents and purposes all that is required to amend the Constitution is a two-thirds majority in Parliament and in the National Council of Provinces (with some exceptions), I contend that my argument is sustainable. I include a discussion on the basic features doctrine, which is particularly relevant to my conclusion regarding when a Court is justified in defying Parliament's wishes.

Ultimately, having proposed and based my argument on the notion that the judiciary must show deference to Parliament, the question arises: when is the Court entitled not to show deference to Parliament? When is a Court entitled to move beyond the Constitution and review legislative and executive acts without recourse to the legislature's values? In other words, when is an activist Court justifiable in a constitutional democracy? I agree with Cass Sunstein when he argues that the Court's notion of what values are immutable are limited to those values which protect democratic processes. As Davis, Chaskalson and De Waal argue, a Court "may legitimately review legislative and executive acts without reference to the legislature's values when those acts interfere with the possibility of equal participation in the affairs of society"[60]. Only in these circumstances is a Court democratically entitled to move beyond the constitutional text and have recourse to values not provided therein. Such values are limited to those values which ensure the continuation of democratic rule, and this approach is therefore justifiable

[60] Davis, Chaskalson and De Waal at 22.

(in the sense that it is not countermajoritarian) because it is required in order to protect constitutional democracy itself.

I do not propose to argue that the above approach will reveal the one true meaning underlying a particular constitutional provision. I agree that "[n]o single method of reading the text is ... sovereign or can be 'proved' to be 'the correct one'"[61], and with Sachs J when he says "I regard the question of interpretation to be one to which there can never be an absolute and definitive answer..."[62]. But I do argue that the above approach allows the judiciary to carry out its constitutional obligations with courage and impartiality, while simultaneously limiting the opportunity for judges to be seduced into participating too actively in the political game, a game in which it is only democratically entitled to umpire, and not to play.

The issue of the Court's democratic credentials is not merely academic. It has been argued by an eminent judge that the power of judicial review is justified, and the dilemma therefore settled, by the drafters of the South African Constitution when they demanded, in the appointment of the members of the Constitutional Court, a balanced composition, representing different races, both genders and a breadth of professional experience; when they opened the selection procedure to a measure of public participation and scrutiny; and entrusted to nobody but the judges the power to enquire into the validity of statutory provisions[63]. However, in spite of these textual considerations, the contradictions raised by the dilemma are still relevant and need to be taken into account by the Court. Questions relating to the Court's legitimacy have already been raised in relation to the Court's abolition of the

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[61] Du Plessis at 221.
[62] Sachs J in *S v Mhlungu* 1995 (7) BCLR 793 (CC) at para 129.
[63] Didcott J in *Bux v Officer Commanding, Pietermaritzburg Prison and others* 1994 (4) SA 562 (N) at 566.

death penalty[64]. The apparent public outrage at the outlawing of the death penalty has not been assuaged by the fact that 11 judges believe that it is *inter alia* a cruel and unusual punishment. The public's sense of "who are they to dictate this to us" is a manifestation of the countermajoritarian dilemma. Another, and arguably more pertinent, example is that of the so-called Sandton Ratepayers' case[65], where the Court was exactly split down the middle and therefore failed to reach a majority[66]. The cause of the split was quite simply differing models of constitutional interpretation, with Chaskalson P's camp[67] arguing in favour of a more literal approach and Kriegler J's camp[68] choosing to emphasis context (political and institutional), purpose (the eradication of inequalities from the past) and values underlying the Constitution as a whole. The result was opposite conclusions on the meaning of the constitutional provision in question, revealing that constitutional interpretation has very real practical consequences. And the Court can expect some challenging decisions in the near future. For example, it will no doubt be requested to tackle the controversial issue of affirmative action, which will inevitably arise if the proposed Employment Equity Bill is passed by Parliament. This Bill amounts to a government attempt at social reform ("the government's drive to take on white economic privilege"[69]) and the Court will no doubt be required to test such an exercise of legislative power against the values enshrined in the Constitution[70]. Likewise, if the controversial Tobacco Products Amendment Bill is passed, the Constitutional Court can expect to have decide whether the curtailment of advertising amounts to an unjustifiable government incursion into the

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[64] *S v Makwanyane* 1995 (6) BCLR 665 (CC).
[65] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* CCT 7/98 14/10/98.
[66] The 11th judge, Judge Didcott, was absent due to illness .
[67] Chaskalson P, O'Regan, Goldstone, Madala and Ackermann JJ.
[68] Kriegler J, Mokgoro, Langa, Sachs and Yacoob JJ.
[69] Article by M Edmunds and M Soggot in the Mail and Guardian dated February 13 to 19, 1998.
[70] Note Cass Sunstein's view in his The Partial Constitution (1993) that "[d]emocratic considerations strongly argue against an aggressive judicial role in this setting", quoted in Kriel, R 'On How to Deal with Textual Ambiguity' (1997) 13 SAJHR 311 at 314.

freedom of speech. Another recent example of the type of challenge facing judges under the new constitutional dispensation includes the controversy surrounding the decision of De Villiers J in the *South Africa Rugby Football Union* case[71] in which he found against the President and is doing so launched a rather scathing attack on the President himself.

Although his unbridled criticism of the President caused opposition parties to hail the judgment as being "independent", it is arguable what in fact the judge's motives were. Judgments such as these raise the issue of the judiciary's democratic entitlement in the minds of the populace, even if not in so many words. The issue of democratic entitlement therefore needs to be taken into account by the judiciary when it carves a niche for itself in South Africa's fledgling democracy.

My conclusion is ultimately that the power of judicial review is justifiable in a constitutional democracy. However, the manner in which the judiciary exercises this power will determine whether judicial review is treated with respect or disdain by the populace. I have argued that, provided that it is exercised in a manner consistent with the fundamental principles of democracy, the judiciary should retain the credibility it deserves. The most important of these democratic principles is the doctrine of separation of powers which dictates amongst other things that the legislature is the only branch of government democratically entitled to determine the content of the Constitution, including both the language thereof and values which underlie it. The judiciary is therefore obliged to respect both. However, a Court is entitled to look beyond the constitutional text where and only where it is protecting the democratic processes themselves. A model of constitutional interpretation which takes these principles into account is one means of ensuring that the judiciary, when it exercises its power of judicial review,

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[71] The President lodged an appeal to the Constitutional Court, reported as *President of the Republic of South Africa v South African Rugby Football Union* CCT 16/98 Constitutional Court 2 December 1998.

remains within the bounds determined by the principles of democratic government.

CHAPTER 2

BACKGROUND - TEACHING OLD DOGS NEW TRICKS

1. THE FORMAL APPROACH TO INTERPRETATION

The history of Constitutionalism in South Africa has been summed up as being "the rise and fall of parliamentary sovereignty"[1]. Before the introduction of constitutional democracy into South Africa in 1994[2], the Westminster system of government under which the South African judiciary operated dictated that parliamentary sovereignty was the order of the day[3]. In this legal and political environment, the formal approach to interpretation of statutes flourished. This approach, inspired predominantly by English law, entailed interpreting statutes according to certain generally accepted rules, the most important of which was the court's obligation to seek the intention of Parliament, normally by seeking the literal meaning of the statute[4]. The judiciary was expected to, and did, bow to the wishes of Parliament when it interpreted and gave effect to legislation. Langa J summed up this approach: "The doctrine of parliamentary sovereignty meant, virtually, that the State could do anything, enact any law, subject only to procedural fairness"[5].

The prevailing judicial attitude for almost a century of constitutional jurisprudence in South Africa was one of utmost deference to Parliament, or, put more aggressively, one of either "covert support for or acquiescence in

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[1] Klug, H 'History' in Chaskalson, Kentridge, Klaaren, Marcus, Spitz, and Woolman (eds), Constitutional Law of South Africa (1996) ("CONLSA").
[2] The interim Constitution came into effect on 27 April 1994.
[3] See generally Carpenter, G; Introduction to South African Constitutional Law; Butterworths; Durban; 1987.
[4] Hosten, Edwards, Nathan and Bosman; Introduction to South African Law and Legal Theory; Butterworths; Durban; 1983 at 254.
[5] *S v Makwanyane* 1995 (6) BCLR 664 (CC) at para 219.

policies of the government of the day"[6]. John Dugard argued that judgments of the South African judiciary expressed a tendency to confirm a *status quo* which was ultimately to their advantage[7]. The South African courts had no doubt about their role vis-à-vis the legislature, namely, that the court's somewhat inferior function was merely to give effect to the will of Parliament. It was completely accepted that a judge's function was "*ius dicere* not *ius facere* .... I have only to interpret what the Legislature enacts and apparently intends"[8]. And put more strongly, "Parliament may make any encroachments it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of the courts of law to enforce its will"[9]. It was emphasised that "[c]ourts of law are not concerned with the question whether an Act of Parliament is reasonable or unreasonable, politic or impolitic"[10]. With regard to the language of an Act, it was understood that it "must neither be extended beyond its natural sense and proper limits on order to supply omissions or defects, nor strained to meet the justice of an individual case"[11]. The courts, and even the most senior judges, endorsed the principle that a judge's sense of morality is irrelevant to the interpretive process. As Ogilvie Thompson CJ said, "... [I]n our country a judge must interpret the enactments of Parliament and ... administer the law, not as he perhaps would like it to be, or as he might consider it ought to be, but as set out in the relevant statutory provision so interpreted"[12]. The dicta to this effect are many and unanimous[13].

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[6] Du Plessis, L and De Ville, J 'Bills of Rights Interpretation in the South African Context (1): Comparative Perspectives and Future Prospects' (1993) Stell L R 63 at 84.
[7] Dugard 'The Judicial Process, Positivism and Civil Liberty' (1971) SALJ 181, quoted in Du Plessis and De Ville ibid at 82.
[8] Wessels J in *Seluka v Suskin & Salkow* 1912 TPD 258 at 270.
[9] Stratford ACJ in *Sachs v Minister of Justice* 1934 AD 11 at 37.
[10] Centlivres CJ in *Harris v Minister of Interior* 1952 (2) SA 428 (AD) at 456.
[11] Hoexter JA in *R v Tebetha* 1959 (2) SA 337 (AD) at 346.
[12] Ogilvie Thompson CJ in ? (1972) 89 SALJ at 33-34. He went on to criticise judges who expressed opinions on constitutional issues, whether political or not, on the basis that this impaired their independence, detachment and impartiality.
[13] See for example, Innes J in *R v McChlery* 1912 AD 199 at 220, Steyn CJ *S v Tuhadeleni and others* 1969 (1) SA 153 (AD), Didcott J in *Nxasana v Minister of Justice and another* 1976 (3) SA 745 (D) at 747-8.

Over the last century, a number of constitutional crises have arisen in South Africa around the issue of judicial review. As far back as 1897, the principle of judicial review was rejected aggressively by the government to the point that President Kruger dismissed Chief Justice J G Kotze for attempting to introduce the principle into South African law[14]. President Kruger's oft-quoted and rather dramatic warning to judges was that "the testing right is a principle of the devil", which the devil had introduced into paradise to test God's word[15]. In 1936, the issue again raised its head when the government attempted to remove Black voters from the common voters' roll[16]. The legislation was challenged in *Ndlwana v Hofmeyr*[17], and the highest court in the land[18] confirmed that Parliament could adopt any procedure it saw fit and, once it had complied with that procedure, any amendments to legislation would be valid[19]. By the 1950s, the courts, much to the surprise of the government, had adopted a diametrically different approach and for the first time South Africa briefly experienced a judiciary with an extended power of judicial review. In 1951, when the government tried to introduce the Separate Representation of Voters Act[20], the validity of the legislation was challenged in the so-called first *Harris* case[21]. The Appellate Division unanimously overruled the decision in *Ndlwana* and, by concentrating on procedural issues, declared the Act of Parliament invalid. The court did not state expressly whether it had a testing power, but simply assumed it was competent to declare the Act invalid[22]. The government's response to this was to create a "High Court of Parliament" which "court" attempted to reverse

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[14] *Brown v Leyds NO* (1897) 4 Off Rep 17
[15] Quoted in Klug, H 'Introducing the Devil : An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 193.
[16] Act 12 of 1936, as quoted in Carpenter at 140.
[17] 1937 AD 229.
[18] The Appellate Division of the Supreme Court.
[19] "[T]he procedure ... is, so far as Courts of Law are concerned, at the mercy of Parliament like everything else" - Per Stratford ACJ at 238, as quoted in Carpenter at 140.
[20] This Act sought to disenfranchise a racially defined sector of the South African population (Coloureds).
[21] *Harris v Minister of the Interior* 1952 (2) SA 428 (A) per Centlivres CJ.
[22] Carpenter at 145 and 261.

the decision in the first *Harris* case. This legislation was challenged in the second *Harris* case[23] (also known as the High Court of Parliament case), where the court again assumed that it had the power of judicial review and declared the Act invalid. It stressed the doctrine of separation of powers (that the High Court of Parliament was merely Parliament in another guise), and also the concept of constitutionally protected rights which would be rendered nugatory without judicial protection (which took the issue of rights further than it had in previous cases)[24]. The government finally got its way by, firstly, enlarging the Senate[25] and, secondly, enlarging and packing the Appellate Division, which thereafter accepted the reinstated Separate Representation of Voters Act[26]. In 1961, the Republic of South Africa Constitution Act No 32 of 1961provided conclusively that no court of law would be competent to test the validity of an Act of Parliament[27]. The brief life of an extended power of judicial review was therefore successfully extinguished by government.

During the negotiations leading up to South Africa's 1983 Constitution[28], an attempt was also made to introduce an extended power of judicial review[29]. However, the National Party rejected such a court on the grounds that "a testing power in regard to the contents of legislation implies that the courts will participate in a typically legislative function and in certain cases will be the final legislator", which would "politicise" the judiciary[30]. This same issue is

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[23] *Minister of the Interior v Harris* 1952 (4) SA 769 (A).
[24] Carpenter compares the court's reasoning with that in *Marbury v Madison* in that the in both cases the court assumed its testing right by inference.
[25] In order to get the procedurally prescribed two-thirds majority.
[26] *Collins v Minister of the Interior* 1957 (1) SA 552 (A). The court held that Parliament has complied with procedure and that its motive for increasing the Senate was irrelevant. Schreiner JA, dissenting, held that motive was irrelevant but purpose was not, and that legislation with an unauthorised purpose or objective was invalid. See Carpenter at 147. This judgment was effectively given statutory endorsement in the Republic of South Africa Constitution Act No 32 of 1961.
[27] With the exception of legislation purporting to amend sections 108 (language rights) and 118 (procedural provision) - section 59(2).
[28] The Republic of South Africa Constitution Act No 110 of 1983 (now repealed).
[29] Opposition parties argued in favour of creating an independent Constitutional Court.
[30] Debate in Parliament taken from Hansard August 1983, as quoted in Cockram, G-M; Interpretation of Statutes; (3rd Ed); Juta; Cape Town; 1987 at 12 to 13.

still raised today (although not by politicians, but rather by academic theorists) and is addressed in later next Chapter of this thesis.

The South African courts had been severely criticised for their somewhat "our hands are tied" approach to statutory interpretation. In John Dugard's 1971 critique of the South African judiciary, he criticised judges for their unduly narrow approach to their interpretive function[31]. He argued that the judiciary was free to have chosen another approach to interpretation based *inter alia* on the principle that "when a law sinks below a minimum standard of justice, it should not be enforced on the grounds that it has ceased to become law"[32]. This the courts failed to do, preferring to adhere rigidly to the English application of parliamentary sovereignty. This "mixture of Diceyan constitutionalism and white majoritarianism" proved to be a "fatal brew"[33]. The English approach to interpretation was justified by Lord Scarman in *Duport Steel Ltd v Sirs and others*[34], where he argues that a literal approach, in which the intention of Parliament is sought, is the only way to prevent a judicial system from becoming uncertain and arbitrary:

> "The Constitution's separation of powers ... must be observed if judicial independence is not to be put at risk. For, if people and Parliament came to think that the judicial power is to be confined by nothing other than the judge's sense of what is right ... confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application."

Cora Hoexter correctly pointed out that, although a "democratically minded" judge "may worry about the legitimacy of activism on the part of an unelected judiciary", this worry was "over-punctilious" as the legislature itself was not

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[31] Dugard, J 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 SALJ 181 as quoted in Cockrell at 7-8.
[32] Dugard, J 'Judges, Academics and Unjust Laws' (1972) 89 SALJ 271 at 284.
[33] Davis, Chaskalson and De Waal at 1.
[34] [1980] 1 All ER 529 at 550-1.

democratic[35]. This is an understatement. Lord Scarman's argument is valid (and I refer to it later to substantiate my argument for minimal judicial activism), but it is only applicable in a system where Parliament is democratically elected. In other words, in a system where Parliament is not democratically elected, a judiciary cannot be described as being undemocratic for not showing deference to that Parliament. A democratically elected legislature South Africa unquestionably did not have. There were (and still are) glaring political and legal distinctions between South Africa and England which our judiciary chose to ignore and continued to find itself bound by English precedent with regard to interpretation of statutes.

Is the criticism of the judiciary's lack of resistance to the National Party government's apartheid policies justified? It has been said that "[t]he only thing necessary for the triumph of evil is for good men to do nothing"[36]. If the judiciary had consistently and unanimously thwarted Parliament's attempts at creating a society divided along racial lines, what would the result have been? Most certainly Parliament would have made use of its powers to have removed such resistance one way or another, and therefore it could be argued that ultimately such resistance would have been fruitless. Would it have made a difference to South Africa's political and legal history if the court had adopted an activist role of reforming society[37]? Would its contribution to the transformation to democracy in South Africa have been so powerful as to have brought about change sooner than 1994? Did the judiciary, by acquiescing to Parliament's internationally criticised apartheid policies, lose its credibility in the eyes of the public? These questions are fortunately now

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[35] Hoexter, C 'Judicial Policy in South Africa' (1986) 103 SALJ 436 at 438.
[36] Remark attributed to Edmund Burke (1729-1797) in Fraser, D; Dictionary of Quotations; Collins; Great Britain; 1988 at 55.
[37] Higginbotham in his article entitled 'Racism in American and South African Courts: Similarities and Differences' (1990) 65 New York University LR 479 argues that, although courts can serve as the vanguard for social change, "used as a sole tool, they cannot eradicate societal racism" (as quoted in Gutto, S "The Constitutional Court's Opening Salvo

predominantly of academic interest only, but I agree with Froneman J when he argues that it would be "prudent to take cognisance of the criticism of judicial behaviour under the old pre-Constitution order" and that due regard should be given to the "deficiencies in the past" [38].

South Africa's pre-1994 legal system was, as I have illustrated, "overwhelmingly characterised by the formal vision of law"[39]. The judiciary viewed its strictly formalist and literalist approach as proof of its apolitical nature. As Du Plessis puts it, literalism "was sustained by the myth of the judiciary's unfaltering political disinterestedness"[40].

2. NEW CONSTITUTIONAL ORDER

With the introduction in 1994 of the interim Constitution, these self-same courts quoted above, together with the newly-formed Constitutional Court, are expected to take into account the revolutionary political and legal changes which have occurred in this country, and develop an appropriate theory of constitutional interpretation which is in keeping with the new role of the judiciary. The enormity of the paradigm shift which is required of our the judiciary cannot be underestimated. It entails a complete and dramatic break from the past, and an open-minded and enthusiastic embracing of the new role which has been placed on its shoulders. Kriegler J rather evocatively describes it as "the Phoenix-like emergence of the old judiciary in new feathers"[41].

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in Confronting the Fundamental "Mischief" of the Past and Sowing Seeds for the New South African Jurisprudence' (1996) 12 SAJHR 47 at 53).

[38] *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (Ck) at 632-3.

[39] Cockrell at 7.

[40] Du Plessis, L 'Legal Academics and the Open Community of Constitutional Interpreters' (1996)12 SAJHR 214 at 219.

[41] Kriegler J in *S v Mhlungu* 1995 (7) BCLR 793 (CC) at para 100.

However, this does not mean that all previous rules of law are henceforth to be ignored[42]. But continuity with the past should not be exaggerated. As Mahomed
J states in *Makwanyane*: "The South African Constitution ... retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, ... the past .... The contrast between the past which [the Constitution] repudiates and the future to which it seeks to commit the nation is stark and dramatic"[43].

This difficulty was anticipated. During the negotiation of the Constitution, the view emerged that most of the apartheid era judges were unsuited to decide on constitutional issues[44]. It has been argued that, in order to overcome this problem, the composition of the judiciary needed to be widened and political influence needed to be removed from the appointment process[45], the former of which indeed has occurred and the latter of which certainly reduced.

As happened in Canada in the 1980s, the change from parliamentary sovereignty to constitutional democracy in South Africa has understandably created a period of confusion amongst judges[46]. They are struggling to identify the proper role of the judiciary in a constitutional democracy and, more particularly, to identify the appropriate manner in which to interpret legislation, specifically the Constitution itself. This confusion is apparent from judgments of the High Court as well as the Constitutional Court[47], as illustrated below:

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[42] *Zuma* at para 17 (per Kentridge AJ).
[43] *Makwanyane* at para 262.
[44] Sarkin, J 'The Political Role of the South African Constitutional Court' (1997)114 SALJ 134 at 134.
[45] Forsythe (1991) SAJHR 1, quoted in Du Plessis and De Ville ibid at 84.
[46] Cockrell at 3 expects this transition to be "traumatic".
[47] I do not mean to imply that any one of these judgments is wrong, merely that there was at this time no uniformity of approach between the respective courts.

1. Supreme Court pre-1994

Prior to 1994, the South African judiciary had the opportunity to engage in constitutional interpretation when it was called upon to test the constitutional validity of legislation under the Bophuthatswana Bill of Rights[48]. As could be expected, it generally interpreted the Bill of Rights in the only manner with which it was familiar. Both Miller JA[49] and Galgut AJA[50] adopted a literal or formal approach to interpretation, where they sought the intention of the legislature.

However, this was not always the case. Friedman J adopted a more generous approach to constitutional interpretation in *Nyamakazi v President of Bophuthatswana*[51]. And Heath J in *Ntenteni v Chairman, Ciskei Council of State* accepted the "purposive construction of a constitution" as opposed to seeking the intention of the framers of the constitution[52].

2. High Court post-1994

Looking for the "intention of the drafter" or the "intention of the framers of the Constitution" is still a popular approach of the post-1994 judiciary[53]. The courts also at times fail to recognise the fundamental differences between an interpretive process relating to a Constitution and that relating to ordinary legislation[54]. However, calls for a "generous and purposive interpretation" of

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[48] Davis, D 'Democracy - Its Influence upon the Process of Constitutional Interpretation' (1994) 10 SAJHR 103 at 104.
[49] In *S v Marwane* 1982 (3) SA 717 (A) at 749D-F.
[50] In *Segale v Government of the Republic of Bophuthatswana* 1990 (1) SA 434 (BA) at 448F-G.
[51] 1992 (4) SA 540 (B).
[52] 1993 (4) SA 546 (CkGD) at 554.
[53] Marais J in *S v Sixaxeni* 1994 (3) SA 733 (C) at 736-7. Farlam J in *S v Williams and Five Similar Cases* 1994 (4) SA 126 (C) at 136-7.
[54] Thirion J in *S v Saib* 1994 (4) SA 554 (D), who went so far as to argue that the rules of constitutional interpretation do not "differ materially from the ordinary rules of the interpretation of statutes. One still has to ascertain and give effect to the intention of the Legislature" (at 559).

the Constitution start to appear during this period[55]. In addition to this, the importance and role of values begins to emerge, that certain principles or values need to extracted from the Constitution as a whole, against which law or conduct can be tested[56], and that "interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution"[57].

3. Constitutional Court

Although the Constitutional Court has indicated that it intends making a decisive break from the past by moving away from the formalist or literal approach to interpretation, it has not articulated with any clarity how it intends to do this. Its failure to articulate a theory of constitutional interpretation has attracted fairly harsh criticism from the academic sector. Its approach has been described as "rainbow jurisprudence"[58] because it consists of "wishy-washy" statements which "flit before our eyes ..., beguiling us with their lack of substance", which seem to deny the existence of deep conflict in the realm of substantive reasons[59]. Cockrell concludes that there is "an absence of a sufficiently rigorous jurisprudence of substantive reasoning in the judgments of the Constitutional Court"[60]. Jonathan Klaaren notes that the Court has swung between different approaches to constitutional interpretation, and has failed to adopt a consistent approach to

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[55] Myburgh J in *Khala v Minister of Safety and Security* 1994 (4) SA 218 (WLD) at 222.
[56] Froneman J in *Qozeleni v Minister of Law and Order and another* 1994 (3) SA 625 (ECD). Didcott J supports Froneman J's approach in *Qozeleni*, but only in respect of rights and liberties, not "the prosaic issue of jurisdiction"- *Bux v Commanding Officer, Pietermaritzburg Prison, and others* 1994 (4) SA 562 at 566. The Constitutional Court quoted *Qozeleni* with approval in its first case - *S v Zuma* 1995 (4) BCLR 401 (CC) per Kentridge AJ.
[57] Froneman J in *Matiso v Commanding Officer, Port Elizabeth Prison, and another* 1994 (4) SA 592 at 597.
[58] Cockrell, A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1.
[59] Cockrell at 11.
[60] Cockrell at 37

interpretation[61]. Lourens Du Plessis states that "[j]udgments in constitutional cases so far have shown a conspicuous lack of explicit reflection on the exigencies of the methods of constitutional interpretation", although he concedes that the courts have coped pretty well by relying on "gut-feeling"[62].

In its first official engagement with constitutional interpretation, the Constitutional Court unanimously endorsed what could be described as a formal approach to interpretation[63]. While acknowledging the important role that "values" play[64] and referring approvingly to the generous[65] and purposive[66] approaches to interpretation (neither of which approaches the court elaborated upon), the court emphasised that above all the language of the constitutional text must be respected. As Kentridge says: "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument"[67]. The same idea was reflected in *S v Makwanyane*[68], but the emphasis here was reversed. Although it was acknowledged that language cannot be ignored, the emphasis was on a "generous" and "purposive" approach which "gives expression to the underlying values of the Constitution" [69].

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[61] Klaaren 'Structures Of Government In The 1996 Constitution : Putting Democracy Back Into Human Rights' (1997) 13 SAJHR 3

[62] Du Plessis, L 'Legal Academics and the Open Community of Constitutional Interpreters' (1996)12 SAJHR 214 at 226.

[63] *S v Zuma and Others* 1995 (4) BCLR 401 (CC). This judgment declared unconstitutional the reverse onus provision contained in section 217(1)(b)(ii) of the Criminal Procedure Act No 51 of 1977 (relating to the admissibility of confessions by an accused). The unanimous judgment was delivered by Kentridge AJ.

[64] He cites with approval (at para 17)Froneman J in *Qozeleni*, who states that the Constitution must be examined with a view to "extracting those principles or values against which such law ... can be measured" and that the Constitution must be interpreted to give "clear expression to the values it seeks to nurture for a future South Africa" (*Qozeleni* at 80). In *Zuma* the court proceeded to extract the values relating to the right to a fair trial by looking at historical background and comparative foreign case law (conclusion at para 33).

[65] He quotes Lord Wilberforce in the above case.

[66] He quotes Dickson J's famous dicta in *R v Big M Drug Mart Ltd* (1985) 18 DKR (4th) at 321, 395-6.

[67] *Zuma* at para 17.

[68] *S v Makwanyane* 1995 (6) BCLR 665 (CC).

[69] Mention was made of the need to have "due regard to the language that has been used" - per Chaskalson P at 676.

The unanimity of the court on interpretive issues did not last long. In *S v Mhlungu*[70], the Court was sharply divided in its approach to interpretation to the point that each approach created different conclusions. The majority (led by Mohamed J with Madala, Mokgoro, O'Regan and Langa concurring) without doubt ignored the literal meaning of the words in order to arrive at what they considered to be the fairest interpretation of the provision in question. The minority (led by Kentridge AJ with Chaskalson P, Ackermann J and Didcott J concurring) held that the language of the section in dispute was clear and therefore could not be ignored. Kentridge AJ held that "there are limits to the principle that a constitution should be construed generously" and that the court was ignoring its own warning in *Zuma* that the language of a constitution must be respected[71]. The judgments of both the majority and the minority can be criticised not so much for their respective outcomes, but for the routes which they took to arrive at such outcomes[72].

What has emerged from the case law to date is that, in theory, the Constitutional Court has accepted what it calls a purposive model of interpretation. By this is more or less meant that the court can give meaning to a constitutional provision by examining the purpose of such provision. What the Court has not made clear is the role which language plays in the interpretive process, nor has it clearly articulated what it means by purposive approach. Nor has the Court acknowledged that constitutional interpretation is more about making hard choices over moral and political values than it is

[70] 1995(7) BCLR 793 (CC). Here, the court examined section 241(8) of the interim Constitution, which section attempted to draw a cut-off date for application of the interim Constitution to pending cases. The majority of judges found that the only purpose of this section was to preserve the authority of pre-Constitution courts to continue to function a courts for the purpose of adjudication in pending cases (to preserve the legitimacy of pre-Constitution courts). In other words, the section did not deprive any person of constitutional protection merely because his or her case arose before the 27 April 1994 (passing of the interim Constitution), as the minority concluded.

[71] At para 78.

[72] See Chapters 6 and 7 below for further discussions on this point.

about warm and fuzzy decision-making[73]. The Court is fond of broad phrases such as "judicious interpretation"[74], where Mohamed J incorporated a lengthy list of factors to be taken into consideration by the Court (particularly the text, history and ethos of the Constitution) but which omitted a reference to the purpose of the provision[75].

Although the judiciary is on the whole adjusting well to the swift and dramatic changes brought about by the interim and final Constitutions, the Constitutional Court needs to adopt a coherent and justifiable theory of constitutional interpretation in South Africa and it needs to do so as a matter of some urgency. This will not only clarify the role of the judiciary in South Africa's new constitutional democracy, but will also ensure that a uniformity of approach between the respective High Courts and the Constitutional Court develops. The sooner the Constitutional Court leads the way and adopts a model of interpretation appropriate to South Africa's political and legal climate, the sooner the "rainbow jurisprudence" will dissipate leaving clear skies in its wake[76].

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[73] Cockrell, A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1 at 11.
[74] Mohamed J in *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 266.
[75] Which approach he endorses in *Western Cape* at paras137 and 144.
[76] With apologies to Cockrell, who, it seems, would prefer the rainbow to remain but with a vastly improved spectrum of colours (at 38).

CHAPTER 3

JUDICIAL REVIEW AND ITS ASSOCIATED DILEMMA - LOOKING THE GIFT HORSE IN THE MOUTH

1. THE EXTENDED POWER OF JUDICIAL REVIEW

Review of government action by the judiciary is a concept with which most South African lawyers are familiar. The concept first entered English administrative law as far back as the 17th century[1] and has been in existence in South Africa since circa 1828[2], albeit in a very limited form. Its predominant function was until 1994 to ensure that administrative bodies acted within their powers and according to correct procedures[3]. Even in this limited form, it was acknowledged that the power of judicial review had political implications. As Baxter puts it, "[t]he outer boundary of review is a matter of political significance; and it ebbs and flows in sympathy with the continuously fluctuating interrelationship of the three organs of government"[4].

With the introduction of constitutional democracy into South Africa[5], the judiciary's position vis-à-vis the legislature and executive has been dramatically enhanced by the entrenchment of a justiciable Bill of Rights. The power of judicial review, now firmly entrenched in South African constitutional and administrative law, has been vastly extended to include the power of the judiciary to overturn conclusively acts of the legislature and the

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[1] L Baxter; Administrative Law; Juta; Cape Town; 1984 at 21.
[2] Baxter at 303.
[3] For example, Lord Brightman in *Chief Constable of the North Wales Province v Evans* [1982] 3 All ER 141 at 154: "Judicial review is concerned, not with the decision, but with the decision-making process", as quoted in Baxter; Administrative Law; Juta; Cape Town; 1984 at 305.
[4] Baxter ibid at 320.
[5] Initially, with the introduction of the interim Constitution and thereafter the final Constitution.

executive, to the extent that it is empowered to declare Acts of Parliament invalid[6]. Judicial review in this form is well-entrenched in the jurisprudence of the United States. It was first read into the US Constitution in 1803 by Chief Justice Marshall in the famous and oft-cited case of *Marbury v Madison*[7] and has remained a feature of their constitutional landscape, albeit controversially[8]. In South Africa we now have a powerful judiciary in that it can influence the political, social, legal and even moral direction which our government takes.

2. DILEMMA - AN UNELECTED JUDICIARY

However, the rationale underlying this extended power of judicial review remains the subject of a much-debated and politically-charged dilemma. Traditionally, the debate, predominantly taking place in the US, revolves around the issue of justifying a power which allows an unelected and unaccountable judiciary to overturn acts of an elected and accountable legislature. The judges do not acquire their positions through popular elections, are not accountable even to the elected officials who nominated them and are secured in their independence by a guaranteed tenure and salary.[9] The argument runs that such a concept is contrary to the principles of democracy as it limits the manner in which the majority is able to rule. It is consequently known as the counter-majoritarian dilemma.

Laurence Tribe refers to this dilemma as the "general puzzle of why majority will should be constitutionally constrained"[10]. The US academic Alexander

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[6] Sections 98 and 101 of the interim Constitution and sections 167 and 172 of the final Constitution.
[7] 5 US (1 Cranch) 137 (1803).
[8] For a summary of the US approach, see Chapter 5 below.
[9] Tribe, L; American Constitutional Law; The Foundation Press; New York; 1988 at 62.
[10] Tribe at 12.

Bickel describes judicial review as being a "counter-majoritarian force in our system", and constitutes "control by an unrepresentative minority of an elected majority"[11]. Majoritarian democrats argue that the essence of democracy is that the will of the majority should prevail over the will of minorities regarding the government of a country. As Professor Davis describes it, majoritarianism means that "disputed political issues are decided through a political process in which the majority dominates."[12] In this context, the institution of constitutional review raises an apparent contradiction in that unelected judges are empowered to overturn the will of a democratically elected and accountable legislature. And therefore "the politics of an unelected and unaccountable judicial elite"[13] are immune from the wishes of the majority.

There is a consequent fear that judicial review could "stultify popular efforts to transform society"[14] and it is therefore seen as a restriction upon democratic politics[15].

3. JUDICIAL REVIEW IS JUSTIFIABLE

In spite of fears regarding the legitimacy of judicial review, it is still acknowledged that to reject independent review would undermine the

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[11] Bickel, A; The Least Dangerous Branch: The Supreme Court and the Bar of Politics; Yale University Press; New Haven; 1986 at 16. He also warns that judicial review may over time have a tendency seriously to weaken the democratic process, as it expresses a form of distrust of the legislature. He refers to James Bradley Thayer's argument that legislatures are becoming accustomed to this distrust and therefore are more and more readily becoming to justify it (at 21-2). Although this argument may have some merit, intuitively I cannot agree with this attempt at justifying legislatures' tendencies to ignore the interests of the electorate.

[12] Davis, D 'Democracy - Its Influence upon the Process of Constitutional Interpretation' (1994) 10 SAJHR 103 at 103.

[13] Davis ibid at 103.

[14] Davis, D 'Administrative Justice in a Democratic South Africa' (1993) Administrative Law Reform 21 at 24.

[15] Dennis Davis points out that this approach of equating democracy with majoritarianism is attractive to many South Africans, perhaps because of our history of undemocratic

legitimacy of the constitutional vision. Therefore various theories have developed which attempt to overcome the countermajoritarian dilemma. One argument in favour of judicial review contends that, because the Constitution is the document of "the people", the people themselves have consented to constrain themselves. In other words, the Constitution is a "political pact by which society has sought to constrain the wishes of the majority"[16]. For example, the US academic Ackerman argues that the justification for the exercise of judicial review is based on "we the people", who formulated a constitutional choice which binds the more limited authority of government[17]. He argues that the people are the source of constitutional values, but the government is not "the people". The judiciary in India has also argued along similar lines in the past. In the famous case of *Kesavananda*[18], the majority drew a distinction between "the people" and Parliament, arguing that the font of constitutional sovereignty was the people.

The fact that the institution of judicial review may be undemocratic, or at least be perceived as being undemocratic[19], does matter. But the fact that it is countermajoritarian does not. A distinction exists between the separate concepts of majoritarianism and democracy. The former has "no exclusive claim on the meaning"[20] of the latter. Democracy does not always mean majoritarianism[21]. Merely because the power of judicial review is counter-majoritarian does not mean that it is undemocratic. Democracy is much more

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oppression of the majority by a racial minority - Davis, D 'Administrative Justice in a Democratic South Africa' (1993) Administrative Law Reform 21 at 22.

[16] Davis, D 'Democracy - Its Influence on the Process of Constitutional Interpretation' (1994) 10 SAJHR 103 at 107.

[17] Ackerman We the People (1991), quoted in Davis, Chaskalson and De Waal at 2.

[18] *Kesavananda v State of Kerala* AIR 1973 SC 1461, as discussed in Davis, Chaskalson and De Waal at 41.

[19] The adage "not only must justice be done, but also be seen to be done" is appropriate here.

[20] Davis, Chaskalson and De Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation" Chapter 1 of Van Wyk, Dugard, De Villiers and Davis; Rights and Constitutionalism in the New South African Order; Juta; Cape Town; 1996; at 2.

[21] Corder, H 'Lessons from (North) America (Beware the "Legalization of Politics" and the "Political Seduction of the Law") (1992) 109 SALJ 204 at 224.

than a process[22]. It is a co cept of government which inherently includes notions of equity, fairness, justice and division of power, with ut which no country could be described as democratic. Adherence to these notions is more democratic than strict compliance with the will of a majority. Therefore, the fact that judicial review places limitations on majority rule does not render such a system undemocratic. This is the form of democratic rule, one which is not entirely majoritarian, which was originally proposed by James Madison[23]. Robert Bork elaborated on this point: "[t]here are some things a majority should not do to us no matter how democratically it decides to do them"[24]. Laurence Tribe points out that the perception of many Americans over the last two centuries is that, whatever the model, the government cannot be relied upon to behave voluntarily as the Constitution demands. The American perception is that some form of intervention from "a point at least partially outside of ordinary majoritarian politics" is necessary in order to maintain checks and balances and ensure the adequate discharge of government's obligations[25]. And this is where constitutionalism comes in. Constitutionalism means that there are characteristics fundamental to democracy which cannot be amended or destroyed even by a majority government.[26] Such characteristics include political processes (for example, the right of individuals to participate in the political process equally and without limitations based on talent, ability or economic resources) as well as certain values (for example, democratic principles like the rule of law and separation of powers). Thus the power of judicial review not only contributes to, but is also necessary in order to perfect and to maintain democratic

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[22] Davis divides theories of democracy into two general approaches: one embodies a set of values such as equality and tolerance, and the other sees democracy primarily as a process - Davis, D 'Administrative Justice in a Democratic South Africa' (1993) Administrative Law Reform 21 at 22.

[23] Davis, Chaskalson and D[illegible] ibid at 9.

[24] Bork 'Neutral Principles and S[illegible] First Amendment Problems' (1971) 47 Ind LJ 1 at 2-3, as quoted in Davis, Chaskalson and De Waal ibid at 9.

[25] Tribe at 9.

[26] Davis, Chaskalson and De Waal ibid at 2.

political processes and values. As Ettienne Mureinik concludes, the Bill of Rights provides a "potent weapon for bringing about democracy"[27]. And the onus is placed on the judiciary to ensure that such processes and values are preserved against incursions by government.

Jonathan Klaaren describes the dilemma as essentially the opposition of democracy (Parliament) and human rights (the judiciary), where Parliament is seen as the democratically elected representative of the populace, and the Court the protector of the populace in the face of abuses by such representative[28]. He argues that neither democracy nor human rights must be privileged at the expense of the other. Klaaren notes that there is a distinct leaning in favour of human rights rather than democracy, certainly in the realms of legal academia., despite the fact that historically, in South Africa at least, the two concepts have been treated as synonymous. It was generally understood that democracy would lead to human rights, and vice versa[29]. Drawing on this, Klaaren argues in favour of placing the two concerns on equivalent footing, and favouring neither one nor the other[30]. Klaaren's argument is an attempt to emphasise that, in a political and legal environment which is tending to focus on human rights or substantive justice, the democratic process is frequently ignored or forgotten[31].

It is fairly uncontroversial to argue that the judiciary is the best suited institution of government to ensure that such processes and values a:

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[27] Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31 at 48.
[28] Klaaren, J 'Structures of Government in the 1996 South African Constitution : Putting Democracy back into Human Rights' (1997) 13 SAJHR 3 at 5.
[29] Klaaren at 4.
[30] Klaaren at 5-6. He argues that this notion is supported by academics such as Kentridge and Spitz, who use the US academic Cass Sunstein to make the same point, that in a constitutional democracy human rights and democracy merge.
[31] He is calling for a greater recognition or appreciation of the democratic processes which make up a constitutional democracy. This includes an appreciation of the relationship between the institutions of government and also affects the content of some rights. He gives the example of "an openness to the collective dimension of human rights" - Klaaren at 5.

respected by the government as a whole[32]. Through the function of judicial review, the judiciary is often depicted as the institution continuously engaged in a struggle to keep the political branches true to the Constitution. The most classic example of this approach is enunciated by Ronald Dworkin in his work Taking Rights Seriously. This view requires the frequent exercise of judicial power to restrain other institutions because those institutions are thought to have no disposition to honour constitutional rights[33]. Laurence Tribe refers to the fear that without "judicial prodding", positive constitutional duties would too often and too easily be ignored by public authorities "short-sightedly wedded to the status quo"[34].

Is the judiciary the most appropriate branch of government to act as watchdog? Certainly it would be inappropriate for the legislature, as drafters of the constitutional text itself, to act as watchdog to itself and as arbitrator over disputes between itself and citizens. The executive? History has shown that abuse of citizens' rights frequently emanates from this branch of government, which fact would militate against granting it the power to decide whether such abuses have occurred[35]. I agree with Bickel when he argues that the Supreme Court is the institution of government best equipped "to be the pronouncer and guardian" of the values which a people hold to have a

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[32] Although some academics have expressed, in varying degrees of cynicism, doubts as to how effective judges are at doing this. See Robert Nagel; Constitutional Cultures - The Mentality And Consequences Of Judicial Review; University of California Press; California; 1989. Also Davis, Chaskalson and De Waal ibid at 9.

[33] Robert Nagel describes this approach as "overly pessimistic", calling this " the confrontation model" and referring to the constitutional costs of a "routinely pugnacious judiciary - Nagel, R; Constitutional Cultures - The Mentality and Consequences of Judicial Review; University of California Press; California; 1989 at 23.

[34] Tribe, L; American Constitutional Law; The Foundation Press; New York; 1988 at 9.

[35] It is arguable that the executive is involved in constitutional dispute resolution through the so-called "state institutions supporting constitutional democracy" established in Chapter 9 of the final Constitution, for example, the Public Protector, the Human Rights Commission and the Auditor-General. It seems to be unclear whether these institutions fall under the legislature, the executive or the judiciary. I believe that, although not subject to executive control, their most appropriate categorisation is executive.

certain enduring value[36]. The independence and non-accountability of the judiciary elevate it to a level above the political fray and the vagaries of politics and public opinion[37]. Rather than being undemocratic, this is vital for the health and survival of an "open and democratic society based on human dignity, equality and freedom"[38]. In addition to this, the Court is by its training and nature more likely to offer a principled, rather than a politically expedient, interpretation of the constitutional text. As Bickel puts it, "Courts have certain capacities for dealing with matters of principle that legislators and executives do not possess" in that "[j]udges have, or should have, the leisure, the *training, the insulation*" [39] to do so. Tribe also argues along similar lines. He refers to the judiciary's unique capacity and commitment to engage in constitutional discourse - to explain and justify its conclusions about governmental authority "in a dialogue with those who read the same Constitution even if they reach a different conclusion". He sees the judiciary as a "dialogue-engaging institution" which is insulated from day-to-day political accountability, making it the ideal branch of government to engage in the task of constitutional interpretation[40].

The existence of a power of judicial review, and its exercise by the judicial branch of government, can therefore be justified in a democratic system of government.

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[36] Foreword by Harry H Wellington to Bickel's The Least Dangerous Branch: The Supreme Court and the Bar of Politics; Yale University Press; New Haven; 1986 at xi.
[37] For a more detailed discussion on this point, see p x below.
[38] Sections 36 and 39 of the final Constitution, which sentiment is echoed in section 1, as well as sections 33, 35, the Preamble and the Postamble of the interim Constitution.
[39] Bickel at 25.
[40] Tribe ibid at 15.

4. LIMITING JUDICIAL POWER

Even though it is ideologically acceptable that an unelected judge has the power to trump the will of an elected Parliament, the open-ended nature of constitutional interpretation still creates a problem. This problem relates to the *manner* in which the judiciary exercises such power over its partners in government. A judge can, by invoking the power of judicial review, potentially impose his or her own set of beliefs or ideologies on the government of the day. Judges are compelled to make "some basic choices" in giving a Constitution its content[41]. They will "inevitably be confronted with interpretive choices and the exercise of those choices will profoundly effect [sic] the outcome of constitutional disputes"[42]. Judges therefore theoretically have the power to "interpret constitutional provisions in accordance with their own values or ideological preferences" [43], and the values and ideologies of a particular judge or the judiciary as a whole, therefore, can effectively trump the values and ideologies of the other two branches of government, more particularly, the democratically elected and accountable legislature. For this reason, it is often said that a Bill of Rights or the power of judicial review "judicialises politics" or creates a "politicisation of the judiciary"[44].

The question therefore arises: have the known dangers of a parliamentary sovereignty not merely been exchanged for the unknown dangers of a judicial sovereignty[45], where the judiciary is now theoretically empowered to do as it pleases without accounting to anyone? Is this any less undemocratic

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[41] Davis, Chaskalson and De Waal ibid at 3.
[42] Marcus, G 'Interpreting the Chapter on Fundamental Rights' (1994) 10 SAJHR 92 at 92.
[43] Smith, N 'The Purposes behind the Words - A Case Note on *S v Mhlungu*' (1996) 12 SAJHR 90 at 97.
[44] Du Plessis, L and De Ville, J 'Bills of Rights Interpretation in the South African Context (1): Comparative Perspectives and Future Prospects' (1993) Stell L R 63 at 81.
[45] Steven Friedman calls it a "juristocracy" and Sachs J referred to it as a "dikastocracy" (from the Greek word 'dikastos' = judge) in *Du Plessis and Another v De Klerk and Another* 1996 (3) SA 850 (CC) at 932, both quoted in Cockrell, A 'The South African Bill of Rights and the "Duck/Rabbit"' (1997) 60 Modern Law Review 513 at 536.

(ie more democratic) than a legislature or executive which is empowered to do as it pleases? There is no guarantee that an unfettered judiciary would ensure a more democratic society than an unfettered legislature or executive. As Cockrell puts it, "it is difficult to understand why a Court's judgment regarding what is appropriate in an 'open and democratic society' should take priority over that of the legislature"[46].

The resolution of this problem depends on the manner in which the judiciary exercises its power of judicial review, or rather the extent to which it is prepared to invoke its power. If a judge has recourse to his or her own personal convictions in the interpretive process, he or she runs the risk of usurping the role of the legislator, thereby effectively breaching one fundamental principle underlying the achievement of democracy, namely, the doctrine of separation of

powers. In order to avoid allegations of being undemocratic, a Court must exercise its power of judicial review in a manner which allows itself to be limited by the doctrine of separation of powers. In other words, a Court, in giving meaning to a constitutional provision, must respect the functional and institutional integrity of the three branches of government, namely, the legislature, the executive and the judiciary. The respective constitutional roles of the three branches dictates to a large extent which branch is primarily responsible for what government function, thereby avoiding the accumulation or concentration of power in the hands of one branch alone. Should the judiciary not respect this doctrine, it runs the risk of creating a "minority tyranny" as opposed to the more common "majority tyranny"[47], in the sense that the majority is prevented from ruling where its power is legitimate.

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[46] Cockrell, A 'The South African Bill of Rights and the "Duck/Rabbit"' at 535.
[47] These terms are used by Robert Bork in his article 'Neutral Principles and Some First Amendment Problems' (1971) 47 Ind LJ 1 at 11, as quoted in Davis, Chaskalson and De Waal ibid at 13.

Democratic principles therefore act as a limiting factor on the manner in which the judiciary exerts its authority over its partners in government. As Cass Sunstein puts it, interpretive principles should be based "first and foremost on considerations of democracy" and that in most cases this would lead to "judicial caution"[48]. What does this mean? It means essentially that, in order for the judiciary to exercise its power of review in a justifiable manner, it needs to articulate a theory of constitutional interpretation which is line with one of the most fundamental principles underlying democratic rule, namely, the doctrine of separation of powers. As Bork concludes, the judiciary's power is legitimate only if it has a "valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom"[49]. Such a theory must respect the Court's role (I argue in the next Chapter that the Court's role is arbitrator of disputes and watchdog of government), and more particularly, the legislature's greater capacity and democratic entitlement to make laws. As long as the judiciary exercises the power of judicial review within the limitations set be the doctrine of separation of powers, the judiciary's exercise of the power will be justified in a constitutional democracy[50].

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[48] Cass Sunstein The Partial Constitution (1993) at 144. He goes on to say that "if interpretive principles are generally to grow out of democratic commitments, it follows that a judicial role in social reform will frequently be unjustified" (at 144-5).

[49] Bork ibid at 11.

[50] I believe this idea is echoed in Cockrell's article when he says "[i]n order to save the practice of constitutional review from the charge of democratic illegitimacy, it must therefore be possible to distinguish the institutional position of the Constitutional Court from that of Parliament" (at 534).

CHAPTER 4

THE DOCTRINE OF SEPARATION OF POWERS AND THE ROLE OF THE JUDICIARY IN A CONSTITUTIONAL DEMOCRACY

1. INTRODUCTION

The introduction of a justiciable Bill of Rights has fundamentally altered the role of the South African judiciary[1]. As Kriegler J says,"[t]here is universal consensus that the Constitution ushered in the most fundamental change in the history of our country" as the Constitution is "superimposed on the whole of the existing legal landscape, bathing the whole of it in its beneficent light"[2]. Whereas in the past the Court's function was merely to enforce the will of Parliament[3], constitutional supremacy, introduced by section 4(1) of the interim Constitution and confirmed by section 2 of the final Constitution[4], has brought about the demise of parliamentary sovereignty and the principle that Parliament can do as it pleases. The Constitutional Court has happily embraced this concept of constitutional supremacy. As Chaskalson P laid down, "[i]t is of crucial importance at this early stage of our new constitutional order to establish respect for the principle that the Constitution is supreme"[5].

The powers of the judiciary are now greatly enhanced. Courts are empowered to use the Constitution as a "yardstick against which to measure the validity of the products of the legislative process and the actions of the

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[1] Kentridge, J and Spitz, D 'Interpretation' Chapter 11 of CONLSA at 11-16.
[2] In *S v Mhlungu* 1995 (7) BCLR 793 (CC) at para 89 and 99.
[3] See for example, Stratford ACJ in *Sachs v Minister of Justice* 1934 AD 11 at 37.
[4] Section 2 of the final Constitution states: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."
[5] *Executive Council, Western Cape Legislature, and others v President of the Republic of South Africa and others* 1995 (10) BCLR 1298 (CC) at para 100.

executive branch of government"[6]. Because of these enhanced powers, the judiciary now undeniably plays a part in the political game. It makes political choices when it interprets a constitutional text. As Sarkin notes, constitutional interpretation is a question of making political choices[7]. In constitutional disputes, decision-makers inevitably consider conflicting values that inform and contextualise the constitutional text. Sarkin quotes the former US Supreme Court Justice Jackson: "All constitutional interpretations have political consequences"[8].

The issue is how involved should the judiciary get in the political game before its actions can be called undemocratic? In other words, in spite of its increased powers over the other two branches of government, what serves to limit its power to ensure that it remains a democratically acceptable institution? I argue that the answer lies in the role which the doctrine of separation of powers, together with the Constitution, has determined for the judiciary. The doctrine of separation of powers is a fundamental principle underlying the achievement of democracy. In order to exercise its power of judicial review democratically, a Court must therefore exercise such power in a manner which respects the doctrine of separation of powers. In other words, a Court, in giving meaning to a constitutional provision, must respect the functional and institutional integrity of the three branches of government, namely, the legislature, the executive and the judiciary. It is therefore necessary to analyse this doctrine in order to gain an understanding of the roles of the respective branches of government.

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[6] Kentridge and Spitz at 11-16.
[7] Sarkin, J 'The Political Role of the South African Constitutional Court' (1997) 114 SALJ 134 at 137.
[8] Sarkin at 142, quoting Jackson 'The Supreme Court in the American System of Government' (1955).

The Courts' role is determined by the interrelationship between, firstly, the Constitution itself and, secondly, the doctrine of separation of powers. It can therefore be said that the doctrine of separation of powers acts as a limiting factor on the manner in which the Court exercises its power of judicial review. It ensures that the judiciary adheres to the dictates of democratic principle. As Jonathan Klaaren argues, the "relations between the institutions of central government, a topic termed the separation of powers" is "crucially significant to the achievement of democracy"[9]. Heinz Klug also argues that only an "institutional analysis of how Courts achieve ... the power to decide who *decides, will enable us to develop a balanced understanding of the judicial* role"[10]. Insight into these institutional concerns and limitations allows for the development of an understanding into when the Court should show deference to the other branches of government.

The role of the judiciary has two implications. Firstly, it acts as a limitation on the manner in which a Court exercises its power of judicial review, in the sense that in a given case the Court should be reluctant to interfere unnecessarily in the legislative or administrative functions of government. However, in the context of constitutional interpretation it has another implication which is frequently overlooked. It implies that the judiciary is obliged to respect the language used by the legislature in the drafting of the Constitution and to respect the values which the legislature chose to encapsulate therein. Only the legislature, wearing the hat of the Constitutional Assembly, was democratically entitled to choose the content of the Constitution. Should the constitutional document become outdated, or cease to reflect the popular political and moral sentiment of the day, it is the

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[9] Klaaren, J 'Structures of Government : Putting Democracy back into Human Rights' (1997) 13 SAJHR 3 at 3. He notes that this topic has received little attention from South African constitutional writers.

[10] Klug, H 'Introducing the Devil : An Institutional Analysis of the Power of Judiciary Review' (1997) 13 SAJHR 185 at 186. He neatly refers to "institutional logic and judicious politics" (at 189).

duty of the legislature to amend the Constitution to reflect such changes. It is not the Court's duty to read new meanings into the constitutional text in order to make provision for such changes. And it not the Court who is expected to be the most sensitive to popular sentiment - this is the legislature's function. The Court must respect these principles when it engages in the task of constitutional interpretation.

Before embarking on a discussion of the appropriate role for the judiciary, and more as an aside, I take a somewhat cursory look at the role of government as a whole. I conclude that government itself should play a limited role in regulating the lives and livelihoods of its citizens. I do not intend to cover this vast subject in detail, but rather wish merely to give an idea of the ideological framework within which my argument relating to constitutional interpretation falls.

2. THE ROLE OF GOVERNMENT - NANNY-STATE OR SERVICE PROVIDER?

In essence, I believe that the function of government is one of service-provider. It is a body which is mandated by its customers (the electorate) to provide certain specified services which its customers believe would be more effectively performed collectively, as opposed to individually or privately. Baxter sees the state slightly differently, as a "conglomeration of organs, instruments and institutions *whose common purpose is the 'management' of the public affairs*, in the public interest ... ." (my emphasis)[11]. His emphasis on 'management on behalf of' is along the same lines as my emphasis on 'provide services on behalf of', as both entail a voluntary handing over of a limited authority for the specified purpose of providing a communal service.

[11] Baxter, L 'The State and other Basic Terms in Public Law' 1982 THRHR 212 at 225-226, as quoted in Carpenter at 4.

Government is mandated to perform these services on behalf of its customers within certain limits, which limits have been set out by law. The primary law governing the relationship between government and citizen (or, as I wish to emphasise it, between service-provider and customer) is the Constitution, which VerLoren van Thermaat has described as "the aggregate of binding rules which relate to the distribution or exercise of state authority"[12].

Government should not attempt to do too much. The author Jim Rogers criticises what he calls "statism", which he defines as "the concentration of economic controls and planning in the hands of a highly centralised government" and includes "the belief that the state is the mechanism best suited for solving most if not all of society's ills ...." [13]. The scope of its services should be as minimal as possible, and should include, for example, basic education, primary health care and provision of water (which notions are included in the Bill of Rights as the so-called socio-economic rights[14]). The most important service which is asked of government, it is generally contended, is the protection of borders and the maintenance of law. As Charles Carlton puts it, "[f[or centuries political philosophers have recognised that the maintenance of law is a fundamental purpose of government"[15]. Without this, life would become, in the words of Thomas Hobbes, "solitary, poor, nasty, brutish and short"[16]. The British authority, O Hood Phillips defines "state" as having the purpose of "resisting external force and the

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[12] VerLoren van Thermaat JP; Staatsreg; 3rd Ed by M Wiechers (1981) at 4, quoted in Carpenter at 7(English translation of Afrikaans).
[13] Rogers, J; Investment Biker; Adams Media Corp; Massachusetts; 1994; at 17 where the author argues that '[s]tatism is the great political disease of the twentieth century'. An unashamed capitalist, Rogers is a successful Wall Street foreign investor and part-time lecturer in Finance at Columbia University. The above-quoted off-the-cuff remark reflects what I believe to be a fairly commonly held attitude towards over-reliance on government.
[14] Sections 26 to 29.
[15] in Gambitta, May and Foster (eds); Governing Through Courts; Sage Publications; USA; 1981 at 161.
[16] Hobbes, T; Leviathan,I, 13.

preservation of internal order"[17]. Ackermann J also refers this duty when he says that "in a constitutional state individuals agree to ... abandon their right to self-help in the protection of their rights only because the State ... assumes the obligation to protect these rights"[18]. He also strongly suggests that undue government intervention in the spontaneous and private ordering of social affairs will have adverse consequences for individual liberty, collective intellectual progress and the overall economic wealth of the nation[19].

The financial authors James Dale Davidson and Lord William Rees-Mogg in their recent book entitled "The Sovereign Individual"[20] have a fairly radical dislike of government. Their book revolves around their prediction that the far-reaching implications of technological change will "liberate individuals at the expense of the twentieth-century nation state". They predict that the shift from an industrial to an information-based society will result in the collapse of what they call "the Welfare State". Economic responsibility will be shifted to individuals who will become completely responsible for their own destinies (hence the "sovereign individual" of the title).

Their work is thoroughly researched, particularly the political history aspect, and concludes with some controversial predictions on the future of democracy. Based on their research, they argue that the core function of government is protection, a service for which the citizen pays in the form of

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[17] Hood Phillips, O and Jackson, P; Constitutional and Administrative Law; 6th ed; 1978 at 5, quoted in Carpenter at 4.
[18] *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 168.
[19] *Ferreira v Levin* 1996 (1) BCLR 1 (CC) at 30E-33E.
[20] Davison and Rees-Mogg; The Sovereign Individual; Macmillan Publishers; London; 1997 at 82. The authors edit and publish *Strategic Investment*, one of the world's more widely circulated investment newsletters. Davidson is a private merchant banker who founded and chairs the National Taxpayers Union in the United States. He has written for the *Wall Street Journal* and numerous other national publications. Lord Rees-Mogg was Assistant Editor of the *Financial Times* in the 1950s and is an investment advisor. He was also editor of *The Times* and Vice-Chairman of the BBC. He is the author of various books on economic issues.

taxes. They reach this conclusion by tracing the development of government as an institution from early times, through the Middle Ages, up to the Industrial Revolution and what they consider to be symbolic of its demise, the fall of the Berlin Wall.

The authors trace the development of what they alternatively call the "nation-state", the "democratic welfare state" or the "nanny state". Based on historical fact, they conclude that "the nation-state became history's most successful instrument for seizing resources", and that its success was based upon its "superior ability to extract the wealth of its citizens"[21]. They note that states have been the norm for the past two hundred years of the modern period and that, in the longer sweep of history, states have been rare [22].

They argue that government today "offers poor value for the money it collects", that it is an institution which has "grown to a senile extreme", that it is a "deeply indebted institution which can no longer pay its way", and that its operations are "ever more irrelevant and even counterproductive" to the prosperity of its citizens[23]. They call the nation-state of today a "predatory institution".[24]

In addressing the issue of "who controls government?"[25], the authors refer to the economic historian Frederic Lane[26] and conclude that the control of democratic government lies in three possible hands: "proprietors", "employees" or "customers". Lane was apparently inspired to analyse the control of government in economic terms by the example of the medieval

[21] At 115.
[22] At 118.
[23] At 99.
[24] At 117.
[25] At 121.
[26] Lane, FC 'Economic Consequences of Organised Violence' (1958) 18 The Journal of Economic History 402, and Lane, FC; Venice : a Maritime Republic; Baltimore; John Hopkins University Press; 1973.

merchant republics like Venice[27]. Here merchants paid for a service which government provided, namely, protection. They were genuine customers paying for a service which government provided. They did not seek to profit from their control government's monopoly. Governments controlled by their customers have incentives to reduce their operating costs as far as possible as well as to hold down the prices they charge their customers. The authors persuasively conclude that, where customers rule, governments are lean and generally unobtrusive, with low operating costs, minimal employment, low taxes and are compelled to move towards efficiency. Davison and Rees-Mogg conclude that no democracy today treats its voters as customers and that "most democracies run chronic deficits"[28]. By citing examples, they conclude that most of today's democracies are mass democracies controlled by the second category referred to above, namely, "employees". Governments show resistance to reducing the costs of their operations, policies are difficult to change, quality of service is low, complaints are hard to remedy, and ultimately, those who pay for democratic government have little say about how their money is spent.

While bearing in mind the strongly capitalist / individualist and anti-government stance that these to authors inevitably embrace (given their commercial and financial backgrounds), and while acknowledging that such a stance may not be the appropriate approach for the South African economic and social climate, I do think that they offer valuable insights into the nature and role of government. My view of government is not as negative as the authors' somewhat antagonistic approach to government, but I do have some common ground with them. I agree that government's function should be as limited as is reasonably possible given existing circumstances. But I believe that there is room for government to perform certain functions which, as

[27] Davison and Rees-Mogg at 123.
[28] At 124.

mentioned above, are better performed collectively than privately. But in providing these services, the relationship between government and citizen must always be one of service-provider and customer.

This view is in contrast to arguments put forward by amongst others the eminent Dicey, who has argued that Parliament, as the direct representative of the people, is the "protector of the people's interests"[29]. This formulation of the role of government is, I believe, paternalistic, unrealistic and outdated. It is premised on the assumption that "government knows better", which both history and logic have shown to be untrue. Research done recently in South Africa concluded that "[t]here is a substantial disconnect between political elites at the centre and citizens on the periphery"[30]. The age-old truism that "power tends to corrupt and absolute power corrupts absolutely"[31] probably has something to do with this.

As the body which originally conferred the power to provide such services, the customer / electorate clearly has the right to participate in how those services are being provided. In other words, government is at all time accountable to its customers / electorate as to how it is performing. As Carpenter puts it, in looking at the concept of democracy, "[w]hatever formulation one uses, the crux of the matter is that the people (the electorate) should have the final say in regard to how they are to be governed"[32].

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[29] A V Dicey; Introduction to the Study of the Law of the Constitution; 10th ed; 1973, as quoted in Carpenter at 12.
[30] Report prepared for the US Agency of International Development, democracy and governance assistance programme regarding South Africa, as quoted in The Star dated February 17, 1998.
[31] First Baron Acton (1834-1902) Letter, Life of Mandell Creighton from Fraser, D; Dictionary of Quotations; Collins; Great Britain; 1988 at 1.
[32] Carpenter at 12

Ettienne Mureinik called it a "culture of justification"[33] which needs to become ingrained in the ethic of government in South Africa.

The judiciary needs to identify its role within a government which not only aspires to the principles of constitutional democracy, but also limits and justifies its interference in the lives of its citizens.

3. THE DOCTRINE OF SEPARATION OF POWERS

1. Introduction

The idea of separating government power between three branches of government is integral to a system of government which wishes to call itself democratic. It is trite that the doctrine of separation of powers dictates that each branch of government must respect the functional integrity of the other two branches in order to maintain a government free from overconcentrations of power and tyranny. As Chaskalson P says, "[t]he principle of separation of powers ... recognises the functional independence of branches of government"[34]. What is the functional integrity of each of the branches and when is the exercise of a power by one branch overstepping the mark is not capable of an easy or definitive answer. As Hosten et al warn, the doctrine of separation of powers is useful politically, but juridically it is most difficult to define and demarcate these powers[35]. Sachs J went so far as to note that it is "dangerous to lay down rigid rules concerning fundamental questions relating to the characterisation of the function and powers of Parliament"[36].

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[33] Mureinik, E 'A Bridge to Where? Introducing the Bill of Rights' (1994) 10 SAJHR 31 at 32.
[34] *In re: Certification of the Constitution of the Republic of South Africa, 1996* (10) BCLR 1253 (CC) ("*Certification 1*") at paras 108.
[35] Hosten et al at 604.
[36] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC) at para 199.

Although the precise nature of each role remains difficult to define, broadly speaking it can be said that it is the function of the legislature to lay down rules, the Courts must apply those rules to the proven facts and the executive must give effect to the Court's judgments and generally attend to the business of government within the ambit of rules of law, which it cannot make or amend[37]. In spite of the indeterminate nature of the respective powers of the branches of government, complicated by the non-uniform application of the doctrine in respected democracies around the world[38], it is still possible to identify certain core functions of each branch. For example, Parliament would invariably never be entitled to sit as a Court of law[39], nor would a Court be entitled to draft legislation or formulate government policy.

What is clear is the rationale underlying the principle of separating power between different government bodies[40]. The aim is the prevention of tyranny, which could arise if too much power were allowed to accumulate in too few hands. James Madison defined "tyranny" as being "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective"[41]. Laurence Tribe refers to the concern that "the centralised accumulation of power in any man or single group of men meant tyranny; the division and separation of powers ... meant liberty"[42]. The French philosopher, Montesquieu[43], who is attributed with being the founder of the doctrine, argued that a separation of powers was "necessary if political freedom was to be maintained, thus ensuring the protection of all citizens irrespective of their

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[37] Hosten et al at 604.
[38] Chaskalson P has accepted that there is "no universal model of separation of powers" - *Certification 1* at paras 108.
[39] See the High Court of Parliament case discussed in Chapter 2 above.
[40] Baxter argues that the importance of the doctrine lies not so much in the *separation* of powers, as it does in the *distribution* of powers - Baxter, L; Administrative Law; Juta; Cape Town; 1984 at 31.
[41] The Federalist Paper No 47 at 313.
[42] Tribe ibid at 2.
[43] Carpenter at 156.

political views"[44]. The distribution of power would, it was contended, limit the arbitrary exercise of power[45]. As Motala puts it, constitutionalism "seeks to prevent government tyranny, and through the principle of the separation of powers to distribute government power among the three branches of government, the legislative branch, the executive branch and the judicial branch"[46]. Chaskalson P has emphasised that the principle of checks and balances in democratic systems of government "focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another"[47].

This notion of preventing tyranny by distributing government power has become a cornerstone of a democratic system of government.

2. Application of the Doctrine in South Africa

Although a familiar concept to public lawyers in South Africa pre-1994, the doctrine could not be said to have been strictly adhered to. It is trite that power was allowed to accumulate overwhelmingly in the hands to the legislature and executive, at the expense of the judiciary. As the Constitutional Court has said, "the Montesquieuan principle of a threefold separation of state power - often but an aspirational ideal - did not flourish in a South Africa which, under the banner of adherence to the Westminster system of government, actively promoted parliamentary supremacy and domination by the executive."[48]

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[44] Hosten et al; Introduction to South African Law and Legal Theory; Butterworths; Durban; 1983 at 604.
[45] Carpenter at 157.
[46] Motala, Z 'Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under a New South African Order' (1995)112 SALJ 503 at 504.
[47] *Certification 1* at paras 109.
[48] Chaskalson P in *Certification 1* at para 6.

However, the doctrine is now firmly part of South Africa's new constitutional order. The unamendable[49] Constitutional Principle VI of the interim Constitution demanded that "[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness"[50]. And the Constitutional Court has confirmed[51] that the final Constitution complied with this demand[52]. As the Court said in *Certification 1*, "The model [of separation of powers] adopted [by the Constitutional Assembly] reflects the historical circumstances of our constitutional development. We find in the [final text] checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable, executive"[53]. In essence, the final Constitution has distributed government power on a national level by vesting the legislative authority of government in Parliament[54], executive power in the President[55] and judicial authority in the Courts[56]. The Constitution in addition contains many features which act as checks and balances on the abuse of public power[57].

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[49] Section 74(1) of the interim Constitution stated that none of the Constitutional Principles was amendable.
[50] Contained in Schedule 4 to the interim Constitution.
[51] *Certification 1* at paras 106 - 113.
[52] As it was obliged to do in terms of section 71(1) of the interim Constitution. The final Constitution does not expressly mention the doctrine.
[53] *Certification 1* at para 112.
[54] Section 43(a) of the final Constitution.
[55] Section 85(1) of the final Constitution.
[56] Section 165(1) of the final Constitution.
[57] For example, section 91(3) (members of Cabinet are also members of legislature, except President); section 92(2) (Cabinet members are collectively and individually accountable to Parliament); section 86(1) (President is elected by legislature); section 89(1) (President may be removed from office by legislature); section 102(1) (Cabinet my be removed by motion of no confidence of legislature); section 55(2) (legislature is obliged to provided mechanisms to ensure executive is accountable to it and maintain oversight of exercise of executive authority); section 2 (judiciary may review actions of legislature and executive); section 167(4)(e) (judiciary may pronounce on whether legislature or executive has failed to fulfil a constitutional obligation); section 167(4)(a) (judiciary decides on disputes between national and provincial spheres of government).

As the Constitutional Court has been given the power not only to decide on human rights disputes[58], but also on disputes concerning the distribution of power between the different organs of state[59], it has had the opportunity to consider the issue of separation of powers in a formal manner in a number of cases. The two cases discussed below illustrate the Court's awareness of the issues which arise from the doctrine. They particularly illustrate the Court's acceptance of the fact that the judiciary owes Parliament a certain amount of deference on the basis that South Africa's new Parliament (unlike its predecessor) has the democratic credentials. In addition to this, and more relevant to the issue of constitutional interpretation, the Court has acknowledged, albeit not consistently nor unanimously, that deference is owed to Parliament as drafter of the Constitution and that Parliament was the only branch of government democratically entitled to decide on the content of the Constitution[60].

The first case involving the separation of powers is *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*[61]. Here the Court was required to look at legislation[62] in which the legislature had purported to give the executive (the President) the power to amend an Act of Parliament. The issue which the Court had to determine was whether, under South Africa's new constitutional dispensation, Parliament is authorised to assign plenary legislative powers to another body (which included the power

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constitutional obligation); section 167(4)(a) (judiciary decides on disputes between national and provincial spheres of government).

[58] This power also been granted to the High Court - section 169 of the final Constitution.

[59] Section 98 of the interim Constitution and section 167 of the final Constitution.

[60] The Court's role was limited to ensuring that such Constitution complied with the Constitutional Principles, which principles had been determined by the then legislature together with mandated political leaders.

[61] 1995 (10) BCLR 1289 (CC).

[62] Section 16A of the Local Government Transition Act No 209 of 1993. The (predominantly National Party) Western Cape government was objecting to what it felt was the (predominantly African National Congress) national government's interference in its plans for the upcoming local government elections.

to amend legislation)[63]. This required the Court to consider the implications of the doctrine of separation of powers under the Constitution[64], the "manner and form" provisions[65], the supremacy of the Constitution and the requirement that Parliament shall make laws in accordance with the Constitution[66].

After examining the approaches of other relevant jurisdictions, the Court concluded that, where Parliament is established under a written Constitution, the nature and extent of its power to delegate legislative powers to the executive depends ultimately on the language of the Constitution, construed in the light of the country's own history[67]. In looking at South Africa's history, the Court noted that in the past our Courts were reluctant to strike down Acts of Parliament which vested wide plenary powers in the executive. Such decisions were generally based on English precedents, which accepted that a sovereign Parliament could delegate power to the executive to amend or repeal legislation[68]. But our Constitution shows a clear intention to break away from this history and create a "new order"[69]. The Court concluded that, as Parliament is now subject in all respects to the provisions of the Constitution, it only has the powers vested in it by the Constitution.

The Court noted the acceptability, indeed necessity, of Parliament's being empowered to delegate subordinate legislative powers to the executive. However, it distinguished between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power (including the power to amend

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[63] At paras 51 and 52.
[64] Again, references are to the interim Constitution.
[65] Sections 59, 60 and 61.
[66] At para 52.
[67] At para 61.
[68] At para 52.
[69] At para 61.

and repeal Acts of Parliament)[70]. The Court held that empowering the executive to amend or repeal Acts of Parliament is a departure from the "manner and form" provisions of sections 59, 60 and 61 (which ensure that certain strict procedures are adhered to when laws are made or changed). Parliament is only entitled to depart from these provisions where the Constitution expressly permits this or by necessary implication. In the present case, the Constitution did not expressly or impliedly permit a departure from such provisions[71]. The Court therefore concluded that Parliament does not have the constitutional authority to delegate to the executive the power to amend or repeal legislation.

On the issue of separation of powers, the overall impression created by the judgments of the various judges is one of respect for and deference to Parliament. In emphasising the distinct roles of the legislature and the judiciary, the Court acknowledged that the judiciary has a limited ability to interfere with the affairs of the legislature and the executive. As Chaskalson P said, the role of the judges "is not to 'second guess' the executive or legislative branches of government or interfere with affairs that are properly their concern. ... Our task is to give meaning to the Constitution and, where possible, to so do in ways which are consistent with the underlying purposes and are not detrimental to effective government"[72]. Mohamed J[73], in emphasising the need to keep the functions of Parliament and the executive distinct, argued that an elected legislature is the body in whom a Constitution places its confidence[74] and therefore concludes that "it would be constitutionally subversive to allow such political judgments and such policies effectively to be made by those not identified for that purpose in the

[70] At para 51.
[71] At para 62.
[72] At para 99.
[73] Mohamed J agreed with the majority finding but on different grounds.
[74] He was looking at the jurisprudence of the United States.

Constitution"[75]. He also notes that the Constitution "has expressly sought to allocate different functions to Parliament and to the President. The lawmaking function is entrusted to the former; the executive function to the latter"[76].

The Court also took into account the "interests of good governance"[77] when it determined an appropriate remedy in this case, indicating the Court's awareness of and respect for the pressures on the other two branches of government.

Of all the judges, Sachs J is the most vehement proponent of Parliament's democratic credentials. In this case, he refers to the "very majesty of Parliament"[78] and emphasises that Parliament should be seen as the "centrepiece of our constitutional democracy"[79]. His justification is that "the new Parliament should be seen as a dynamic and organic part of the new constitutional order. It is not merely the old Parliament 'cribbed, cabined and confined' by the new Constitution; it is a fundamental component of the new democratic dispensation ushered in by the Constitution and given its legitimacy and composition by the elections of 27 April 1994". He continues: "[i]t is a feature of modern, democratic society, acknowledged, structured and integrated into the new constitutional order"[80]. As regards the function of Parliament, he states rather unspecifically that "Parliament will do what Parliaments do, namely, make laws for the governance of the country, and find the necessary funds for their implementation"[81]. He elaborates on why legislative authority is given to the legislature as opposed to other branches

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[75] At para 131
[76] At para 137.
[77] At para 110.
[78] At para 204.
[79] At para 201. He later refers to it as the "centrepiece of the whole governmental structure"- at para 204.
[80] At para 200.
[81] At para 200.

of government: "[t]he 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"[82].

The arguments relating to Parliament's democratic legitimacy which the Court raised in this case are raised in the context of the relationship between Parliament and the executive. However, such arguments are equally applicable to the relationship between Parliament and the judiciary. The judiciary must respect that Parliament is the primary lawmaker within the government structure, and for good reason. Parliament, unlike the judiciary, is elected by and accountable to the electorate. The task of the judiciary, as Chaskalson pointed out, is not to interfere in affairs that are properly the concern of the other two branches of government, but rather to give meaning to the Constitution. On the face of it, however, the Court did not find in favour of Parliament. It struck down the relevant legislation on the grounds that it contravened the Constitution, thereby arguably interfering in the affairs of the legislature and the executive. The Court justified its interference by referring to the Court's duty to declare legislative and executive action which is inconsistent with the Constitution to be invalid[83] and emphasising that constitutional control over legislative delegations to the executive go "to the root of the a democratic order"[84]. Sachs J describes it as "maintaining constitutionalism"[85].

[82] At para 205.
[83] Chaskalson P at para 100.
[84] Chaskalson P at para 99.
[85] At para 197.

Although this judgment was praised as "revealing the Court to be making its decisions without fear or favour"[86], I agree with Jeremy Sarkin that this was ultimately a political judgment[87]. The Court could fairly easily have justified a decision in favour of Parliament, in other words, it could have allowed Parliament to delegate legislative powers to the executive[88]. Why, then, did the Court choose to find against Parliament? It certainly was not compelled to in terms of any particular provision of the Constitution. However, the political context of this decision was vital, and this case illustrates the Court's adeptness at traversing controversial political waters[89]. There were fears that the Constitutional Court would slavishly find in favour of the ANC-led national government[90]. But, by apparently finding in favour of the provincial government, the Court was able to maintain credibility in the eyes of both national and provincial governments. National government was happy because, by the Court's choice of remedy[91], the Court did not in effect find against national Parliament at all. The judgment was in fact "a well-crafted compromise which ultimately favours the national government" [92]. And the provincial government was happy because, on the face of it, the judgment went in its favour, indicating that the Court had the courage to discipline both Parliament and the ever-popular President.

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[86] Klaaren, J 'A Case Note on *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* ' (1996) 12 SAJHR 158 at 159.
[87] Sarkin, J 'The Political Role of the South African Constitutional Court' (1997) 114 SALJ 134.
[88] There is plenty of cogent support for wide delegation power from countries such as India, Canada and Australia, generally on the basis of the close relationship between the legislature and the executive. And also the minority judgment of Madala and Ngoepe AJ, who argued that, although the relevant legislation was unconstitutional on the face of it, it was saved by section 235 (relating to transitional arrangements and executive authority).
[89] As Klug points out, the Court had "effectively traversed the 'fundamental concerns of constitutional law' and 'matters of grave public concern'" - Klug, H 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 198.
[90] The Court considered a contempt of Court suit (at para 122 per Chaskalson P) on the basis of a newspaper article which quoted one of the parties as implying that the decision may be a "political one". Quoted in Sarkin at 142. It is interesting that the Court at this point denies its political role, where earlier in the judgment it is overtly aware of it.
[91] The offending legislation remained in force until Parliament was able to rectify it.
[92] Sarkin at 140. He argues that this case indicates how clearly the Court is aware of its political role.

This case ultimately reflects that the Court, although acknowledging the democratic pedigree of Parliament and its role as primary lawmaker, is prepared to make full use of its power of judicial review in order to exercise constitutional control over the manner in which the other branches of government exercise their powers. It also illustrates the Court's overt awareness of the political consequences of its decisions and its willingness to forge compromises between political rivals.

In *Du Plessis v De Klerk*[93] the Court had to consider *inter alia* the issue of horizontality, namely, whether the provisions of the interim Constitution applied to any relationship other than that between citizens and organs of state. Although the Court held unanimously upfront that on procedural grounds the Constitution could not be invoked in this case[94], the judges saw fit to deal with the issue of horizontality at great length. The majority of the Court found that the provisions of the Bill of Rights are not in general capable of application to any relationship other than that between citizens and legislative and executive organs of state.

In arriving at this conclusion, the judges generally had recourse to textual and separation of powers considerations, particularly the respective roles of the judiciary and the legislature. Here, the judges were prepared to restrain themselves and found that it was not their duty to reform the common law. Kentridge AJ, for the majority, stated as much when he said that "[t]he radical amelioration of the common law has hitherto been a function of Parliament; there is no reason to believe that Parliament will not continue to exercise that function"[95]. Ackermann J also noted this, stating that direct application of the

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[93] 1996 (5) BCLR 658 (CC).
[94] All relevant factors occurred prior to the commencement of the interim Constitution and therefore the Constitution could not be invoked.
[95] At para 53. He also refers to the Court's jurisdiction not being "suited" to the exposition of principles of private law - at para 58.

Bill of Rights would cast onto the Constitutional Court "the formidable task of reforming the private common law of this country". This would be undesirable in a "broader constitutional sense, pre-empting in many cases Parliament's role of reforming the common law by ordinary legislation"[96]. This deference to Parliament is also evident in Kentridge's emphasis on the need to examine and interpret the language of the specific constitutional provisions[97].

Sachs J[98], in a separate but concurring judgment, analysed the relationship between Parliament and the judiciary at length under the doctrine of separation of powers[99], essentially seeking an answer to the question: what spheres of decision-making belong to Parliament and what to the Court?[100] As he did in *Western Cape*, he again emphasises that it is Parliament's function to "legislate on matters of great social and political concern", not the Court's[101]. The role of the Court is to stand as sentinel to ensure that Parliament does not stray beyond the framework of the Constitution. He rationalises his deference to Parliament on the grounds that the realisation of values is best left in the hands of the elected and accountable politicians[102]. He refers to institutional and structural reasons why Parliament is best suited

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[96] At para 112.

[97] At para 33, he states that "[t]here can be no doubt that the resolution of the issue must ultimately depend on an analysis of the specific provisions of the Constitution". And at paras 43 onwards, he proceeds with a formalistic examination of the relevant provisions. Mohamed DP, in his separate but concurring judgment, also undertakes a detailed analysis of the text - for example, para 76-77.

[98] It is interesting to bear in mind Sachs J's historical standpoint on the issue of an entrenched Bill of Rights. In 1985 he expressed doubts as to the all-too-sudden conversion of whites to a Bill of Rights and suggested that "its effect, if not its intention, is to give further constitutional protection to racial privilege" (Sachs, A 'Towards the Reconstruction of South Africa' (1985) Journal for Southern African Studies 49 at 58, quoted in Cockrell, A 'The South African Bill of Rights and the "Duck/Rabbit"' (1997) 60 Modern Law Review 513 at 522). Although he does believe that a Bill of Rights is a "valuable instrument in promoting national reconstruction" (also quoted in Cockrell's article above).

[99] He refers to such powers as "separate but complimentary powers as well as separate but complimentary judicial functions" - at para 178.

[100] At para 178.

[101] At para 178.

[102] "How best to achieve the realisation of the values articulated by the Constitution, is something far better left in the hands of those elected by and accountable to the general public, than placed in the laps of the Courts" -at para 180.

to making decisions on social, economic and political questions.[103] He coins the word "dikastocracy" to describe a country ruled by judges, which our Constitution does not contemplate[104]. In other words, the Court must not usurp the functions of Parliament. He concludes that the task of reforming the common law lies with Parliament and not the Court, and that the Bill of Rights therefore only has vertical application[105]. He reaches this conclusion not by referring to the language of the constitutional text, but on an analysis of the doctrine of separation of powers.

This case, like *Western Cape*, could have gone the other way. In other words, the Court could rationally and justifiably have argued that the interim Bill of Rights had both vertical and horizontal application[106]. Kentridge AJ even conceded that a comparative examination shows that there is no universal answer to the problem[107] and that "arguments of substance" have been deployed on both sides of the debate[108]. And yet the Court voluntarily decided to favour a more conservative interpretation of the Constitution and curtailed its own powers by claiming that it had no power to interfere constitutionally with relationships which do not involve the state (or, put another way, with abuses of private power). The question is why, in an era of generous interpretations of the Constitution, the Court should have chosen such a conservative approach. Kentridge AJ, with whom Chaskalson P and Langa and O'Regan JJ concurred, found himself bound by what he

[103] At para 180. These reasons include the factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions.
[104] At para 181.
[105] At para 190.
[106] For example, see the minority judgment of Kriegler J (Didcott J concurring), where he employs a more purposive approach and concludes that the drafters could never have envisaged such a socially harmful or disruptive meaning to the Constitution (at para 123). And also Woolman and Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classic Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 SAJHR 361, who criticise Kentridge AJ's reading of the text and argue that "other *plausible* and better readings of the text exist" (at 362).
[107] At para 33.
[108] At para 42.

understood to be the literal meaning of the text[109], together with the fact that it was not the Court's function to reform the common law. Mohamed DP was satisfied with this only because the effect of such an interpretation did not leave the victims of private discrimination unprotected[110] (Ackermann J, in a separate judgment, concurred with this[111]). And Sachs J felt that the doctrine of separation of powers, and the fear of creating a "dikastocracy", dictated the outcome. The Court's reticence was again a political decision[112]. Or more correctly, each judgment reflects each judge's preferred political philosophy, particularly regarding the notion of individual freedom. As is evident from the scathing dissenting judgment of Kriegler J, the majority judges are concerned with protecting at all costs private relationships from the "tentacles of government will"[113] and reflect a classical view of the concept of liberalism[114]. The Court therefore showed deference to Parliament in order to reach a conclusion which fell within the judges' own ideological preferences. The judgment is caged in terms of deference to the legislature, but in reality the judiciary offered an interpretation of the text which perpetuated its own political beliefs and value system. In spite of this, Kentridge's reading of the text remains plausible, and can be criticised predominantly for its failure to address the real issues which he was attempting to promote or protect.

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[109] Woolman and Davis argue that in reality Kentridge was not driven by the text, but by concerns about the respective roles of the Appellate Division and the Constitutional Court (at 372). They criticise the majority judgment in this case not so much for the preferred method of interpretation but for the manner in which it was implemented (calling their interpretation "cramped" - at 380).

[110] He argued that, in terms of section 35(3) of the interim Constitution, the ordinary Courts would be entitled to revisit and revitalise the common law with the constitutional spirit - at para 86. He hinted that, if this were not the case, he may have been tempted to ignore the literal meaning of the text. Woolman and Davis ibid describe Mohamed's judgment as being imbued with a refreshingly different spirit to the Kentridge's (at 376).

[111] At para 110.

[112] Although it would appear that the legislature was not satisfied with the Court's conclusions. The final Constitution expressly refers to both horizontal and vertical application of the Bill of Rights.

[113] Kriegler J at para 120.

[114] Woolman and Davis distinguish between classic liberalism and "Creole liberalism", which they argue does not rest on a rigid split between the public and private domain, and which emphasises that real autonomy has its source on both "socially constructed and politically maintained" forms of life (at 399).

Whether or not the criticism of the majority judgment in *Du Plessis v De Klerk* is justified, the case contains what I argue to be the correct approach to the doctrine of separation of powers and the role which it identifies for the judiciary in a constitutional democracy. The judiciary is democratically obliged to respect the legislature's role as the primary lawmaker and its own role as sentinel to ensure that the legislature does not stray beyond the constitutional framework. This respect for Parliament acts a limitation on the exercise of judicial review, which could, if unrestrained, lead to a government by judiciary. Such a "dikastocracy" would be unjustifiable in a democracy.

In a third case, *President of the Republic of South Africa v Hugo*[115], the Court again had the opportunity to examine the doctrine of separation of powers, and effectively extended its power of constitutional review to cover all presidential powers. The Court found that, on a reading of both sections 4 and 75[116], all executive action was subject to the Constitution. The question it then had to answer was whether the President's power of pardon amounted to an "executive" power[117]. It concluded that no fourth branch existed to cater for the Presidential pardon merely because it derived from the royal prerogative, and that, as his powers are neither legislative nor judicial, they must be executive[118]. They were therefore subject to the Constitution and reviewable by the Court[119].

This case illustrates that the Court is less likely to show deference to the executive than it is to Parliament, and that it will, unless contrary to a

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[115] 1997 (6) BCLR 708 (CC). In this case, the Court was requested to investigate the power to pardon offenders granted to the President in terms of section 82(1)(k) of the interim Constitution.
[116] In other words, the Court employed a textual approach.
[117] At paras 10-12.
[118] The Court supported this finding with a further textual argument based on the heading of the section, which refers to "executive acts of the President".
[119] At para 13.

strongly-held philosophical belief[120], assert its power to test impugned action by any organ of state against the discipline of the interim Constitution[121].

Through the cases mentioned above, the Constitutional Court has in one way or another indicated its awareness of the political role which it plays and its acceptance of the fact that, in spite of its new-found power of judicial review, it needs to bear in mind the distinct and separate functions of the three arms of government. The judges have all indicated that generally a certain amount of deference is due, particularly to Parliament, on the basis of its democratic credentials. They have also made an effort to "create a common consensus, based on both a circumscribed assertion of the Court's power and public defence to democratic values"[122].

Sachs J's views on the role of the Courts vis-à-vis the role of the legislature are persuasive and lay the basis for a rational and justifiable approach to constitutional interpretation[123]. He argues for limited interference by the judiciary on the basis that Parliament has the greater democratic entitlement and capacity to decide on issues of great public concern. However, this must

not detract from the Court's role to scrutinise the activities of the legislature and executive, and to measure them up against the standard of the Constitution. Where they fall short of this standard, the judiciary must confidently fulfil its constitutional obligation without fear, favour or prejudice, and pull its partners in government back into line.

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[120] For example, in *Du Plessis v De Klerk*, as discussed above.
[121] Goldstone J at para28.
[122] Klug, H 'Introducing the Devil : An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 194.
[123] Although I disagree with Sachs J's lack of emphasis on the important role of the text in constitutional interpretation. I elaborate on this in Chapter 6 below.

3. The Role of the Judiciary

Despite warnings about the dangers of trying to lay down rigid rules regarding the roles of the respective branches of government, it is possible and indeed necessary to pinpoint at least the core functions of the judiciary in a constitutional democracy. Such functions are apparent from the constitutional text itself, read together with the doctrine of separation of powers. As stated before, this role which the Court carves out for itself will firstly, act as a limit on the manner in which it enforces the Constitution against Parliament and the executive, and, secondly, dictate the way in which it interprets the Constitution.

Under South Africa's new constitutional dispensation, as read with the doctrine of separation of powers, the judiciary essentially retains its traditional role as the determiner of rights or the arbitrator of disputes in concrete cases between citizens[124]. In addition to this, through the power of judicial review, it now also has the extended function of settling disputes between citizen and state, even where this means overturning an Act of Parliament. It also has the new role of final arbiter in conflicts over the constitutional allocation of power[125], whether vertical distributions of power (national v provincial) or horizontal distributions of power (executive, legislative or judicial powers). In other words, the Constitution has bestowed on the judiciary the role of watchdog of constitutionalism and democracy itself. This role has been described eloquently in a number of ways: the judges are "defenders of the Constitution"[126], or the "gatekeepers" to the domain of rights[127], or as "the guardian of the Constitution, as the protector of

[124] This traditional role is referred to in Klug, H 'Introducing the Devil : An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 187-8 and 197.
[125] Klug, H 'Introducing the Devil : An Institutional Analysis of the Power of Judiciary Review' (1997) 13 SAJHR 185 at 201.
[126] Sachs J in *S v Mhlungu* at para 110.
[127] Kentridge and Spitz 'Interpretation' Chapter 11 of CONLSA at 11-12.

human rights and as the upholder of democracy "[128], and it is the function of the Court to "interpret, protect and enforce" the Constitution[129]. The idea is that, in spite of Parliament's democratic legitimacy, it is the judiciary which has the final say on whether Parliament and the executive are behaving in accordance with the constitutional rules. More specifically, this means that the role of the Court is "confined to defining that framework [governed by law], delineating the ways in which government may and may not participate in such decisions"[130].

The German constitutional scholar Brun-Otto Bryde[131] sees the South African Constitutional Court's specific role as being one of arbitrator, a view apparently shared by the Court itself. Chaskalson P has stated the Court should "not allow itself to be diverted from its duty to act as an independent arbiter of the Constitution"[132]. Klaaren adds to this role another aspect, namely, that the Court should act as facilitator in supervising the structures of central government[133]. This emphasis on facilitation is presumably aimed at removing emphasis from the present litigious nature of the Court, and encouraging a more constructive and practical approach to the settlement of disputes.

By way of contrast, Parliament has been specifically entrusted with the role of lawmaker, a role to which it is the most democratically and functionally suited[134]. And the role of carrying out or administrating such laws has been

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[128] Madala J in *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at para 45.
[129] Kentridge AJ, for the majority, in *Du Plessis v De Klerk* at para 59.
[130] Sachs in *Soobramoney* at para 56, quoting Brennan J in *Cruzan v Director, Missouri Dept of Health* 497 US 261 (1990) at 303.
[131] Bryde, B 'Constitutional Courts in Constitutional Transition', quoted in Klug, H 'Introducing the Devil : An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 186-7.
[132] *Makwanyane* at para 89.
[133] 'Structures of Government in the 1996 Constitution: Putting Democracy back into Human Rights' (1997) 13 SAJHR 3 at 4.
[134] See Sachs J's argument why this is so, in *Western Cape* at para 205,

constitutionally entrusted to the executive[135]. In comparing the powers of the three branches of government, Alexander Hamilton, one of the drafters of the US Constitution, described the Court as the "least dangerous" branch of government because it is the least able to "annoy or injure" the political rights of the US Constitution. Unlike the executive and the legislature, the judiciary "has no influence over either the sword [the executive] or the purse [legislature]" and therefore it has neither "FORCE nor WILL, but merely judgment" [136]. With the power of judicial review in its present form, Hamilton's words are arguably no longer applicable, particularly his statement that the judiciary has no influence over the "sword or the purse" of government and that it is therefore the "least dangerous branch". The role bestowed on the judiciary by means of the power of judicial review makes it a branch of government with considerable power, even if it is an indirect and covert power[137].

In spite of Kriegler J's protestations to the contrary[138], the judiciary now undeniably plays a vital political role in that its function is to ensure that government operates within the framework of the Constitution and the values and principles contained in the Bill of Rights[139]. The Constitutional Court in particular, and the judiciary more generally, is charged with protecting the elements of our constitutional democracy[140] and empowered to decide on matters of fundamental social importance[141]. Professor Cockrell also refers to

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[135] Mohamed J in *Western Cape* at para 137.
[136] In the 78th Federalist, 'The Judges as Guardians of the Constitution', as quoted by Bickel, A; The Least Dangerous Branch - The Supreme Court at the Bar of Politics (2nd ed); USA; Vail-Ballou Press; 1962 at v.
[137] Laurence Tribe refers to Hamilton's words to argue that the judiciary is the best suited arm of government to act as the "intermediate body between the people and the legislature" - Tribe ibid at 12.
[138] In *S v Makwanyane* at para 207.
[139] Davis, D 'Democracy - Its Influence of the Process of Constitutional Interpretation' (1994) 10 SAJHR 103 at 103-4.
[140] Kentridge and Spitz at 11-16A.
[141] Klug, H 'Introducing the Devil : An institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 185.

the political role of the Court in the context of looking at "moral and political reasoning" with which it now inevitably engages when it engages with substantial reasoning[142]. He concludes that the Court should construct a "rationally defensible moral and political viewpoint"[143].

There is, however, some scepticism as to how great a political role the Court can play and whether it is capable of bringing about social transformation on its own. Sunstein refers to the growing post-*Brown v Board of Education* conviction that Courts are ineffective in bringing about social change[144]. Brun-Otto Bryde[145] argues that the Court's ability to play a major political role is questionable as this is dependent upon the acceptance of the Court's role by the wider legal culture and political system. He does however believe that the Courts have contributed to stabilising democracy in the context of constitutional transitions. Professor Gutto also notes that the Courts cannot change society[146]. They can, however, "serve as the vanguard for social change and as a beacon in dark times, but used as the sole tool, they cannot eradicate societal racism"[147].

The Courts must make use of the power of judicial review courageously and without fear, favour or prejudice. Our judiciary must "measure up to the challenge"[148] of constitutional democracy, which places it in the responsible position of ensuring that government complies with its constitutional

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[142] Cockrell 'Rainbow Jurisprudence' (1996) 12 SAJHR 3 at 13-15.
[143] Cockrell at 18.
[144] The Partial Constitution at 146-7, quoted in Kriel, R 'On How to Deal with Textual Ambiguity' (1997) 13 SAJHR 311 at 314.
[145] Bryde, B 'Constitutional Courts in Constitutional Transition', quoted in Klug, H 'Introducing the Devil : An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 186-7.
[146] Gutto, S 'The Constitutional Court's Opening Salvo in Confronting Fundamental "Mischief" of the Past and Sowing Seeds for the New South African Jurisprudence' (1996) 12 SAJHR 47 at 55.
[147] He quotes AL Higginbotham 'Racism in American and South African Courts: Similarities and Differences' (1990) 65 New York Univ LR 479 at 485.
[148] Editorial of the Sunday Times dated May 10, 1998.

undertakings to the electorate. The Court must accept that its role will at times demand that it make hard choices between competing rights and ideologies, and particularly so when it acts against the will of the majority, as expressed through the legislature, by striking down legislation which conflicts with the Constitution[149].

4. Limitations on Judicial Power

The role of the judiciary, as determined by the doctrine of separation of powers, acts as a limitation on the exercise of judicial power. The judiciary must, as the non-elected and non-accountable branch of government, respect the roles of the other two branches of government as determined by the doctrine of separation of powers. In other words, the Courts should be wary of exercising their power of judicial review so as to extend into areas which the other two branches of government are better equipped and more democratically entitled to determine. Heinz Klug describes it from a more practical perspective: "the comparative institutional weakness of the judicial branch, by its very nature, requires the judiciary to be circumspect in its exercise of authority over the more resourced and powerful arms of government"[150]. For institutional, democratic, social and practical reasons, the Court should be reluctant to hinder social reforms introduced by a democratically elected, majoritarian government. The principle was summed up by Lord Scarman, although in a different context: "The Constitution's separation of powers ... must be observed if judicial independence is not to be put at risk. For, if people and Parliament came to think that the judicial power is to be confined by nothing other than the judge's sense of what is

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[149] Kentridge and Spitz at 11-16A.
[150] Klug, H 'Introducing the Devil : An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 189

right ... confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application"[151].

The doctrine of separation of powers also serves, conversely, to limit the powers of the legislature and the executive, neither of which may impose on the functions of the other or the judiciary. Thus, as Klaaren and Chaskalson point out, legislation which purports to bring judicial organs of state under the control of Parliament may be struck down under the separation of powers doctrine, even if such legislation was not in conflict with an express provision of the Constitution[152].

In addition to acting as a limitation on the manner in which the Court imposes its will on the legislature and the executive, the doctrine of separation of powers also dictates how the Court is to interpret the Constitution. In other words, a model of constitutional interpretation must take into account the respective roles of the three branches of government before it can be justified in a constitutional democracy. By respecting the separation of powers between branches of government, the Court is ultimately respecting a fundamental notion which underlies democracy itself. In this way, the judiciary is able to exercise its power in such a way as to justify the exercise of judicial review in a majoritarian democracy.

Before elaborating on such a model of constitutional interpretation, it is necessary to look at the issue of independence of the judiciary. The judiciary's independence is a vital component of the doctrine of separation of powers and is relevant here insofar as it qualifies or expands upon the role of the judiciary in a democracy. The independence of the judiciary is critical to the functioning of a healthy democracy, and ultimately determines whether or

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[151] In *Duport Steil Ltd v Sirs and others* [1980] 1 All ER 529 at 550-1.
[152] Klaaren and Chaskalson 'National Government' Chapter 3 of CONLSA at 3-3.

not the Court is able to fulfil its constitutional obligations impartially and without prejudice, fear or favour.

5. Independence of the Judiciary

Chaskalson P stated that the Court should "not allow itself to be diverted from its duty to act as an *independent* arbiter of the Constitution"[153]. A Court beholden to the political majority of the day is not in a position to protect the citizen from abuses of public power. Montesquieu himself, in formulating his original doctrine of separation of powers, was more concerned about the independence of the judiciary and its separation from the legislature and the executive, than he was about the rigid dichotomy between legislature and executive[154]. Such independence is now generally accepted to be an essential part of the doctrine of separation of powers[155] and of democracy itself.

Independence of the judiciary was a feature of South Africa's previous Westminster-style dispensation[156], albeit in a system where the judiciary's political role was not great. It is generally acknowledged that, in such a system, the judiciary is constitutionally weaker than the legislature, because of the overriding supremacy of Parliament[157].

Independence of the judiciary is now entrenched in South African constitutional law. Constitutional Principle VII of the interim Constitution demanded that "[t]he judiciary shall be appropriately qualified, independent and impartial and shall have the power to safeguard and enforce the

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[153] *Makwanyane* at para 89 (my emphasis).
[154] Carpenter at 258-9.
[155] *Certification I* at para 123 (per Chaskalson P).
[156] Carpenter at 256.
[157] Carpenter at 259.

Constitution all fundamental rights"[158]. The Constitutional Court has confirmed that this requirement has been complied with by the final Constitution[159]. Although the legislature and the executive participate in the appointment of judges, the Court held that this is not inconsistent with the doctrine of separation of powers or with the judicial independence required by CP VII[160]. The Court stated that what is crucial for judicial independence is that the judiciary "enforce the law impartially and that it should function independently of the legislature and the executive"[161].

An independent judiciary means that:

1. judges must be impartial[162];

2. the administration of justice must take place in a manner which inspires confidence and respect in the minds of the general public;

3. judges must be appointed on merit and not on the grounds of political expediency; and

4. their tenure should not be dependent on the vagaries of political change[163].

The pertinent issue is essentially who appoints the judiciary and who can dismiss it. Under South Africa's final Constitution, the judiciary is appointed by the executive (the President). However, in appointing the President and

[158] Contained in Schedule 4 to the interim Constitution.
[159] *Certification I* at paras 118 to 148.
[160] *Certification I* at para 123.
[161] At para 123. It then concluded, rather surprisingly, that all judges are independent because the Constitution says they are independent (at para 123).
[162] See *Certification I* at para 123, quoted above.
[163] Carpenter at 256.

Deputy President of the Constitutional Court, the President must do so "after consulting"[164] political party leaders and the Judicial Services Commission ("JSC"), a newly-formed body made up of judges, Cabinet members, attorneys, advocates, academics, politicians from national and provincial level and persons designated by the President[165]. When the President appoints the rest of the Constitutional Court judges, he or she must first consult the President of the Court and political party leaders, and must choose from a list of nominees prepared by the JSC.

With regard to dismissal of the judiciary, a judge may only be removed from office if the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, and the National Assembly calls for that judge to be removed with a two-thirds majority[166].

In this manner, the executive and the legislature participate in the selection of Constitutional Court judges, but not decisively. The body which must nominate a judge is broadly representative of both the legal and political community. The result is, hopefully, a judiciary which is independent, yet mindful, of the political aspirations of the other two branches of government. As Klaaren argues, "the membership of the Court is likely to (continue to) be in broad agreement with the thinking of the legislature and the executive"[167].

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[164] Section 174(3).
[165] Section 178(1).
[166] Section 177(1). Tenure of judges is governed by section 176, in terms of which Constitutional Court judges are appointed for a non-renewable period of 12 years. Their remuneration packages cannot be reduced.
[167] Klaaren, J 'Structures of Government in the 1996 South African Constitution: Putting Democracy Back into Human Rights' (1997) 13 SAJHR 3 at 25. While in no way implying that judges therefore toe the party line, he also notes that it may be "something of a misconception to call the Court countermajoritarian" (at 25).

Du Plessis believes that "judicial appointments are bound to remain as political as they had been under apartheid"[168], although he concedes that the representation of political interest groups has increased for the better. He may be right - it is common knowledge that those members of the Constitutional Court bench who were not already judges were/are supporters of the ANC[169]. As Sarkin emphasises, the question of who is appointed to the bench is critical, since individual judges play a large part in determining the decisions which emanate from the Court[170]. The background of a judge dictates his or her degree of activism (reforms resulting from Court intervention) or conservatism (leaving 'political issues' to the legislative process)[171]. His or her "value-permeated pre-understanding"[172] has an impact on his or her interpretation of a constitutional text. As has been said, "[i]t is not so much our judgments as it is our prejudices that constitute our being"[173]. Du Plessis argues that such "prejudices" are not such a bad thing. He quotes the German constitutionalist Peter Haberle to argue that political and social influences which put pressure on judges interpreting the Constitution are not necessarily threats to judicial independence[174]. It is a way of making the judiciary cognisant of the "open community of constitutional interpreters", thereby curtailing judicial high-handedness[175].

South Africa's system of appointing judges on so-called "merit" is not universally favoured, even in countries committed to constitutional

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[168] Du Plessis, L 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12 SAJHR 214 at 227.
[169] Sarkin, J 'The Political Role of the South African Constitutional Court' (1997) 114 SALJ 134 at 137.
[170] At 136.
[171] At 136.
[172] Du Plessis at 216.
[173] Hans-Georg Gadamer 'Philosophical Hermeneutics' (1976) 9, quoted by Du Plessis at 217.
[174] At 217.
[175] At 217-218. Haberle argues that such "open community" includes all organs of state, all public powers and all citizens and groups, with no fixed number (quoted by Du Plessis at 214). He believes this helps establish legitimacy for a political order.

democracy. In the United States, 26 of the individual States *elect* their judges (a mixture of partisan and non-partisan elections) to the State benches, as opposed to appointing them based on merit. While the merit system is not without criticism, many practitioners and academics in the US have heavily criticised the election system. Justice Stevens, dissenting in *Harris v Alabama*[176], emphasises the potential problems with a system which relies heavily on the election process. The case looks at judges' decisions on the death penalty in Alabama, which has a partisan-elected judiciary. He concluded that judges "bend to political pressure"[177].

Professor Croley[178] also has difficulty with the elected judiciary - his basic question is: how can elected/ accountable judges be justified in a regime committed to constitutionalism?[179] (This is in interesting variation of the more commonly asked question : how can unelected judges be justified in a regime committed to democracy (the countermajoritarian dilemma)?)

It remains to be seen whether South Africa's Constitutional Court will be essentially independent, bearing in mind that there is a fine line between independence, on the one hand, and showing deference to Parliament as the democratically elected branch of government, on the other. I do not believe that it has to date been faced with any hard choices vis-à-vis the national government. In the controversial *Makwanyane*, it knew it had the support of Parliament in abolishing the death penalty[180]. Most of the legislation which it has struck down to date has been apartheid-era legislation, and therefore

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[176] 513 US 504, 519-20 (1995)

[177] Quoted in Wefing, JB 'State Supreme Court Justices: Who Are They?' (1997) 32 New England LR 47 at 76. See also Bright and Keenan 'Judges and the Politics of Death : Deciding between the Bill of Rights and the Next Election in Capital Cases' (1995) 75B Boston Univ.L.Rev 759 where the interrelationship between the election system of appointment of judges and the death penalty is discussed.

[178] 'The Majoritarian Difficulty : Elective Judiciaries and the Rule of Law' (1995) Chicago L Rev 689, 690.

[179] Wefing at 77.

[180] Klaaren, J 'Constitutional Court Statistics for the 1995 Term' (1996) 12 SAJHR 39 at 44.

ideologically and politically the Court has asserted its power with confidence. In the *Western Cape* case, the Court found against Parliament on the face of it, effectively striking down legislature drafted by the new government. This judgment was, however, more an exercise in pragmatism than a mark of judiciary independence. In *Soobramoney*[181] the Court was not prepared to impose administratively and financially burdensome duties on the state in order to prolong the life of an individual citizen. Unlike India, where the first two decades of its Supreme Court's life were marked by its opposition to Parliament (which could be described as marking its independence from Parliament)[182], our Constitutional Court's first few years are marked by non-opposition to Parliament. It is arguable that this is not so much as a result of a lack of independence, but rather due to the Constitutional Court's acute awareness of Parliament's greater democratic credentials and therefore its legitimacy.

[181] *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC).
[182] See Chapter 5 for an in-depth discussion of India's experience.

CHAPTER 5

A COMPARATIVE VIEW

1. INTRODUCTION

In order to substantiate my argument that the judiciary should refrain from activist intervention in the running of democratic government, I look at the examples set by and comparative experiences of the USA and India. The US Supreme Court, although not quite having reached the levels of controversy which the Indian Supreme Court managed to attain, has still been the subject of much criticism for the manner in which it systematically and routinely encroaches into the legislative and executive arena. The issue of democratic legitimacy of the Supreme Court therefore remains the subject of heated debate among legal and political academics in the US, even if on a somewhat theoretical level. The experience of the Indian Supreme Court is perhaps far more pertinent to South Africa. The Indian Parliament, newly established after the withdrawal of Britain from India, carried tremendous popular and moral support. When the Indian judiciary deliberately and systematically chose to confront the Indian legislature and to interpret its new-found Constitution in a manner which conflicted dramatically with Parliament's interpretation thereof, the issue of the Court's democratic legitimacy again rose its head, to the extent that the Indian Supreme Court was almost done away with. The result of such confrontation was not a country with a Supreme Court seen as being the champion of people's rights, but rather a Supreme Court seen as the last bastion of elitism. The experience of India sharply illustrates that fears relating to the legitimacy of the Court's position in South Africa are well-founded, and that they need to

be taken into account when the South African judiciary exercises its power of judicial review.

While in no way implying that South African Courts should import wholesale legal concepts from comparative jurisdictions, which the Court has already warned itself against[1], no purpose would be served by South African academics and jurists attempting to re-invent the proverbial wheel by tackling constitutional issues such as democratic legitimacy in isolation. Comparative experience should be woven into South African jurisprudence wherever it can positively contribute to the development of our law. As Chaskalson P has stated, international and foreign authorities are of value because they offer guidance in the interpretive process[2].

2. JUDICIAL REVIEW IN THE UNITED STATES

1. Introduction

The concept of judicial review has become intertwined with the concept of constitutionalism in the US over the past 200 years. This country's Supreme Court paved the way for other democracies to adopt the most effective of checks and balances when it expressly introduced the idea that the judiciary is able to override both the legislature and the executive on matters of government. Judicial review in this form began with the famous case of *Marbury v Madison*[3], where Chief Justice Marshall read into the US Constitution the implication that the Court was empowered to overturn an Act

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[1] For example, *S v Makwanyane* at paras 37-39; *Bernstein v Bester* 1996 (4) BCLR 449 (CC) at paras 132-2 (Kriegler J); *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at para 127 (Kriegler J); *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC) at para 61.
[2] *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 34-35.
[3] 5 US (1 Cranch) 137 (1803).

of Congress wherever it was in conflict with the Constitution. Marshall CJ alluded to institutional considerations for his decision, arguing in effect that it is only the Court that can decide when the political process cannot[4]. This power of the Court to review the decisions of the highest democratically elected body in the land, despite its hazy beginnings, is now an integral feature of the US constitutional landscape.[5]

Even at that early stage constitutional review was politically controversial. It was suspected that the reason why the Court's ruling in *Marbury* was accepted was because the federalists wished to empower the only the branch of government which they controlled[6]. Today it is by no means settled that such a power is justifiable in a majoritarian democracy, although the Court continues to make full use of it, and the ambit and scope of the power remains the subject of considerable controversy. The American academic Laurence Tribe refers to this controversy as the "general puzzle of why majority will should be constitutionally constrained"[7] and warns that "whether imposed by unelected judges or by elected officials ..., choices to ignore the majority's inclinations in the name of a higher source of law invariably raise questions of legitimacy in a nation that traces power to the people's will"[8]. The debate appears to revolve around differing concepts of the meaning of democracy. Loosely speaking, one camp places its emphasis on majoritarian wishes (hence the dilemma being referred to as the countermajoritarian dilemma[9]), while the other camp places its emphasis on the protection of individual rights[10]. The reason that this dilemma, with its legal and political

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[4] Klug, H 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 192. Klug concedes that Marshall's argument here is "thin".
[5] Klug ibid at 190.
[6] Klug ibid at 191.
[7] Tribe, L; American Constitutional Law; The Foundation Press; New York; 1986 at 12.
[8] Tribe ibid at 10.
[9] For a discussion on the issues raised by the countermajoritarian dilemma, see Chapter 3 above.
[10] The approaches to constitutional argument are by no means limited to these two categories. Tribe refers to 7 major alternatives for constitutional argument in American law,

connotations, remains an issue in most constitutional democracies today is that it relates directly to the democratic legitimacy of the judiciary and the justifiability of the power of judicial review in a democratic system of government.

2. Activist v Conservative Courts

Although most US jurists and legal academics appear to be in favour of the power of constitutional review, there is a fair amount of criticism about the manner in which the US Supreme Court has exercised its power. History reveals a pendulum swing at various times between an activist Court and a conservative Court, caused arguably by a natural tendency to aspire to the impossible task of settling at the happy medium. Where a particularly activist Court has introduced "sweeping expansion of constitutional rights"[11], a backlash has generally been created which produces a generation of conservatives calling for judicial restraint. An example of this occurred in the 1960s, when an activist Court led by Chief Justice Warren generated enough discomfort amongst conservatives that some formed an "Impeach Earl Warren" movement[12]. By the 1980s and in direct response to this activism, the Court had been packed with conservative judges, culminating in the Rehnquist Court, which produced a different form of judicial activism by adopting a less flexible theory of constitutional interpretation.

This pattern of swinging between activism and restraint will presumably continue for as long as the Supreme Court continues to exist. And the corresponding influence which the Court wields over government of the US

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each of which represent approximate tendencies, rather than precise formal approaches (at 2). These are 1. Separated and divided powers; 2. Implied limitations on government; 3. Settled expectations; 4. Governmental regularity; 5. Preferred rights; 6. Equal protection; and 7. Structural justice.

[11] Davis, Chaskalson and De Waal ibid at 7.

[12] Davis, Chaskalson and De Waal ibid at 7.

will continue to fluctuate accordingly. Be that as it may, the Court remains the subject of criticism even during its moments of restraint, not only for the manner in which it exercises its power of judicial review, but also for the dependence on, or routinization of, this power which it has managed to create in the eyes of general public.

3. The Routinization of Judicial Review

Despite the different approaches adopted by the so-called activist or conservative Courts, it appears to be a fairly common criticism in the US that the Supreme Court has now involved itself in too many aspects of government. Robert Nagel in his book Constitutional Cultures[13] points out that the American public has developed what he calls an "excessive reliance on judicial review" and that this has created a "routinization of judicial power". The US federal Courts at present "control more important public decisions and institutions in more detail and for more extended periods that at any time in our history"[14]. Examples include policies relating to marriage, parent-child relations, abortion, zoning, public administration, police practices, commercial advertising, defamation, aliens, affirmative action, and state taxation. Nagel criticises the Courts' habit of applying the "limited number and range of provisions in the Constitution" to the "myriad highly specific political and social issues"[15] to which such provisions are now applied. He doubts the logic of the Courts' so doing, referring to it as "downright implausible" [16] that this was ever envisaged[17].

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[13] Nagel, RF; Constitutional Cultures - The Mentality and Consequences of Judicial Review; University of California Press; California; 1989 at 1.
[14] Nagel at 1.
[15] At 3.
[16] At 3. In passing, he also appears to question the logic underpinning American constitutional law itself - referring to the fact that it is based on "a short, old legal document" from which is sought "conclusive wisdom on the appropriate dynamics" of certain private and public affairs (at 3). He does not take this point any further.
[17] He seems to be referring here to a form of intentionalism, but does not elaborate.

Nagel effectively argues that the US Supreme Court has gone too far and, by doing so, has created a form of government by judiciary[18]. He firmly believes that the judiciary's "frequent intervention in ordinary political affairs works against both the preservation and the healthy growth of our constitutional traditions"[19]. He concludes simply that the Courts should "attempt less"[20]. More notably, he suggests that the judiciary ought not be in what he describes as constant confrontation with society. He feels that this is becoming more common - the Courts engage in decisions that dramatically alter social and political institutions. In looking at the Indian experience, it becomes more apparent why the Court should not become accustomed to being in constant confrontation with society, or as in India's case, in confrontation with the legislature.

The complaint underlying Nagel's thesis is not unique. Another well-known critic of the manner in which the US Supreme Court is engaging in the task of constitutional review is the academic and one-time judge, Robert Bork. His work, entitled The Tempting of America : The Political Seduction of the Law[21], looks at the judicial role in government under the US Constitution and warns of the dangers of the law becoming seduced into playing a politicised role in government. Bork argues that in the US the law, through the judgments of the Supreme Court, has become "seduced" into playing a political role, a role to which it is unsuited and which the Constitution did not

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[18] This sentiment is also reflected in Bork's 'The Political Seduction Of The Law' and Mandel's 'The Legalisation Of Politics', both quoted in H Corder 'Lessons from (North) America (Beware the "Legalization of Politics" and the "Political Seduction of the Law") (1992) 109 SALJ 204. Cass Sunstein also criticises this "court-centeredness", which he describes as a continuing problem for constitutional thought in the US - Sunstein The Partial Constitution (1993) at 9.

[19] Nagel at 3.

[20] Nagel at 3. He also proposes that "public understanding as expressed in prolonged practice" should play a greater role in judicial interpretation.

[21] Robert H Bork; The Tempting of America : The Political Seduction of the Law; New York; The Free Press; 1990.

intend for it[22]. Politicisation of the judiciary should be avoided because "[t]he Constitution is too important to our national well-being and to our liberties to be made into a political weapon"[23]. In order to minimise the scope for this sort of seduction, and to counter the effects of the countermajoritarian dilemma, Bork argues in favour of a theory of constitutional interpretation which is based on the "philosophy of original understanding"[24].

Nagel raises another criticism of the US system of constitutional review, which I raise even if only to disagree with him. He criticises the US system heavily for its dependence on members of the legal profession. He argues that a lawyer's training by its very nature encourages him or her to look for ambiguity where there may be none. Judicial interpretation (by this he means "efforts to extract meaning from a document"[25]) necessarily embodies the "intellectual culture of lawyers and judges"[26], that is, the analytic and communicative styles traditionally associated with legal interpretation[27]. Lawyers therefore seek non-durable meaning, whereas theoretically they argue in favour of the virtues of durable meaning[28]. The pervasive influence

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[22] Hugh Corder summarises Bork's argument, as well as the debacle surrounding Bork's nomination to the Supreme Court bench in 1987. He concludes that this latter incident is highly relevant to South Africa, particularly at a time when South Africa faced choices as to how to structure its judicial review function - Corder, H 'Lessons from (North) America (Beware the "Legalisation of Politics" and the "political seduction of the law")' (1992) 109 SALJ 204. Corder also looks at the work of the Canadian academic, Michael Mandel, entitled The Charter of Rights and the Legalisation of Politics in Canada ;Toronto; Wall and Thompson; 1989. Corder wrote this article prior to the promulgation of the interim Constitution and was hoping to "inject a dose of realism" into the debate on judicial review by pointing to some of the problems which "government by judiciary" may cause, as experienced by the US and Canada (at 205).

[23] Quoted in Corder at 210. Bork's opinion about *Brown* was that it was "a great and correct decision ... supported by a very weak opinion".

[24] Quoted in Corder at 211. See Chapter 6 below for a more detailed discussion of Borkean originalism.

[25] At 1.

[26] At 1.

[27] Legal training emphasises argumentative skills. Those most entrusted with the meaning of our fundamental document are by training, role and instinct inclined to think that it is difficult to discover meaning (at 7-8). The simple fact, he concludes, is that lawyers have steadily and fundamentally altered the Constitution (at 9).

[28] In exploring the notion of durability, Nagel (at 6) refers to *Marbury v Madison*, which initiated the concept that the moral and legal authority of judicial review is justified in part on

of the legal profession on constitutional interpretation has created the situation where "[t]he meaning of the Constitution of the United States emerges from the adversarial arguments and judicial opinions that make up the legal culture"[29]. Lawyers therefore affect not only what the Constitution is, as a practical matter, but also how it is thought about and understood. This, in addition to the adjudicatory and adversarial climate in which a Court examines any given constitutional issue, has resulted in a "legal constitution" which is inferior in important ways to the "political constitution". With a legal Constitution, the public's perception of its meaning depends on the judiciary's interpretation of it. This is wrong, he believes. Rather, the judiciary's interpretation of the Constitution should depend to a large degree on the public's perception of its meaning[30].

Nagel is therefore proposing a model of interpretation which depends to a large degree on the public's perception of the meaning of a constitutional provision. He argues that the Court has in fact made use of this form of interpretation on a few occasions, with commendable results. The most highly publicised example of this is the case of *Brown v Board of Education*[31]. The Court reached its conclusion that segregated schooling was unacceptable, not by making use of standard legal interpretation practices,

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grounds that constitutional principles were "designed to be permanent ... unchangeable by ordinary means" (*Marbury* at 176-7). He quotes Alexander Bickel, who wrote that enforcement of constitutional principles by the Courts "may meet a need for continuity and harmony in our values" (Bickel, A; The Supreme Court and the Idea of Progress; New York; Harper & Row; 1970 at 87). Also, Henry M Hart Jnr justified judicial review in the need for "articulating and developing impersonal and durable principles" (Hart, H 'The Time Chart of the Justices' (1959) 73 Harv. L Rev 84 at 99). However, he suggests that, although much of the legitimacy of constitutional law continues to depend on the possibility of enduring meaning, legal scholars ("armed with sophisticated understanding about the inherent inaccuracies of written communication and about the demands created by social change") in reality regard this principle as naive.

[29] Nagel at 1.

[30] Hence his proposal that "public understanding as expressed in prolonged practice" should play a greater role in judicial interpretation. It is this aspect of "public understanding" which he believes is not given enough judicial attention, thus bringing constitutional interpretation into disrepute.

[31] 347 US 483 (1954).

but rather on the basis of a "widely shared understanding" or a "dominant national culture" regarding segregation in schools. "Everyday perceptions grounded *Brown* in a morality that was both powerful and widely understandable"[32]. *Brown* illustrates Nagel's argument that judicial interpretations should draw from the "substance of general experience" and submit to the "discipline of common language"[33]. By using various examples (free speech cases, federalism cases and equality cases)[34], Nagel illustrates that the Courts seldom take into account the public perception of the meaning of a constitutional provision.

Is this a viable option for interpreting the Constitution? Nagel is arguing for "public understanding" to be the determining factor in this exercise. How is such public understanding to be ascertained, and in what manner? What percentage of the public need to understand a provision to have a particular meaning before that meaning is accepted by the Court? Surely this is a form of majoritarianism originally sought to be prevented by the introduction of a justiciable Bill of Rights? It is trite that the Court should not isolate itself from public perceptions, but insofar as these are nebulous, indeterminable and potentially unconstitutional, they should not be a determining factor when the Court interprets the constitutional text. Nagel's criticism of the legal profession's pervasive and apparently negative impact on constitutional interpretation is surely of academic interest only. To suggest that only lawyers seek non-durable meaning in the Constitution is simplistic and simply not true. It is in the nature of litigation itself that differing interpretations of the text become apparent. If Nagel wishes to do away with lawyers altogether, he must also wish to do away with litigation itself, a thought which is difficult to imagine in any modern constitutional democracy. I do not share Nagel's pessimistic view of the judicial mind, which I believe has much to offer by way

[32] At 5.
[33] At 5.
[34] At 27-105.

of impartiality, rationality, logic and common sense in looking dispassionately at constitutional issues in dispute.

One of the bases of Nagel's argument is an attempt to draw a distinction between meaning and interpretation. He argues that, if meaning is not confused with interpretation, many constitutional provisions have remarkably stable meanings. For this reason he is arguing for minimal judicial intervention, which history has shown merely confuses interpretation with meaning[35]. Laurence Tribe also refers to this distinction between meaning and interpretation. He agrees that the Court's interpretation of the Constitution should not itself be seen as the "supreme law of the land", as this wrongly equates the Constitution with the Court's interpretation of it[36]. Tribe argues that a "variety of actors" make their own constitutional judgments and thus possess the power to develop interpretations of the Constitution[37]. Whereas Tribe is merely emphasising that the Court is not the only body responsible for giving meaning to the Constitution, Nagel is proposing that lawyers on the whole and the judiciary in particular remain as uninvolved as possible with the interpretation of the Constitution. Both Nagel's and Tribe's points that meaning can be separated from interpretation are again surely of academic interest only. In reality, particularly in a given dispute, one branch of government needs to be the final arbiter in constitutional disputes and needs to be responsible for giving meaning to the "vacant" words of the constitutional text. In such a given dispute, the Court's

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[35] For example, the meaning of a " republican form of government", where the Court early on determined that this was to be enforced by the legislative branch, and has never been challenged. Some of these "uninterpreted provisions" are fundamental to orderly, accountable government (e.g. Congress must "assemble" each year; expiry of presidential term; procedures to amend the Constitution). Some of the uninterpreted Constitution is less fundamental, although taken for granted (e.g. territorial integrity of the states respected; soldiers not quartered in private homes; census conducted every 10 years) (at 13).

[36] Tribe ibid at 34.

[37] Such actors include the president, legislators, state courts and the public at large (at 34).

interpretation of the text must surely equate with the meaning of the text in the given set of facts before the Court.

In conclusion, it is clear that a number of respected academics in the US argue in favour of less involvement by the judiciary in matters which more correctly belong to the "political" branches of government. Failure to do so compromises the democratic integrity of the judiciary and brings the whole concept of constitutionalism into question. In order to reduce the opportunities for involvement in political affairs, US legal academia spends a great deal of time debating the most appropriate model of constitutional interpretation. Most approaches seek to reduce the role of the judges in the process of constitutional review by holding judges to a method of reasoning which limits their ideological input. Bork, for example, proposes a model of constitutional interpretation which limits a Court's discretion by emphasising the relevance of original intent. Nagel only briefly touches on what he believes to be the correct model of constitutional interpretation, and his model is not based on an attempt to deal with the countermajoritarian dilemma. He argues that the Court should take into account "public understanding as expressed in prolonged practice"[38], on the implicit basis that the Court should respect the separation of powers between the legislature and the judiciary. Judges, and the manner in which they are trained to think and argue, do not render the judiciary the ideal branch of government to give meaning to the Constitution. For this reason, Nagel proposes minimal involvement by the judiciary in the affairs of government.

4. Lessons to be Learnt

Although it could hardly be said that the US Supreme Court has been in danger of losing its life on the basis of its being too activist, one of the

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[38] At 3.

foundational lessons which can be learned from the US is that a judiciary can expect severe criticism if it embroils itself too heavily in the political wrangling of government. In a more volatile political climate such as South Africa's, an activist Court may expect to receive more than only criticism, and a call for its removal from the political landscape altogether is not inconceivable[39]. The ideological basis of criticism levelled at an activist Court is not merely academic. A Court needs to show, through the manner in which it exercises its power of judicial review, that it will carry out its constitutional obligations impartially, but with a respect for the principles underpinning democratic government. This means that a Court must show deference to Parliament as being the democratically elected and accountable branch of government. For institutional, political and ideological reasons, the Court is not suited to certain functions of government. It therefore needs to self-impose limitations on the manner in which it exercises its power of constitutional review.

3. JUDICIAL REVIEW IN INDIA

1. Introduction

India's constitutional experience is arguably more relevant to South Africa for a number of reasons. Its Constitution was drafted more recently, the power of judicial review is expressly granted to the judiciary in the constitutional text

and, more importantly, India has a similarly complex and diverse political climate in which the Supreme Court is required to operate. The history of the Indian Supreme Court illustrates more pertinently how a Court may lose its credibility, almost its life as well, if it persists in undermining legislative attempts at implementing government policy (social reforms, in this case). In

[39] Fears have been voiced that, should the ANC obtain the requisite two-thirds majority in the 1999 general elections, it may make substantial amendments to the Constitution.

a series of judgments relating to the right to property, India's highly activist Supreme Court eventually lost credibility with government and the public, and was almost done away with. This struggle between the Court and Parliament was finally settled in the famous case of *Kesavananda v State of Kerala*[40], which paved the way forward for the relationship between the three branches of government. From this point on, India saw the development of its unique social justice approach to constitutional interpretation, which resulted in the explosion of public interest law in that country. Public interest law is of interest because of its approach to the purpose of rights and applicability of the doctrine of separation of powers.

According to the thoroughly researched account by Davis, Chaskalson and De Waal[41], the story goes as follows:

2. The Court v Parliament

A furious debate raged for many years between India's legislature and its judiciary around the property clause in India's post-independence Constitution. At the time of drafting the Constitution, Nehru considered poverty and inequality as the most important issues facing the independent India. As part of a political compromise, he conceded the inclusion of two property protection clauses in the Constitution, but he envisaged that they would provide an extremely limited protection to property. The Supreme Court had other ideas. The Indian judges treated social engineering schemes as falling clearly within the scope of their review power to protect property rights, and the first 25 years of the Indian Constitution were dominated by a struggle which developed between Parliament and the Courts over property rights. This period saw a plethora of legislation aimed at social reform,

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[40] AIR 1973 SC 1461.
[41] Davis, Chaskalson and De Waal ibid at 35-64.

followed by a sequence of Court judgments invalidating such legislation, which in turn was followed by constitutional amendment to overrule the judgments[42]. In this process, the Supreme Court lost most of its popular support, and constitutional democracy under judicial review was discredited to the point that the legislature was prepared to abolish the institution of independent judicial review altogether.

The Court's response to Parliament's repeated amendments to the Constitution to circumvent decisions on property rights was the well-known case of *Golak Nath v State of Punjab*[43]. A majority (6 to 5) held that fundamental rights were absolutely sovereign. Not even a two-thirds majority of Parliament had the authority to infringe fundamental rights. Thus any constitutional amendment which purported to repeal or even restrict a fundamental rights was invalid. The judgment of Subba Rao CJ in this case illustrates the Court's attitude to constitutionalism and democracy during these struggles. In essence, he argued that, in the light of India's past history, the legislature was implicitly not a body which could be trusted for "uncontrolled and unrestricted power might lead to an authoritarian state" [44] and it was the judiciary which the Constitution appointed to act as sentinel against state encroachments. This "Hobbesian fear"[45] of the elected representatives coupled with an appeal to natural law are recurrent features of the Supreme Court judgments of this period[46]. The Court was categorically asserting its strength against Parliament in the name of constitutionalism, on the basis that majoritarianism itself was the evil against which the people needed to be protected.

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[42] As Davis, Chaskalson and De Waal point out, the conflict was open - the preface to amending legislation normally expressly referred to the offending Supreme Court judgment (at 37).
[43] AIR 1967 SC 1643.
[44] Quoted in Davis, Chaskalson and De Waal ibid at 38.
[45] Davis, Chaskalson and De Waal ibid at 38.
[46] Cf. the US academics' leanings in the other direction, namely, in favour of the elected representative (quoted above).

In response to this, the Congress election campaign in 1971 was characterised by strong anti-judiciary rhetoric. Soon after its election victory, Parliament struck back at the judiciary with two legislative enactments, the first of which overrode *Golak Nath*[47] and the second of which attempted to make the question of compensation for takings of property non-justiciable[48]. The constitutionality of these two amendments was considered in the watershed case of *Kesavananda v State of Kerala*[49]. The outcome of *Kesavananda* can be summarised as follows: the majority (7) found that Parliament's amending power did not allow Parliament to abrogate the "basic features" of the Constitution. The minority did not agree with this distinction between essential and non-essential features of the Constitution and held that the amending power extended to the whole Constitution. The Court found that the property right was not an essential feature of the Constitution and therefore the amendments to the Constitution removing such rights were upheld.

The judgment contains echoes of both the old and the new approaches to constitutionalism in India. The majority judgment reflected the past attitude to constitutionalism, apparent in the judgment in *Golak Nath*, while the minority judgment prefigured some of the Court's new directions in the 1980's, particularly regarding the shift in interpretation which took the Indian Supreme Court into public interest law. The judgment has been described as a political compromise between the Court and the state[50]. The Court retained its right to review all amendments in terms of their compatibility with the essential core of the Constitution, but it conceded that the right to property

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[47] By making all fundamental rights subject to Parliament's amending power.
[48] In response to *Cooper v Union of India*, called the *Bank Nationalisation* case, cited at Davis, Chaskalson and De Waal at 39.
[49] AIR 1973 SC 1461.
[50] Davis, Chaskalson and De Waal at 39.

was not a fundamental feature of the Constitution and that Parliament therefore was free to do away with it.

In spite of the vast differences in ideologies as well as concluding judgments, both majority and minority judges sought to legitimate their position in terms of the doctrine of original intent[51]. Two factors encouraged this approach: (1) the relative youth of the Constitution; and (2) the tremendous moral authority retained by the drafters as they had lead the struggle for independence against Britain. Both majority and minority judges share an appeal to populism, but their versions of populism are significantly different. This is due to different conceptions of democracy. The majority invoke "the people" as the font of constitutional sovereignty, yet simultaneously echo *Golak Nath* in their fear of what the people's representatives in Parliament are capable of doing with power. A distinction is drawn between Parliament and the people. The judges stress that even a two-thirds majority of Parliament need not represent the majority of the people and that Parliament therefore cannot wield constituent sovereignty, which vests solely in the people.

This conception of judicial review is not based on the usual concerns of anti-majoritarianism which has concerned the US Courts. The Indian Supreme Court is reluctant even to concede that Parliament represents a majoritarian position. They appear to be driven by a fear (obviously influenced by the unimpressive history of post-colonial democracy) that those wielding power will inevitably be drawn to authoritarianism at the expense not only of minorities but also themselves. The judges, again looking at lessons from their history, warn that "[h]uman freedoms are lost gradually and imperceptibly and their destruction is generally followed by authoritarian rule" and that, in the constant struggle between liberty and power, the Court is responsible for safeguarding "the democratic values enshrined in our

[51] See Chapter 6 below for a discussion on this doctrine.

Constitution"[52]. It is a clear premise of the majority that the people are not able to exercise this vigilance and therefore the Court does it on their behalf.

This theory of democracy has been described as being based on "judicial paternalism"[53]. The people have given themselves the Constitution. The task of the judge is to protect the people from the depredations of Parliament as the people themselves are no political match for Parliament. The judge restraining political power is not preventing social change, nor acting undemocratically. Rather he or she is controlling the pace of change in the interests of the democratic freedoms which the people have given themselves in the Constitution. This approach to the Court's role arguably reflects the majority judges' aversion to the social changes taking place in India at the time, and for this reason could be described as conservative.

The minority judges, on the other hand, argue so far in favour of judicial deference to Parliament that it borders on an abdication of the Court's constitutional duties. They argue that Parliament can do as it pleases, that the Constitution does not have any core features which are immune from parliamentary amendment. To hold otherwise would amount to a threat to democracy. They argue that the people are not in need of protection from the Court, and that they are perfectly capable of looking after themselves. Their argument is based on a concept of democracy which, firstly, equates the people's representatives in Parliament with the will of the people, and secondly, encourages trust in the elected representatives as being "the corner-stone of democracy"[54]. The minority have no fear of public power and in fact encourage complete faith in the majoritarian processes of government. Their implication is that, to argue otherwise (in other words, on the majority's

[52] Per Hegde and Mukherjea JJ in *Kesavananda* at 1629 para 682, quoted in Davis, Chaskalson and De Waal at 43.
[53] Davis, Chaskalson and De Waal at 42.
[54] Dwivedi J at 2009 para 1960, quoted in Davis, Chaskalson and De Waal at 44.

version of democracy), a "Government of Judges"[55] would be created in India. The minority believe that the main aim of the Constitution is social revolution and all interpretation of the Constitution must take place in this light, stressing that the Constitution must be interpreted as a programme for social and economic justice[56].

Falling almost squarely between the minority and majority judgments is the judgment of Khanna J. Although ultimately concurring with the majority, Khanna J reaches his conclusion on different ideological grounds. Like the minority, he has faith in a majoritarian form of democratic government[57] and does not share the majority's fear of parliamentary power[58]. He regards a two-thirds majority as an adequate check on unfettered amendment. He argues that no generation has the monopoly on knowledge which entitles it to bind future generations irreversibly, and warns that a Constitution which is incapable of amendment invites extralegal revolutionary change. He believes that the arguments of his fellow majority judges are based on "fear and distrust in the majority of the representatives of the people"[59]. He argues that "the best safeguard against the abuse of power is public opinion and the good sense of the majority of members of Parliament"[60]. But he does not take this to the extreme. He argues that Parliament is not entitled to amend the "essential structure" of the Constitution, that the basic institutional character of the state must remain intact. For example, Parliament cannot change its democratic, secular nature, and it cannot end constitutional government.

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[55] Dwivedi J at 2008 para 1957.
[56] This approach was later to form the basis of Indian public interest law - Davis, Chaskalson and De Waal at 45.
[57] Davis, Chaskalson and De Waal refer to Khanna J's faith in "parliamentary sovereignty" (at 44), but I believe that the emphasis should be placed more on the majoritarian nature of the minority judges' arguments. For example, Ray J refers to "the interest which prevails must be the interest of the mass of men" (at 1707 para 1031).
[58] Davis, Chaskalson and De Waal at 43.
[59] *Kesavananda* at 1855 para 1427, quoted in Davis, Chaskalson and De Waal at 43.
[60] *Kesavananda* at 1903 para 1550, quoted in Davis, Chaskalson and De Waal at 43. This is a brave approach given the recent experience with Gandhi's authoritarian administration.

Such changes would amount to more than an amendment, they would constitute an abrogation of the Constitution and its replacement with a new Constitution[61]. However, he acknowledges that limiting Parliament's powers in this fashion derogates from the principles of democracy and therefore he concludes that only those values which are absolutely essential to the Constitution can be said to be core values.

Khanna J's judgment attains a rational and justifiable balance between the Court's powers and Parliament's powers in a constitutional democracy. While acknowledging that constitutionalism demands that in certain limited spheres the legislature has no right to interfere, he ultimately respects the principles of democracy by showing the deference due to Parliament as the elected and accountable branch of government.

3. Re-establishing Legitimacy and Social Justice Interpretation

The judgment in *Kesavananda* did not, however, go far enough to satisfy the legislature that the judiciary was a legitimate institution in Indian society and the political confrontations between the two branches of government did not come to an end. The day after the *Kesavananda* judgment, Ghandi appointed a new Chief Justice, AN Ray, who was known to favour the state. By the next year, the state had become worryingly authoritarian. Ghandi still accused the Court of being an "enemy" of progressive forces in India, but "progressive" had come to mean the partisan interests of the Congress government. According to Davis, Chaskalson and De Waal, "political repression was being used by the central government on a scale unprecedented in post-colonial India"[62]. By 1975, Ghandi's political survival looked unlikely. The Congress Party had been humiliated at various state elections and Ghandi

[61] *Kesavananda* at 1859-61 paras 1437-44, quoted in Davis, Chaskalson and De Waal at 43-44.
[62] Davis, Chaskalson and De Waal at 40.

herself was convicted of corrupt electoral practices and, pending her appeal, was prevented from sitting in Parliament. Her response was to declare a State of Emergency. Thousands of political leaders were detained and rigid press censorship introduced. When Parliament tried to remove the jurisdiction of the Supreme Court to deal with electoral offences against the Prime Minister and Speaker, the Court would not accept this, finding that it was in violation of the fundamental features of the Constitution in that it impaired free elections. This show of defiance by the Court prompted the government to threaten to introduce a new Constitution which excluded the power of judicial review. The Court, "suitably chastised"[63], thereafter delivered a series of executive-minded decisions.

Ghandi lifted the Emergency in 1977. Her party was overwhelmingly rejected by the electorate in favour of another party whose platform was anti-Ghandi, commitment to rights, the rule of law, and the abolition of the property rights clauses in the Constitution. There was an explosion of popular democratic activity. A liberal press emerged as a powerful institution in India for the first time. The Court sought actively to align itself with these developments, and the development of public interest law, an area of law unique to India, started to take form.

The legitimacy of the Supreme Court reached a low point during the Emergency years. The post-Emergency Court was crucially aware of this and deliberately set about trying to recreate legitimacy for itself and for the rule of law. The Court adopted an activist role in protecting citizens' rights, particularly the rights of the poor and underprivileged (dominated by Bhagwati J, the architect of public interest law). Bhagwati J's judgments were explicitly motivated by the need for the Court to re-establish itself as a legitimate institution in Indian society. For example, he referred to the Indian

[63] Davis, Chaskalson and De Waal at 40.

Constitution as "a document of social revolution"[64], an idea which the judges in *Golak Nath* and the majority in *Kesavananda* would not have found appealing.

The first expression of this new judicial activism was evident is *Maneka Ghandi v Union*[65] were the Court specifically ignored the original intent theory and invoked the "general character of the Constitution"[66] in interpreting the relevant section. In cases following this judgment, the relevant clause was read to require that all state action be reasonable, non-arbitrary and in the public interest. Public interest could be determined by the judiciary because it was shaped by the preamble and the directive principles[67] contained in the Constitution.

The post-Emergency Court adopted as its starting point the fact that the Indian Constitution is designed to create a democratic welfare state and that all constitutional interpretation has to be consistent with this primary goal. This "social-justice-based interpretation"[68] became the dominant approach to constitutional interpretation of the Indian Supreme Court and the judgments reflect this explicitly. For example, Bhagwati J has stated that the Constitution which the drafters forged "has a social purpose" and that it must therefore be interpreted in a manner which advances "the socio-economic objective of the Constitution"[69]. And Chinappa Reddy J has similarly stated that the expositors of a Constitution like India's must not overly concern

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[64] In *SP Gupta v Union of India* AIR 1982 SC 149 at 196-7. This idea is an echo of the minority judgment of *Kesavananda*.
[65] AIR 1978 SC 597.
[66] Davis, Chaskalson and De Waal at 46.
[67] See Bhagwati 'Human Rights as Evolved by the Jurisprudence of the Supreme Court of India' (1987) Commonwealth Law Bulletin 236, as cited by Davis, Chaskalson and De Waal at 47.
[68] Davis, Chaskalson and De Waal at 47.
[69] In *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473 at 1490.

themselves with the words of the Constitution, but rather with "the philosophy or what we may call the 'spirit and the sense' of the Constitution"[70].

According to social justice interpretation, the traditional way of treating fundamental rights as superior to directive principles is rejected. Fundamental rights serve to protect political democracy and are of no value unless they can be enforced in court. Directive principles serve to advance social and economic justice. The Constitution provides that they are unenforceable, but this does not make them any less important than fundamental rights. In a country like India, with limited resources, the legislature must decide on the allocation of these resources. If the Court were able to control this allocation in the name of enforcement of directive principles, parliamentary democracy would be reduced to an "oligarchy of judges"[71]. However, the Constitution instructs all organs of state to treat the directive principles as fundamental in the governance of the country, and therefore the Court is bound to apply the directive principles in interpreting the Constitution. They serve as a code of interpretation and should be read into the fundamental rights wherever possible. Bhagwati looks at creating not merely a political democracy, but rather a "real participatory democracy" which also means a "social and economic democracy with fundamental rights available to all irrespective of their power, position or wealth"[72].

The Indian Supreme Court is therefore extremely reluctant to invalidate state action which is performed in pursuance of the directive principles but which infringes fundamental rights. Rights are not seen as the protected domain of individual autonomy into which the state cannot encroach. Rather, the emphasis is placed on the upliftment of the community or society as a whole,

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[70] In *ABSK Sangh (Railway) v Union of India* AIR 1981 SC 298 at 335 para 123.
[71] Chinappa Reddy J in *ABSK Sangh (Railway) v Union of India* AIR 1981 SC 298 at para 124, quoted in Davis, Chaskalson and De Waal at 47.
[72] In *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789 at 1847.

even where this may mean the infringement of an individual's rights. The Court therefore supports uplift programmes implemented by the legislature, rather than opposing them as it attempted to do in the past.

It is clear that the Indian approach to constitutional law differs vastly from the US approach. In the US constitutional jurisprudence developed under a Bill of Rights structured around the core values of individual liberty and property. In India, after a somewhat shaky start, constitutional jurisprudence now revolves around social as opposed to individual rights. Essentially the difference is one of priorities. In India, the priority is the community as a whole, while in countries like the US, the rights of the individual take first place.

The American approach has not gone uncriticised. Davis, Chaskalson and De Waal refer to a "rights as relationship" argument put forward by the US commentator Nedelsky[73] (whose work is not based on Indian constitutional law, but her notion of "rights as relationship" arguably captures the practice of the post-Emergency Indian Supreme Court). She argues that there should be a shift of focus from protection against others to structuring relationships so that they foster autonomy, that constitutional protection of autonomy is no longer an effort to carve out a sphere into which the collective cannot intrude, but a means of structuring relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined. This is a potentially far-reaching argument, and, it is submitted, may be more useful to the development of South African constitutional law than the more American individualist approach to rights, given our vastly differing political conditions.

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[73] Nedelsky 'Reconceiving Rights as Relationship' (Paper delivered at the Gender and Law Conference, Centre for Applied Legal Studies, University of the Witwatersrand, Johannesburg, 20 March 1993), quoted in Davis, Chaskalson and De Waal ibid at 62.

4. Public Interest Law

At this point, it is worth looking briefly at where social justice interpretation took the Indian Supreme Court to ascertain whether such an approach to interpretation is relevant or desirable in South Africa. Social justice interpretation provided the constitutional framework for "the most ambitious project of public interest law ever undertaken by a Supreme Court"[74]. With the change of approach by the Indian Supreme Court, there was in the 1980s an explosion of class action litigation around social issues. The Court had relaxed the rules of procedure and standing[75], transformed the relationship between rights and remedies, and creatively extended the scope of the fundamental freedoms entrenched in the Constitution[76].

By recognising that rights involve relationships between state and individual, the Court was able to expand the range of fundamental rights so that they serve a social rather than individual function. The Court shifted its role from protecting individual rights to guarding against any violation of the rule of law[77]. A number of cases from this period illustrate this point[78], all which are indicative of an extremely activist Court, in terms of both recognition of rights and creation of remedies. This emphasis on social rights is evident from dicta to the effect that public interest litigation is "not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation", but rather it is intended to promote the public interest. This means that the rights of large numbers of people who are poor, ignorant or in a

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[74] Davis, Chaskalson and De Waal at 48

[75] The Court saw the purpose of public interest litigation as being to make justice popularly accessible, so it therefore was particularly accommodating on issues of *locus standi* (Davis, Chaskalson and De Waal at 56).

[76] Davis, Chaskalson and De Waal at 48.

[77] Craig 'Public Interest Litigation' (1987) 29 J of the Indian Law Institute 502, cited in Davis, Chaskalson and De Waal at 56.

[78] Cited in Davis, Chaskalson and De Waal at 48-52.

socially or economically disadvantaged position "should not go unnoticed and unredressed".[79]

Where my approach takes leave from the Indian approach is that public interest litigation, even though motivated by the best intentions, involves the judiciary in areas that are politically and democratically the reserve of the other branches of government. The Court has, however, been tacitly aware of the dilemma and has been careful not to invade the province of the legislature. It has repeatedly stated that the Court does not have the power to make laws or to allocate state revenue and has very seldom set aside legislation. Too a far greater extent, the Court has involved itself in the affairs of the executive. Much of public interest litigation has seen the Court taking over the control of the administration of a particular issue from the executive.

The reason for the Court's treating the legislature and the executive in a different manner is linked to a notion of the relationship between judicial review and democracy[80]. There is a reluctance to restrict the legislature's powers as parliamentary accountability is seen to be the cornerstone of democracy. The function of judicial review is also seen as a being the encouragement of social reform. Successive Parliaments have shared a public commitment to social democracy which was reflected in their legislative programmes. Thus the Court saw no reason to interfere[81]. But the executive, the Court felt, was different. The public service was dominated by competing privileged groups who have been able to appropriate resources and who frequently frustrated legislative attempts at social reform. For this reason the Court felt it was entitled to involve itself in the executive functions of government. The similarities between the Indian executive and the South

[79] *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473 at 1476-7.
[80] As seen in the minority in *Kesavananda*, who emphasised the democratic entitlement of the legislature, as representatives of the people, to govern a country as they see fit.
[81] Davis, Chaskalson and De Waal at 58.

African executive are clear, in that the plethora of South African administrative bodies are still overloaded with employees seeped in the pre-1994 regime. Although the Indian Court has been willing to impose its will on the executive, the problem of enforcement has raised its head. Many of its orders could not be enforced and the Court has resigned itself to the fact that its orders cannot be of more than persuasive value. In any event, the popular legitimacy of the Court has prompted the executive into more accountable behaviour.

In spite of the Court's eagerness to participate in the transformation of Indian society, its public interest approach has inherent limitations. The Court has neither the resources nor the expertise to take over the administration of every branch of the executive. In addition to this, there are ideological problems with the judiciary's taking over the legislative functions of government. As long as the Court's and the legislature's approach to social transformation overlap, the Court will in all likelihood remain legitimate in the eyes of the electorate. However, should the Court have invoked exactly the same approach but with different consequences (for example, Parliament was not of a mind to introduce social transformation), it would be interesting to see whether the Court would remain quite as popular. In other words, I do not believe the Court's popularity arises from its commendable efforts at social transformation, but rather from the fact that its efforts are in line with Parliament's efforts, which at this point in time happen to include social transformation.

There appears to be growing uneasiness about the future of public interest law in India, linked possibly to the judiciary's acceptance of the limits of its power over the executive and to the fact that this kind of litigation puts unprecedented strains on the resources of the Court. The Court's despair is notable in a few judgments, particularly where reference is made to

standing[82]. However, academics have raised fears that, merely as a result of these solvable problems, public interest law will be thrown out altogether. It has been argued that this would be regrettable as "the flood of public interest law cases reflected a real social need rather than an abundance of vexatious litigants in India"[83].

5. Lessons to be learnt

Soon after its creation, the Indian Supreme Court felt the need to assert its "institutional autonomy from the other branches of government"[84] and felt no qualms about directly confronting the legislature on matters of policy. This confrontation left the reputation of the Court in tatters as it was seen to be protecting existing distributions of wealth and power from state interference. It was not so much that the Court confronted Parliament, but rather that its ideologies differed so greatly from those of the electorate and their elected representatives, who were in favour of the redistribution of wealth. After this turbulent period, and in order to gain (or re-gain) credibility, the Court changed its tack and decided to align itself with the policies and aspirations of the government of the day. The result of this was a Court popularly accepted, respected and supported by the populace, in spite of its active participation and interference in areas of government traditionally the preserve of the legislature and the executive, particularly the latter.

The Indian experience shows that the South African Courts should approach their new-found power of judicial review with extreme care. Too much conservatism (in the sense of resistance to change from the *status quo*), particularly where it acts as a barrier to legislative attempts at social transformation, could cause our Court to lose its credibility. Social

[82] Davis, Chaskalson and De Waal at 61.
[83] Davis, Chaskalson and De Waal at 61.
[84] Davis, Chaskalson and De Waal at 62.

transformation is arguably a commitment underlying our final Constitution[85] and as such the Court is obliged not only to respect it, but also to assist in its implementation wherever possible. India's version of an activist Court (in the sense that changes to the *status quo* were welcomed) is commendable, but only for the reason that it aligned itself with the commitments underlying the Constitution. This is not to say that a court needs to align itself with the government of the day. Constitutional democracy requires a court to align itself with the Constitution, as drafted by the legislature, and to ensure that government behaves within the framework set up by the Constitution.

The lessons from India are complex. Although India's post-Emergency Court is commended for its activism, its activism is only acceptable because it is grounded in the Indian Constitution, not merely because the judiciary chose to adopt a policy of social transformation, nor even because it aligned itself with the government of the day. Regarding the Indian Court's "generous" approach to interpretation[86], again such generosity is only justified where it is in line with the text of the Constitution read together with the Constitution's underlying values. For the Court to invoke the concept of a generous interpretation merely to impose its own ideologies onto the constitutional text, would be unjustifiable in a society committed to democratic government.

[85] For example, see section 25(4) of the final Constitution which states that, for the purposes of the property clause, public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources. The interim Constitution was more explicit, where reference was made to the need for restructuring of South African society in both the preamble and the postamble. The interim Constitution also demanded the establishment of a Commission on Restitution of Land Rights, whose function was to oversee the redistribution of land to persons dispossessed of their land under racially-motivated legislation (sections 121-123).

[86] Chinappa Reddy J in *ABSK Sangh (Railway) v Union of India* at para 123.

CHAPTER 6

MODELS OF CONSTITUTIONAL INTERPRETATION

1. INTRODUCTION

I have argued that, as the doctrine of separation of powers is an integral feature of democratic government, the Court must respect such doctrine if it wishes to exercise its power of judicial review in a democratic manner. This doctrine bestows specific institutional roles on each branch of government, which roles need to be adhered to and respected by each branch when it carries out its constitutional obligations. In particular, the role of the Court determines the manner in which it must exercise its power of judicial review. It therefore acts as a limitation on the manner in which the Court exercises this power. As independent arbitrator of disputes and watchdog of government, the judiciary is obliged to respect the role of the legislature, as maker of laws and formulator of policy. For the judiciary to attempt to assume the role of the legislature would be undemocratic, and would therefore justify the criticism levelled against the power of judicial review. The judiciary is not democratically or ideologically entitled to "legislate on matters of great social and political concern"[1]. By adhering to the principles underlying the doctrine of separation of powers, namely, by respecting that each branch of government has differing democratic roles and entitlements, the Court's power of judicial review will be justifiable.

What this quest for democracy leads to, as determined by the doctrine of separation of powers, is a need to limit a judge's discretion in the interpretive process. A judge is not democratically entitled to invoke his or her own

[1] Sachs J in *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at para 178.

personal set of values when he or she gives meaning to a constitutional provision, as it is the legislature's right and duty to incorporates a nation's values in the constitutional text. As Kentridge AJ stressed strongly in *S v Zuma*, "the Constitution does not mean whatever we might wish it to mean"[2]. One method of limiting a judge's discretion is to reduce or limit the judiciary's role in the process of constitutional review by adopting a model of constitutional interpretation which incorporates the principles mentioned above, most importantly the principle that the judiciary must respect the legislature as maker of laws and drafter of the Constitution. The doctrine of separation of powers therefore dictates how the Court is to read the Constitution.

Before embarking on a discussion of models of constitutional interpretation, it is helpful first to look at the issue of how and why the interpretation of a Constitution differs from the interpretation of other legislation. Although, in the past, the South African Courts have failed to recognise that there is a "fundamental dissimilarity between an interpretive process relating to a Constitution and that relating to ordinary legislation"[3], it is now generally accepted that constitutional interpretation does differ from the interpretation of ordinary statutes in a number of ways. In constitutional cases, judges are not merely attempting to determine legislative intent (as with ordinary statutes). They are attempting to understand and to clarify the way in which government itself is required to function[4]. For this reason, constitutional interpretation places the judiciary squarely within the realm of politics, even if merely in the role of umpire, and the rules of interpretation which apply to

[2] *S v Zuma* 1995 (4) BCLR 401 (CC) at para 17.
[3] Davis, Chaskalson and De Waal at 122.
[4] Kentridge and Spitz at 11-12.

constitutional texts must understandably differ from those rules which apply to ordinary legislative enactments[5].

The South Africa Constitutional Court appears to be quite happy with the principle that the two processes are vastly different. In its first case, the Court noted that a Constitution calls for "principles of interpretation of its own"[6]. Chaskalson P has emphasised the distinction and confirmed that the Courts "are concerned with the interpretation of the Constitution, and not the interpretation of ordinary legislation"[7]. His explanation for the distinction is that a constitution is "no ordinary statute", in that it is "the source of legislative and executive authority". A Constitution determines how the country is to be governed and how legislation is to be enacted, it defines the powers of the different organs of State as well as the fundamental rights of every person which must be respected when the State exercises such powers.

It is still undecided whether the above principles apply to the whole Constitution, or whether they apply only to the interpretation of the Bill of Rights. As has been pointed out, the Constitution "does not only deal with lofty ideals and principles. It has many provisions on mundane matters"[8]. In *Mhlungu's* case, Kriegler J argued that the purposive and generous approach

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[5] In seeking a model of constitutional interpretation, it needs to be borne in mind that one is seeking a set of principles for interpreting the words of a Constitution itself, not the words of ordinary legislation in the light of the Constitution. In other words, when the validity of a legislative enactment is challenged under the Constitution, the Court engages in two kinds of interpretation: firstly, it looks at the challenged enactment (ordinary legislation) to determine which provisions in the Constitution it potentially contravenes. Then it examines those constitutional provisions and interprets them in the light of the interpretive principles relating to constitutional interpretation. Thereafter, it reverts to the legislative enactment to ascertain, using the ordinary rules of statutory interpretation, whether it contravenes the constitutional provisions as interpreted.

[6] *S v Zuma* 1995 (4) BCLR 401 (CC) at para 14, where Kentridge AJ quoted with approval this dictum of Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319 (PC) at 328-9.

[7] S v *Makwanyane* 1995 (6) BCLR 665 (CC) at para 15.

[8] Van Dijkhorst J in *Kalla and another v The Master and others* 1995 (1) SA 261 (T) at 268-9.

to constitutional interpretation is only applicable to the Bill of Rights, and not to the interpretation of a "narrow, technical and brief" provision such as section 241(8). Such a provision requires "close reading, not a generous perspective" [9]. However, whether provisions in the Constitution deal with "lofty ideals" or whether they set out mundane procedures, they are nevertheless part of a *sui generis* text, one which sets out the political rules of a nation. The principles of constitutional interpretation should therefore apply to the whole constitutional text, whatever the subject matter of the particular provision at hand.

Constitutional interpretation is therefore not merely about seeking Parliament's intention. Rather, it is about giving effect to a set of values, preserved by the legislature in the Constitution, which act as a framework within which government is entitled to operate. A model of constitutional interpretation must do two things. Firstly, from a practical perspective, it must establish a set of principles for determining how the Courts should exercise their power of judicial review. But secondly, from a theoretical perspective, it must also provide justification for the exercise of such power in the first place[10]. The generally acknowledged problem with constitutional interpretation is that a judge is not politically, socially or morally entitled to impose any meaning or value he or she pleases on a constitutional text. Therefore an interpretive model must attempt "to balance the objectives of the Constitution with the discretion of unaccountable judges"[11]. A workable

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[9] *S v Mhlungu* at para 97.

[10] Kentridge and Spitz propose that a model of constitutional interpretation must establish a set of principles and protocols of textual interpretation which: (1) confront the countermajoritarian dilemma, and provide justification for the exercise of judicial power; (2) establish principles for determining how, under what circumstances and with what degree of intervention Courts should exercise their power; and (3) offer guidelines as to those circumstances which demand aggressive judicial intervention, and those which require greater deference to the legislature - Kentridge and Spitz 'Interpretation' Chapter 11 of CONLSA at 11-17. I believe that the authors' points (2) and (3) overlap to the point that they need not have been ser

[11] Davis, Chaskalson at 12.

theory needs to be identified in terms of which judges can review the constitutionality of legislation and "notwithstanding differing political views, reach consistent conclusions when presented with similar factual situations"[12].

It is generally accepted that the effect of a model of constitutional interpretation must be to limit a judge's discretion[13]. A number of theories of constitutional interpretation have been proposed which attempt to prevent judicial overreaching. Most of them have as their theoretical basis an attempt to counter the countermajoritarian dilemma and each identifies a different authority to which judges should look to produce an objective, consistent, and fair body of constitutional jurisprudence[14]. I look at each of the more popular models of interpretation which have developed in comparative jurisdictions and locally, and conclude that none of these models on its own offers a complete model of interpretation ensuring that the judiciary exercise its power of judicial review democratically. I then propose a model of interpretation which in effect incorporates some of these theories, which together offer a workable framework within which judicial review can justifiably be exercised.

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[12] Davis, Chaskalson and De Waal at 11.

[13] Although it is also generally accepted that it is impossible to eliminate a judge's discretion completely, as pointed out by Chaskalson P in *S v Makwanyane* at para 54. He says that "[t]he differences that exist between rich and poor, between good and bad prosecutions, between good and bad defence, between severe and lenient judges, ... and the subjective attitudes which might be brought into play by factors such as race and class, may in similar ways affect any case which comes before the Courts, and is almost certainly present to some degree in all Court systems".

[14] Davis, Chaskalson and De Waal at 11.

2. THE DOCTRINE OF ORIGINAL INTENT

1. The Theory - Drafters' Intentions

Proponents of the doctrine of original intent argue that Courts should interpret a constitutional provision according to its original meaning, or rather the meaning which the drafters of the provisions had in mind at the time of ratification. This clearly has the effect of limiting a judge's discretion, and therefore ultimately eliminating to a large degree the effects of the countermajoritarian dilemma. It is the ultimate form of deference to the legislature, as the only meaning which a Court will give to a constitutional provision is that which the legislature originally intended for such provision[15]. Courts are expected to ascertain the intention of the legislature from the words of the constitutional text itself[16]. This approach is therefore noted for the emphasis which it places on the language employed in the text.

The traditional originalist approach argues that judges must decide constitutional issues as the framers of the constitutional provision in question would have. In other words, judges must seek the original intention of the drafters of the Constitution and thereby reduce the risk of imposing their own value judgments[17].

The justification for strict intentionalism is that the Constitution, being the supreme law of the land, manifests the will of the people. The objective of the judicial process of interpretation is to ascertain this will. Adherence to the text as well to original understanding constrains the discretion of judges and

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[15] South African lawyers should be familiar with this theory as our Courts pre-1994 consistently applied this model of interpretation to statutory provisions. See Chapter 2 above.

[16] This approach equates with the so-called golden rule of interpretation of statutes - Cockram, G-M; Interpretation of Statutes; 3rd Edition; Juta; Cape Town; 1987 at 44.

[17] Kentridge and Spitz at 11-17.

provides the best guarantee that the Constitution will be interpreted consistently over its history to accord with the will of the people[18].

2. The Criticisms - Who intended what?

The strict originalist approach is not suitable as a model of constitutional interpretation for a number of reasons:

Firstly, from a practical perspective, it is usually impossible to ascertain exactly what the framers' intentions were. As Kentridge and Spitz ask, how does one ascertain original intent with any certainty? Who exactly were the drafters of the Constitution, particularly where it was drawn up by competing political groups each with their own agenda? At what level of generality does one specify the drafters' intent?[19] Heinz Klug argues that original intent theories fail to take cognisance of the "collective nature of the constitution-making procedure"[20]. He notes the Court's warning that the Constitution is the "product of a multiplicity of persons"[21].

A second criticism is that, although original intent does limit the scope of judicial discretion, it goes too far and effectively amounts to a complete abdication by the Court of its constitutional responsibilities. By refusing to take into account anything but the intention of the legislature at the time of drafting, the judiciary fails to fulfil its constitutional obligation to act as watchdog of government. Dworkin criticises original intent along similar lines when he says that it puts "adjudication in the shade of legislation" and that

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[18] Davis, Chaskalson and De Waal at 12.
[19] Kentridge and Spitz at 11-19.
[20] Klug, H 'Striking Down Death - A Case Note on *S v Makwanyane*' (1996) 12 SAJHR 61 at 64.
[21] Chaskalson P in *S v Makwanyane* at para 18.

judges therefore effectively acts as "deputy to the legislature" and as "deputy legislatures"[22].

A third criticism is that the original intent approach fails to take into account that constitutional interpretation is as much about values as it is about words. It ignores the value-laden nature of a constitutional text by overly emphasising the ordinary or plain meaning of constitutional words. In other words, it treats a Constitution like it were any other piece of ordinary legislature, an approach which is now accepted to be incorrect. Alfred Cockrell argues along similar lines. In looking at the difference between "formal" and "substantive" reasoning[23], Cockrell argues that one disadvantage of formal reasoning is that a formal reason (such as a rule) operates as a screen to insulate the decision-maker from consideration of substantive reasons. In other words, the whole point of having a formal reason is to preclude the decision-maker from going behind the authoritative rule and having direct access to substantive reasons[24].

A further objection, one of principle, has been raised regarding the strict originalist approach. The question is asked: why should contemporary society be restrained by the values and beliefs of people who lived sometimes as far back as 200 years (as in the US)? In other words, why should Courts base their interpretations upon the intent of such people, thereby binding successive generations to outdated values? Why should the Constitution not be responsive to contemporary problems? Why is constitutional democracy better served by a commitment to past values than

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[22] Dworkin, R Taking Rights Seriously (1977) at 82.

[23] Cockrell derives his justification for this distinction from the Constitutional Court itself, which frequently juxtapositions the terms "values" and "rules" - Cockrell, A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1 at 3. The formal vision of interpretation equates closely with the doctrine of original intent, and therefore criticisms of the former are relevant to the latter also.

[24] Cockrell at 5. This screen-like function gives rise to the description "suboptimality of rules", which Cockrell argues may produce inferior results.

by a living constitutional document? Some have even argued that "fidelity to democracy may itself require Courts to move beyond the original understanding of the substance of democracy" [25]. I do not believe that this objection is valid. It is not the function of the Court to amend the Constitution, or to amend its interpretation thereof, to suit modern trends. It is Parliament's function to reflect the popular will in its legislation and, if the Constitution becomes outdated, then it is Parliament, as representative of the people, who should effect the necessary changes to the constitutional text[26]. This is not to say that the judiciary should not be "responsive to contemporary problems". Of course it does not, or should not, operate in the proverbial ivory tower, but it can only take these into account in so far as the constitutional text allows for this.

3. Variations on the Theme - Borkean Originalism

In addition to the strict form of originalism discussed above, another more advanced form of originalism is recognised. Called "Borkean originalism" [27], it emanates from the works of Robert Bork and amounts to an extension of strict originalism. Bork seeks to limit a judge's discretion by proposing that judges must "accept any value choice the legislature makes unless it runs clearly contrary to a choice made in the framing of the Constitution". In this sense, a judge is bound to follow the value choices of the legislature as preserved in the Constitution (as opposed to binding a judge merely to the intention of the legislature).

Bork agrees with the underlying dilemma relating judicial review, namely, that the judiciary is not entitled to rule as it sees fit as this would create an

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[25] Kentridge and Spitz at 11-19 to 11-20.
[26] I deal with constitutional amendment in more detail in Chapter 7 below.
[27] Davis, Chaskalson and De Waal at 12-14.

undemocratic society[28]. The judicial supremacy created by the power of judicial review he calls "minority tyranny", as opposed to "majority tyranny" which occurs if legislation invades the areas properly left to individual freedom. He argues that "[m]inority tyranny occurs if the majority is prevented from ruling where its power is legitimate"[29]. However, he argues, judicial supremacy is justified because society has consented to be ruled undemocratically "within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution". But this imposes severe requirements on the judiciary. The Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. Bork warns that, if the Court "does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority"[30].

I agree with Bork's conclusion that the judiciary is not entitled to impose its own value choices onto the interpretive process and that its model of interpretation must "derive from the Constitution". Whereas he talks of "respective spheres of majority and minority freedom", I speak of the respective roles bestowed on the three branches of government, both of which impose limitations on the role which the Court is entitled to adopt for itself. Our one difference at this point appears to be his acceptance that judicial review is undemocratic (he refers to judicial supremacy being undemocratic), whereas I have argued that, so long as judicial review is

[28] Robert Bork 'Neutral Principles and Some First Amendment Problems' (1971) 47 Ind LJ 1 at 10-11, quoted in Davis, Chaskalson and De Waal at 12.
[29] Quoted in Davis, Chaskalson and De Waal at 13.
[30] Bork at 11, quoted in Davis, Chaskalson and De Waal at 13.

exercised within the doctrine of separation of powers, it is not only justifiable but also democratic.

Bork goes on to propose that such a "valid theory" for ascertaining the meaning of a constitutional provision is that the Court should seek the "public understanding" of the provision at the time of its ratification, rather than the framers' private understandings[31]. This requires a look at the text, structure and history of the Constitution, which will indicate a principle or value which the "ratifiers" wished to protect against hostile legislative or executive actions. He argues that this will provide the Court not with a conclusion, but with a major premise from which to begin the interpretive process[32]. However, Bork's proposal does not resolve the first of the criticisms levelled against the originalist approach. Whether the intention sought is that of the original drafters or that of the original ratifiers, the problem of ascertaining what exactly that intention was remains. And even more so the problem of who the original ratifiers were and what was their original understanding of the Constitution. Has Bork resolved the second criticism, namely, that of abdication of constitutional responsibility? He has attempted to draw the issue of values into the interpretive process and thereby extended the Court's discretion to include the enforcement of constitutional values. It would therefore be difficult to argue that the Court has abdicated its duty by ignoring the value-laden nature of the constitutional text. Some academics have argued that Bork's approach to values makes his theory too flexible and therefore it "lacks the precision necessary to guarantee the objective adjudication of constitutional issues" [33]. I do not agree. Bork sources his values in the "text, structure and history" of the Constitution itself, which is the only place a Court is entitled to source them. This renders such values

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[31] Robert H Bork; The Tempting of America : The Political Seduction of the Law; New York; The Free Press; 1990 at 144, quoted in Davis, Chaskalson and De Waal at 13.
[32] Bork ibid at 162, quoted in Davis, Chaskalson and De Waal at 13.
[33] Davis, Chaskalson and De Waal at 13-14.

only as flexible as the constitutional text allows them to be. Where I do not agree with Bork is his search for original intent, albeit of the ratifiers not the drafters of the Constitution. I argue that the Constitution should stand alone from its original drafters and ratifiers, that it should be interpreted as it reads in the light of its context and purpose, not in the light of original intent.

4. Case Law - Original Intent Not Dead Yet

The Constitutional Court, although not expressly embracing the doctrine of original intent, continues to make reference to a search for the intention of the framers of Constitution[34]. The original intent approach was understandably quite tempting towards the beginning of the Constitutional Court's first term because the framers of the Constitution were still very much in the constitutional picture. Not only did the Constitutional Assembly carry tremendous popular support, but the entire process of drafting the final Constitution was an immensely publicised affair. The final Constitution was being drafted during the first term of the Constitutional Court, who were even required to certify its acceptability in the light of the recently-drafted interim Constitution. However, this method of finding meaning is not sustainable. There will come a time when original intent is not quite as easily ascertainable and then the criticisms levelled against this approach raise their heads again.

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[34] For example, *S v Mhlungu* 1995 (7) BCLR 793 (CC) (Mohamed, Kentridge, Kriegler and Sachs JJ all refer to the framers' intent), *S v Makwanyane* 1995 (6) BCLR 665 (CC) (per Sachs J at para 388 and 392), *Executive Council, Western Cape Legislature v President of Republic of South Africa & Others* 1995 (10) BCLR 1298 (CC) (per Kriegler J at para 169), *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) (per Kentridge AJ, with Chaskalson P, O'Regan and Langa JJ concurring, at para 32). An example is Sachs J's words that constitutional interpretation is not about "making the Constitution mean what we like, but of making it mean what the framers wanted it to mean" (in *Mhlungu* at para 112).

The Constitutional Court initially displayed a remarkable leaning towards this formalist approach. For example, in *S v Zuma*[35], Kentridge AJ, while acknowledging the important role that "values" play[36] and referring approvingly to the generous[37] and purposive[38] approaches to interpretation (neither of which approaches the Court elaborated upon), the Court emphasised that above all the language of the constitutional text must be respected. As Kentridge says: "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument"[39].

The Court indicated its awareness of the problem with its democratic credentials by emphasising that, although it is not easy to "avoid the influence of one's personal intellectual and moral preconceptions", the "Constitution does not mean whatever we might wish it to mean"[40]. The Court emphasised its view that the language used by the lawgiver cannot be ignored. If it is ignored, the result is "not interpretation, but divination"[41].

Fairly shortly after this case, the judges' views on the role of language began to diverge. Some continued to emphasise the importance of a plain interpretation, while their fellow judges began to favour a more value-based

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[35] 1995 (4) BCLR 401 (CC). This judgment declared unconstitutional the reverse onus provision contained in section 217(1)(b)(ii) of the Criminal Procedure Act No 51 of 1977 (relating to the admissibility of confessions by an accused). The unanimous judgment was delivered by Kentridge AJ.

[36] He cites with approval (at para 17)Froneman J in *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75 (E), who states that the Constitution must be examined with a view to "extracting those principles or values against which such law ... can be measured" and that the Constitution must be interpreted to give "clear expression to the values it seeks to nurture for a future South Africa" (*Qozeleni* at 80). In *Zuma* the Court proceeded to extract the values relating to the right to a fair trial by looking at historical background and comparative foreign case law (conclusion at para 33).

[37] He quotes Lord Wilberforce in the above case.

[38] He quotes Dickson J's famous dicta in *R v Big M Drug Mart Ltd* (1985) 18 DKR (4th) at 321, 395-6.

[39] *S v Zuma* at para 17.

[40] *S v Zuma* at para 17.

[41] *S v Zuma* at para 18.

interpretation. A prime example of this dichotomy between the various judges is the case of *S v Mhlungu*[42], where the minority, led by Kentridge AJ (with Chaskalson P, Ackermann and Didcott JJ concurring), emphasised the constrictions of the text and the dangers of extending beyond such meaning where it is clear and unambiguous. However, the majority, led by Mahomed J (with Madala, Mokgoro, O'Regan and Langa JJ concurring), was happy to stretch the meaning of the words of the text as far as possible to fit in with their perceived underlying purpose[43]. Both groups *prima facie* base their arguments on the language of the text, referring to the intention of the framers[44] (they also argue in favour of the purposive approach to interpretation, but without articulating exactly what they mean by it[45]).

The minority in *Mhlungu* did not expressly follow the plain approach, mentioning in the course of the judgment the importance of the purpose of the provision within the context of the Constitution as a whole[46] and also accepting that the "spirit and tenor of the Constitution"[47] cannot be ignored. However, the minority essentially base their conclusion on the argument that the section means what it seems to mean to any competent speaker of the

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[42] 1995 (7) BCLR 793 (CC). Here, the Court examined section 241(8) of the interim Constitution, which section attempted to draw a cut-off date for application of the interim Constitution to pending cases. The majority of judges found that the only purpose of this section was to preserve the authority of pre-Constitution Courts to continue to function as Courts for the purpose of adjudication in pending cases (to preserve the legitimacy of pre-Constitution Courts). In other words, the section did not deprive any person of constitutional protection merely because his or her case arose before the 27 April 1994 (passing of the interim Constitution), as the minority concluded.

[43] Eduard Fagan agrees that the majority's ingenuity had to be stretched somewhat in order to reach their conclusion. See Fagan, E 'The Longest Erratum Note in History : a Case Note on *S v Mhlungu*' (1996) 12 SAJHR 79 at 83.

[44] Mohamed J : "The lawmaker should not lightly be imputed with the intention ...." (para 10) and "If the intention of the lawmakers was ..."(para 26). Kentridge AJ: "Rightly or wrongly the framers of the Constitution chose the latter option, and we are required to give effect to that choice"(para 72) and "If the lawmakers had intended that ... " (para 74).

[45] The purposive approach to interpretation is discussed in more detail below.

[46] For example, Kentridge AJ (at paras 63) refers to the "purposive construction" as being appropriate (and para 69).

[47] *Mhlungu* at para 63, where he quotes approvingly from *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75 (E) at 86A and *Shabalala v Attorney-General, Transvaal and Another* 1995 (1) SA 608 (T).

English language[48], and that recourse must be had to the established "canons of statutory interpretation" which have been "developed over the years to assist in problem solving"[49]. For this reason, I believe that, in spite of Kentridge AJ's references to purpose and values, ultimately he is looking for original intent. Kentridge is preoccupied with what meaning the language of the section can reasonably be given[50] and concludes that, if the lawmakers had intended otherwise, they would have said so[51]. He refers to "the ordinary meaning of the words", "colloquial English" and "ordinary parlance"[52], and sees no reason to depart therefrom[53]. He concludes that language of the Constitution itself acts a limit to the principle that a Constitution should be construed generously[54]. Kentridge and Spitz argue a similar point, when they state that "[i]t is the language of the text, and the fact that the Constitution remains a legal instrument, which provides a safeguard against judicial overreaching"[55].

Without expressly basing his approach on the countermajoritarian dilemma, Kentridge appears to be aware of it. For example, in looking at the potential iniquities which may follow on his interpretation, he states that it is open to Parliament (national or provincial) to remedy the situation by enacting legislation[56] and concludes that such anomalies are "the price which the

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[48] Fagan ibid at 81.
[49] *Mhlungu* at para 64.
[50] *Mhlungu* at para 73.
[51] *Mhlungu* at para 74.
[52] *Mhlungu* at para 76.
[53] He states strongly that "I cannot accept that the words 'dealt with' are words of uncertain meaning" and that he can find "no basis in law, language or logic" for giving it a different meaning in the context of section 241(8). Like Mohamed J, Kentridge also resorts to the Oxford English Dictionary to prove his point, namely, that the words "dealt with" have a clear meaning (*Mhlungu* at paras 76 - 77).
[54] *Mhlungu* at para 78, where he, as in *Zuma*, refers approvingly to Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* to the effect that a Constitution is ultimately a written legal instrument, the language of which must be respected.
[55] Kentridge and Spitz at 11-28. My argument differs in that I argue that the plain meaning of the words can be departed from when they conflict with the purpose of a provision (discussed below).
[56] *Mhlungu* at para 81.

lawmakers were prepared to pay for the benefit of orderly transition"[57]. Ultimately, he argues that a departure from the clear and unambiguous meaning of the provision ("doing violence to the language of the Constitution"[58]) is a breach of the Court's duty to promote the values which underlie a democratic society based on freedom and equality[59].

Although I deal with Mohamed J's majority judgment in more detail under the purposive approach, at this stage I wish to include his objections to what he terms Kentridge's plain approach[60], which he argues contains a number of "formidable difficulties"[61]. Mohamed J finds in the language of the Constitution a meaning "contrary to that proffered by any ordinary reading of the section, context or no context"[62]. He stretches meaning to incorporate purpose and therefore his approach appears to be a mix of the original intent and purposive approaches[63]. He argues that a plain interpretation negates "the very spirit and tenor of the Constitution and its widely acclaimed and celebrated objectives"[64]. Mohamed's approach indicates the Court's unwillingness to let go of the language of the text altogether, and that it will therefore rather impose an artificial meaning on the words, than ignore them in favour of their purpose[65]. He concedes that, if the words were not capable

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[57] *Mhlungu* at para 84.
[58] *Mhlungu* at para 84.
[59] Which duty is imposed on the Court by section 35 of the interim Constitution.
[60] *Mhlungu* at para 2.
[61] *Mhlungu* at para 3. By disparagingly referring to the minority's approach as "plain", the majority seem to imply that it is conservative, narrow-minded and old-school and argue that it is contrary to internationally accepted methods of interpretation. As Fagan points out, no such internationally accepts methods exist and certainly there is no international consensus as to the acceptability or meaning of the purposive approach (at 87-8).
[62] Fagan ibid at 79.
[63] Like Kentridge, he also justifies his conclusion by repeated references to the language used in the text (at paras 11 to 21, 24 to 27) and even quotes from the Interpretation Act of 1957 and the New Shorter Oxford English Dictionary (at para 26). It can hardly be denied that this is a classically formalistic approach to interpretation, but he uses it ultimately to show that the language of the text is wide enough to support his value-based argument.
[64] *Mhlungu* at para 8.
[65] I argue later that in such circumstances the Court is entitled to depart from the ordinary meaning of the words, and to give effect to the purpose of the provision.

of an alternative construction, a Court is bound by the plain interpretation even if such an interpretation is contrary to the values underlying the Constitution[66]. The majority therefore favour "the interpretation which best accords with the Court's sense of constitutional justice should be preferred, so long as its adoption does no violence to the express language of the Constitution"[67].

I do not agree with either the minority or majority approach, and at this point wish only to deal with my criticisms of the more intentionalist minority stance. I agree that the starting point for constitutional interpretation is the text of the Constitution itself. But the text stands alone, and meaning must be ascertained from the words, the context and the legislative history, not from the intention of the original drafters. In addition to this, there comes a point where the interpreter of a constitutional provision is entitled to depart from the ordinary meaning of the text. He or she may do so, firstly, where there is no ordinary unambiguous meaning (for example, the provision is too broadly phrased[68]) and, secondly, where the plain meaning is contrary to the values in or underlying the Constitution[69]. In these circumstances, the Court is entitled to have regard to the *ratio legis* or purpose of the constitutional provision in question, by referring to its context and legislative history[70]. In

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[66] *Mhlungu* at para 15. Sachs J in *S v Makwanyane* makes a similar concession when he states that "[i]n the absence of the clearest contextual indications that the framers of the Constitution intended that the State's sovereignty should be so extended as to allow it deliberately to take of the life of its citizens, section 9 should be read to mean exactly what it says ...." (at para 357).

[67] Fagan ibid at 83.

[68] Mohamed J in *Mhlungu* refers to this when he states that the language used is "inherently fluid" and has "uncertain content" (at para 26). O Regan J in *Makwanyane* also acknowledges the problem that the language of each of the relevant rights is not very helpful as an interpretive tool. She argues that they are "broad and capable of different interpretations" (at para 321). Fagan's comment (at 83) that "it is hard to imagine any credible principle of interpretation which could ever permit the Courts to ignore plain language" fails to take this into account.

[69] This somewhat controversial statement is elaborated on in Chapter 7 below.

[70] Lord Denning, in referring to the "schematic and teleological method" of interpretation, concedes that judges "do not go by the plain meaning of the words or by the grammatical structure of the sentence" (in *James Buchanan & Co Ltd v Babco Forwarding & Shipping*

this manner, "textual sterility" can be avoided[71] and the value-laden nature of constitutional interpretation is accounted for. But the minority in *Mhlungu* (and the majority for that matter) seem to indicate (more by their words than by their findings) that they consider themselves bound by the words of the Constitution however unjust the consequences. I agree in principle with the minority's formal approach to, substantiated by the underlying purpose of, the relevant constitutional provision. But I disagree with their inflexible adherence to such language. I argue that, in seeking such purpose, the words may be departed from. This both the minority and majority failed to grasp. Fortunately for the minority, they found a meaning which coincided with the purpose which they argued the provision has, whereas the majority attempted to squeeze an artificial meaning into the words (in order to declare their respect for the legislature) which coincided with their perceived purpose[72].

The minority also downplays the role of values in the interpretive process. As Sachs J points out, Kentridge's judgment gives "far too little weight to the overall design and purpose of the Constitution" [73]. In deciding whether to depart from the ordinary meaning of the words, the Court will be obliged to

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(UK) Ltd (1977) 2 WLR 107 at 112 (as quoted by Sachs J in *Mhlungu* at para 122). Sachs also alludes to this approach when he states that "[i]f there is overlap and collision of material between the two provisions, the essential purposes of each must be discerned and weighed .... It moves the nature of the enquiry from the so-called plain meaning of words looked at on their own, or even in context, to the interactive purposes of different provisions, read together" (at para 107). He therefore acknowledges that in certain circumstances the purposive approach entails a departure from the plain meaning of the words. Sachs is inconsistent in this argument because he goes on to criticise the majority view on the grounds that it "unnecessarily strips section 241(8) of its more obvious meaning" (at para 105).

[71] Madala J in *Du Plessis v De Klerk* warns against a textually sterile approach (at para 157) - Woolman, S and Davis, D 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions' (1996) 12 SAJHR 361.

[72] As Smith points out, one of the main differences between the minority and majority approaches was the question of how and where to find the purpose of the constitutional provision - Smith, N 'The Purposes Behind the Words - a Case Note on *S v Mhlungu*' (1996) 12 SAJHR 90 at 95.

[73] *Mhlungu* at para 105.

make a value judgment. But the values which it employs must emanate from the Constitution itself. The minority in *Mhlungu* fails to take this into account.

In the *Western Cape* case[74], Chaskalson P stated that the meaning of a particular constitutional provision "depends ultimately on the language of the Constitution, construed in the light of the country's own history"[75]. He then engaged in a plain, and often semantic[76], exercise to ascertain the purpose of the relevant provision (as opposed to the intention of the drafters[77]) and therefore its meaning. The case of *Du Plessis v De Klerk*[78] is an example of the Constitutional Court's acceptance of the formal approach to constitutional interpretation, supplemented by the purposive approach. The majority, this time led by Kentridge AJ (with Chaskalson P, Langa and O'Regan JJ concurring), began and ended with the language of the text, which they argued indicated the intention of the framers. Kentridge sought the intention of the framers by undertaking an analysis of the purpose of the Bill of Rights, but this undertaking ultimately depended "on an analysis of the specific provisions of the Constitution"[79] and the legislative history[80]. In reaching his conclusion, there is a noticeable paucity of discourse on the role of values in the interpretive process. Mohamed DP agreed with Kentridge's conclusion, but only because the apparent unjust consequences of such a reading could be eliminated under a different constitutional provision.[81] If this were not the

[74] *Executive Council, Western Cape Legislature v President of Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1298 (CC).
[75] *Western Cape* at para 61
[76] He draws a distinction between the drafters' use of "the" and "this" (at para 39).
[77] At para 37.Chaskalson P seems to change his view in *Du Plessis v De Klerk* where he saw language as the indicator of the intention of the drafters (see below).
[78] 1996 (5) BCLR 658 (CC). In this case the Court had to decide whether the Constitution applied only to the relationship between State and citizen (the so-called "vertical" relationship), or whether it also applied to the relationship between citizen and citizen (the so-called "horizontal" relationship). The majority (Kentridge AJ, Chaskalson P, Langa and O'Regan JJ) concluded that the Constitution has vertical application only.
[79] *Du Plessis v De Klerk* at para 32.
[80] *Du Plessis v De Klerk* at para 56.
[81] Namely, section 35(3) of the interim Constitution, which compels the Court to have due regard to the spirit, purport and object of the Bill of Rights in the interpretation of any law,

case, Mohamed confesses that he would have felt obliged to have found a flaw in his own or in the majority's reasoning[82]. He is therefore indicating a change in position from the one he adopted in *Mhlungu*. In *Mhlungu* he made an attempt to adhere to the language of the text, emphasising its importance even if it leads to unjust consequences. Here I believe he is indicating that he will not find himself so constricted where the Courts are "rendered impotent by the language of the Constitution"[83].

Like the majority, Kriegler J (with Didcott JJ, in the minority) also declared that their conclusion was based, first and last, on the text[84]. Kriegler refers to the intention of the framers[85] and concludes that the plain meaning of the words, read together with the values which the Constitution seek to protect[86], meant that the Constitution applied to both horizontal and vertical relationships. Kriegler J's scathing dissenting judgment illustrates how different the judges' conclusions can be, despite their being based on the same interpretive processes[87]. Kriegler had adopted a similar stance in *Makwanyane* where he argued in favour of interpretive methods which are "essentially legal, not moral or philosophical"[88]. He emphasised that the "starting point, the framework and the outcome of the exercise must be legal"[89]. It is interesting to note a slight change in emphasis on the part of Kriegler in the so-called Sandton Ratepayers' case[90], where he lead the

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and the application and development of the common law. He concludes that the Courts are therefore not impotent in affording protection of constitutional values to those victimised by their denial in the past (at para 86).

[82] *Du Plessis v De Klerk* at para 85.

[83] *Du Plessis v De Klerk* at para 84.

[84] At para 123. He emphasises that the Court did not draft the Constitution, and that the Court's duty is merely to interpret, protect and uphold the Constitution (at para 123).

[85] For example, para 137.

[86] Kriegler J states that a plain interpretation must be reconciled with the spirit of freedom, equality and justice which pervades the Bill of Rights. He also accepts that rights must be interpreted purposively (para 123).

[87] Kriegler describes the majority's interpretation as being "malicious nonsense preying on the fears of privileged whites" (at para 120).

[88] *S v Makwanyane* 1995 (4) BCLR 665 (CC) at 206-7.

[89] *S v Makwanyane* at para 207.

[90] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* CCT 7/98 14/10/98.

camp[91] choosing to emphasis context (political and institutional), purpose (the eradication of inequalities from the past) and values underlying the Constitution as a whole (where Chaskalson P's camp emphasised the text).

The Constitutional Court seems to be proposing that a formal or textual approach to constitutional interpretation is at least a starting point. The judges continue to refer to the intention of the framers when they seek meaning. To supplement the textual approach, they suggest that the purpose of the constitutional provision in question also needs to be taken into account. The judges, however, still manage to reach vastly different conclusions based on their own perceptions of what the purpose of a provision is, a problem which it seems is completely unavoidable so long as the Court has human beings sitting as judges.

3. POLITICAL PROCESS THEORY

1. The Theory - Protection of Political Processes Only

Like the original intent approach, the political process theory seeks to remove values from the process of judicial review. But instead of doing so by seeking the intention of the drafters of the Constitution, the political process theory does so by seeking to protect constitutional processes only. The theory is based on the work Democracy and Distrust by John Hart Ely[92]. According to this approach, the role of judicial review is primarily to remedy dysfunctions in the political process[93]. In other words, the Court's role is to protect the interests of those individuals and groups who are excluded from the political process because they are not powerful enough to get heard in majoritarian institutions of government. The emphasis here is on *process*. Ely

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[91] Kriegler J, Mokgoro, Langa, Sachs and Yacoob JJ.
[92] John Hart Ely Democracy and Distrust : A Theory of Judicial Review (1980).
[93] Kentridge and Spitz at 11-21.

"allows Courts to strike down legislative actions but only when the legislature has acted undemocratically, not when the Courts merely disagree with the legislative outcome"[94]. The Court's function is to reinforce the process of democratic representation by correcting defects in political process in a value-neutral manner, and thereby to perfect democracy[95].

Ely bases his theory on US Justice Stone's famous footnote 4 in *United States v Carolene Products Company*[96], which articulated three bases for legitimate judicial review: firstly, the Court may invoke originalism when it voids legislation which contravenes a specific prohibition in the Constitution. Secondly, it may review legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation. And thirdly, it can review legislation that burdens certain religious, ethnic or racial minorities or when "prejudice against discrete and insular minorities ... curtail(s) the operation of those political processes ordinarily relied upon to protect minorities"[97]. Ely argued that both (2) and (3) above would sufficiently protect a citizen from unjustifiable government invasion. To justify (3), he tries to identify a non-substantive theory of prejudice - one that every judge, regardless of political belief, could use and reach the same result.

Judicial interference is only justified in *political* areas involving *process.* It is not intended that a Court can review legislation which limits rights in the non-political arena[98]. This model argues that the rules defining the basic structure of political and legal relations are essentially neutral on matters of

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[94] Ortez 'Pursuing a Perfect Politics : The Allure and Failure of Process Theory' (1991) 77 Va LR 721 at 725, quoted in Davis, Chaskalson and De Waal at 16.
[95] Ely Democracy and Distrust at 103, quoted in Kentridge and Spitz at 11-21.
[96] 304 US 144 (1938) at 152.
[97] Davis, Chaskalson and De Waal at 16-7.
[98] Klarman 'The Puzzling Resistance to Political Process Theory' (1991) 77 Va LR 747 at 754, quoted in Davis, Chaskalson and De Waal at 17.

substantive value[99]. In other words, it attempts to develop a non-substantive theory of prejudice.

2. The Criticisms - What about Values?

But this is where his theory has been criticised[100]. The political process theory, although minimising judicial intervention, falls short in a number ways. Firstly, as Tribe[101] argues, Ely's theory is "deeply flawed" because of its attempt to read the entire Constitution as having a central non-substantive aim of perfecting democracy by reinforcing the effective workings of representative government. In other words, it places too much emphasis on the procedural aspects of the Constitution. As with the original intent approach, Ely's political process approach ignores the fact that constitutional interpretation is about values as well as processes. Constitutions are concerned with "far more than simply specifying a set of procedures to regulate democratic process"[102]. They contain many substantive values with cannot be accounted for by a process-orientated model, for example, certain rights that are fundamental to meaningful individual security and self-fulfilment and to collective development[103]. In attempting to eliminate judicial discretion completely, Ely eliminates one of the most important features of constitutional review, namely, that a judge is required to take into account the values implicit in the Constitution when he or she carries out his or her duty as "independent arbiter of the Constitution"[104]. In the South African context, as Kentridge and Spitz have argued, our Constitution invites a political theory of interpretation, which, unlike the political process approach, would "develop

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[99] Davis, Chaskalson and De Waal at 17.
[100] Notably by Laurence Tribe in his article 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 Yale LJ 1063, quoted in Davis, Chaskalson and De Waal at 17.
[101] Together with Dorf in On Reading the Constitution (1990).
[102] Kentridge and Spitz at 11-21.
[103] Kentridge and Spitz at 11-21.
[104] Chaskalson P in *Makwanyane* at para 89.

and defend a substantive conception of the meaning of democracy", and which would embrace the many non-procedural guarantees embodied in our Constitution[105].

Secondly, the theory claims to be value-neutral in that it draws a distinction between neutral processes (which are within the institutional competence of the Courts) and substantive value-judgments (which are considered to be illegitimate usurpations of the legislative prerogative). However, critics have argued that, not only are procedural features themselves based on substantive values, but the theory does not explain why democracy is any better served by a process-based conception than by conceptions involving substantive values[106].

3. Variations on the Theme - Klarman and Sunstein

The US academic Michael Klarman[107] attempts to modify Ely's theory by ridding the theory of the "prejudice prong" and constructing a constitutional theory based on only (1) and (2) of Stone J's footnote 4, as he believes that sufficient protection is provided without the inclusion of (3) of footnote 4. Klarman argues that, if the correct processes are in place and are adhered to by government, there is no need for judicial intervention as all citizens would then be adequately represented in Parliament and their rights therefore protected. For example, he argues that, had minority groups in the US been fully and fairly enfranchised since the end of the Civil War, they would have been able to protect themselves through the political process without the protection of the Courts[108]. His argument is essentially that majoritarianism,

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[105] They base this sentiment on the Constitution's commitment to "an open and democratic society based on freedom and equality" (at 11-22).
[106] For example, Cass Sunstein The Partial Constitution at 105.
[107] Klarman, M 'The Puzzling Resistance to Political Process Theory' (1991) 77 Va LR 747 at 748, quoted in Davis, Chaskalson and De Waal at 18.
[108] Cited in Davis, Chaskalson and De Waal at 18.

provided it adheres to the procedural rules, can replace constitutionalism. His approach, like Ely's approach, can be criticised for its emphasis on process at the expense of values. Firstly, as Tribe points out, the rules defining the basic structure of political and legal relations are not necessarily neutral on matters of substantive value[109]. A second criticism is that the right to vote freely and fairly is not the only calculation necessary to ensure a political voice - others include money, education, age, membership in a constitutionally privileged class such as the press, and membership in a politically effective interest group[110]. From a South African perspective, Klarman's approach is correctly criticised because Klarman's limited vision of merely entrenching democratic processes will "do little to ensure the termination of apartheid's legacy", that in order to be consistent with the purpose of the Bill of Rights, the South African Constitutional Court must "promote a core set of values which are essential to a participative political process" [111].

Also linked to Ely's political process theory is the theory of the US academic Cass Sunstein[112]. Sunstein develops on the political process approach to acknowledge the substantive nature of judicial review. He argues that constitutional interpretation inevitably calls for reliance on interpretive principles. These interpretive principles inevitably and always are a product of substantive commitments[113]. They are external to the Constitution itself and requiring some kind of justification independent of the Constitution[114]. He concludes that such principles should be derived from "the general

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[109] Tribe, L 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 Yale LJ 1063, quoted in Davis, Chaskalson and De Waal at 18.
[110] Posner 'Democracy and Distrust Revisited' (1991) 77 Va LR 641 at 648, quoted in Davis, Chaskalson and De Waal at 19.
[111] Davis, Chaskalson and De Waal at 19.
[112] Sunstein The Partial Constitution (1993).
[113] Sunstein at 8.
[114] Sunstein at 11.

commitment to deliberative democracy"[115]. He defines "deliberative democracy" as a democracy based on the imperative for government to provide reasoned debate and justification[116]. Sunstein argues that an aggressive role for the Courts is justified in two circumstances: firstly, when rights relating to the democratic process are infringed (for example, the right to vote) and a political remedy is unlikely; and, secondly, where a group faces obstacles to organisation or pervasive prejudice or hostility[117]. Unlike Ely or Klarman, Sunstein argues that substantive value choices capable of justification play a role in constitutional interpretation because "[r]ights-based constraints on the political process are necessary for a well-functioning democracy.... Unchecked majoritarianism should not be identified with democracy"[118]. In this way, the preconditions for democracy are protected rather than undermined.

As Kentridge and Spitz point out, Sunstein's theory preserves the insights of the political process theory, but also acknowledges that constitutional review is appropriately a value-driven enterprise. The values which Sunstein allows the Court to have recourse to, in the US context, are limited to obstacles to organisation or pervasive prejudice or hostility. His model does not, however, allude to a Constitution like South Africa's which expressly incorporates a much wider spectrum of value. I believe Sunstein's response to this would be that a Court can have recourse to such values which are apparent in the constitutional text. His argument relates to which "non-Constitution" values can a Court have recourse to in the interpretive process. In this sense, I endorse Sunstein's argument. In other words, and I deal with this in more detail in Chapter 7, a Court is only entitled to have recourse to non-

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[115] Sunstein at 123.
[116] Kentridge and Spitz at 11-22. The South African academic Ettienne Mureinik calls for a similar concept when he argues for a "culture of justification" - Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31.
[117] Sunstein at 142.
[118] Sunstein at 142. This is Sunstein's response to the countermajoritarian dilemma.

constitutionally entrenched values in order to protect political processes and to remove obstacles to organisation or pervasive prejudice or hostility. But this model does not offer a complete model of interpretation. In the South African context, where the constitutional text contains express references to the values which it wishes to encapsulate, guidelines as to how a Court should give meaning to constitutional provisions in the light of such values still need to be developed.

The approaches of neither Ely, Klarman nor Sunstein have found favour with the South Africa Constitutional Court, although the importance of democratic process was mentioned by Chaskalson P in *S v Makwanyane*, where he stated that "[t]he very reason for establishing the new legal order ... was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process" [119].

4. VALUE-BASED MODELS OF INTERPRETATION

1.The Theory - Values to t he Rescue

At the other end of the spectrum are the models of constitutional interpretation based on morality, usually in the form of ethics or fundamental values. These models[120] are preoccupied with the value-laden nature of constitutional review. As Ronald Dworkin puts it, "the process of interpretation is designed to discover the fundamental principles on which the character of society is predicated"[121]. In terms of these models, the Court is required to give content to the inevitably open-textured and indeterminate

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[119] At para 88.
[120] I use the plural as there is no one unified value-based model of constitutional interpretation.
[121] Dworkin, R Life's Dominion (1993), quoted in Davis, D 'Democracy - Its Influence on the Process of Constitutional Interpretation' (1994) 10 SAJHR 103 at 107.

constitutional provisions by looking to sources of guidance other than the constitutional text. As Anton Fagan puts it, the "non-originalist" theorists permit the Court to engage in "moral reasoning in order to deal with constitutional indeterminacy"[122].

It is argued that constitutional interpretation is about ensuring moral government and that it is therefore the duty of the judiciary to take into account the values which underlie such government when it gives meaning to a constitutional provision. Values, whether or not they emanate from within the Constitution, therefore play a determining role in constitutional interpretation. Chaskalson P, in general terms, referred approvingly to an approach which "gives expression to the underlying values of the Constitution"[123]. As Cockrell discusses at great length[124], the South African Constitutional Court has in fact become pre-occupied with "values"[125] and is attempting to articulate a theory of constitutional interpretation which gives meaning to the values which underlie the Constitution text[126].

The value-based interpretive models emphasise the value-laden nature of constitutional review - they requires the Courts to "excavate and give

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[122] Anton Fagan 'Constitutional Adjudication in South Africa' D Phil Thesis in Law (1997) at 62.

[123] *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 9. Chaskalson P referred approvingly to the dictum of Kentridge AJ in *S v Zuma* 1995 (4) BCLR 401 (CC) (at para 17), but he reversed the emphasis to place it on the need to give expression to the underlying values of the Constitution.

[124] Cockrell, A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1.

[125] Cockrell refers to the Constitutional Court as being "fixated with the role of 'values'" (at 7) and its "pre-occupation with the role of 'values'" (at 9) and its "obsession ... with the role of 'values'" (at 10). Not all the judges are as devoted to the subject of values - for example, Kentridge AJ makes very little reference to values in his judgments in *S v Zuma*, *Du Plessis v De Klerk*, *Mhlungu*, and even *S v Makwanyane* (although he does discuss "evolving standards of decency" as an indicator of values).

[126] Cockrell makes a distinction between what he calls the "formal" and the "substantive" visions of law, and argues that the Court's frequent use of the word "values" throughout their judgments reveals a paradigm shift of enormous proportions from the former vision to the latter (at 3). Cockrell clearly favours the substantive approach to constitutional interpretation, but feels that the formal approach (a formalistic application of 'rules') is still suitable for non-value-laden texts (for example, tax law) (at 4).

expression to the values which underpin particular constitutional guarantees"[127]. This approach recognises that a constitutional text is more than mere procedural guarantees, but encompasses certain values and principles inherent in a democratic society committed to human dignity, equality and freedom. It is the task of the Court to uncover and enforce these values, even if this leads to large-scale social intervention. The value-based approach argues that the Courts are far more than clearing houses for the products of the legislature - they protect "certain spheres of personhood against incursion by the majority"[128].

In terms of the value-based models, the Constitution is seen as "an essentially open text inviting interpretation, rather than mandating obedience to original intent or legislative will"[129]. In other words, the Constitution is open and "possibilistic" and judges may use it as a "vehicle for progressive change"[130]. Essentially the Constitution is seen as "a text to be interpreted and reinterpreted in an unending search for understanding"[131]. However, the Constitution is not seen as an empty shell - it does provide judges with some general guiding principles and leaves them to fill in the gaps.

The South African academics Davis, Chaskalson and De Waal argue that the justification for this approach to constitutional interpretation rests with the intent of the framers, a fact which they argue is well-established although rarely acknowledged. They argue that the interpretive intentions of the framers "appear to have been to cede to succeeding generations the task of supplying content to the Constitution's open-ended phrases"[132]. They accept

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[127] Kentridge and Spitz at 11-23.
[128] Kentridge and Spitz at 11-23.
[129] West 'Progressive and Conservative Constitutionalism' (1990) 88 Mich LR 641 at 707, quoted in Davis, Chaskalson and De Waal at 14.
[130] West at 708-9, quoted in Davis, Chaskalson and De Waal at 14.
[131] Tribe and Dorf On Reading the Constitution (1992) at 32-3, quoted in Davis, Chaskalson and De Waal at 15.
[132] Davis, Chaskalson and De Waal cite Klarman at 770 in support of this (at 15).

that judicial review in this form is countermajoritarian but that it is justified because the legislature wanted it this way[133].

Kentridge and Spitz also conclude that this form of constitutional interpretation does render judicial review countermajoritarian. However, they do not see original intent entering the equation. Kentridge and Spitz argue that the justification for this approach is based on arguments to the effect that the countermajoritarian dilemma does not matter. They argue on institutional grounds that the judiciary is the best suited branch of government to articulate principle[134] - its relative insulation from the vagaries of political process and lack of accountability give it the necessary space within which to consider questions of principle and political morality[135]. In other words, the value-based approach to constitutional interpretation, despite rendering judicial review countermajoritarian, is justified because it is aimed at securing the protection of individual rights[136].

2. Source of Values

Value-based theorists differ on the issue of the source of the morality to which a Court is entitled to have recourse. Some claim that a Court is to make its decision by having recourse to the "fundamental presuppositions which are rooted in the evolving morality of American tradition and which are likely to gain popular acceptance in the foreseeable future" (Bickel)[137]. Some

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[133] It could be argued that Kentridge AJ is adopting this approach when he argues that the Constitutional Court judges undertake the task of judicial review, not because they have a superior wisdom, but because "the framers of the Constitution have imposed on us the inescapable duty" of deciding on the constitutionality of the death penalty - *S v Makwanyane* at para 192.

[134] Dworkin A Matter of Principle (1985); Dworkin 'The Forum of Principle' (1981) 56 New York Univ LR 469; Dworkin Taking Rights Seriously (1977), cited in Kentridge and Spitz at 11-23.

[135] Kentridge and Spitz at 11-23 to 11-24.

[136] Kentridge and Spitz at 11-24.

[137] Bickel The Least Dangerous Branch at 235-43, quoted in Fagan 'Constitutional Adjudication in South Africa' at 63.

refer to the fundamental and constitutive aspirations of the American political tradition (Perry)[138]. Yet others refer to fundamental public values (Brest)[139] or to basic national ideals (Grey)[140]. The common feature amongst these "non-originalists" is that the relevant morality or values do not necessarily need to be found in the Constitution. As Laurence Tribe puts it, "the choice one makes must be justified extra-textually, but may and should be implemented in ways that draw as much guidance as possible from the text itself"[141]. Mokgoro J has also expressed a need to have "reference to a system of values extraneous to the constitutional text itself, where those principles constitute the historical context in which the text was adopted"[142]. The South African Constitutional Court judges themselves are often rather vague about the source of values. In one case alone[143], the judges interchangeably refer to values "of our Constitution"[144], "underlying values of the Constitution"[145], "the concept and values of the constitutional state"[146], the "core concepts of our constitutional order"[147], the "altruistic and humanitarian philosophy which animates the Constitution"[148], values which are "reflected in the Constitution" or which are "implicit in the provisions and tone of the Constitution"[149].

The morality proposed by the various proponents of value-based interpretation, including our Constitutional Court, seem to fall into the following general categories:

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[138] Perry 'The Authority of Text, Tradition and Reason: A Theory of Constitutional "Interpretation"' at 563-4, quoted in Fagan ibid at 63.
[139] Brest 'The Misconceived Quest For Original Understanding' (1980) 60 Boston LR 204, quoted in Fagan ibid at 63.
[140] Grey 'Do We Have An Unwritten Constitution?' (1975) 27 Stanford LR 703 at 706, quoted in Fagan ibid at 63.
[141] Tribe and Dorf at 116, quoted in Davis, Chaskalson and De Waal at 16.
[142] *S v Makwanyane* at para 302.
[143] *S v Makwanyane* 1995 (6) BCLR 665 (CC).
[144] Chaskalson P at para 58.
[145] Chaskalson P at para 104.
[146] Ackermann J at para 156.
[147] Ackermann J at para 156.
[148] Didcott J at para 177.
[149] Langa J in *S v Makwanyane* at para 222.

Consensus, Tradition and Social Contract

Some constitutional theorists refer to consensus or tradition as a source of values[150]. Examples of this approach are apparent in certain judgments in the US where judges have referred to certain notions that are "deeply rooted in this Nation's history and tradition"[151]. In South Africa, Ackermann J alludes to a consensus-type approach when he states that "in a constitutional state individuals agree to abandon their right to self-help ... because the State, in the constitutional state compact, assumes the obligation to protect these rights"[152] (although Cockrell refers to this dictum as indicating a social contract approach). Hugh Corder noted along these lines that the interim Constitution reads like "an extraordinarily detailed contract"[153]. Mohamed J notes that in some countries a Constitution constitutes a "historical consensus of values"[154].

Davis, Chaskalson and De Waal, quoting from Klarman[155], criticise these theories: firstly, tradition is problematic because of the level of generality, time frame, relevant community, which are susceptible to infinite manipulation, and because it is unclear why today's generation should be shackled by the standards of yesteryear. And secondly, meaningful consensus is unlikely to exist on pressing policy debates, and even if it did exist, the judiciary is not necessarily better placed than the legislature to discern it. Therefore neither consensus nor tradition can provide judges with

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[150] Davis, Chaskalson and De Waal refer to consensus and tradition as the basis for certain models of constitutional interpretation (at 14). I have included it as a source of values as I believe that, when a Court refers to these two concepts, it is in the context of a search for values.
[151] Powell J in *Moore v East Cleveland* 431 US 494, 503 (1977), quoted in Davis, Chaskalson and De Waal at 14.
[152] *S v Makwanyane* at para 168.
[153] Corder, H 'Towards a South African Constitution' (1004) 57 Modern Law Review 491 at 511, quoted in Cockrell 'Rainbow Jurisprudence' at 29.
[154] *S v Makwanyane* at para 262.
[155] Klarman 'The Puzzling Resistance to Political Process Theory' (1991) 77 Va LR 747.

an objective system of judicial review, and the dilemma of too much judicial discretion remains unsolved. Regarding references to social contracts, Cockrell notes that there is a long history of attempts to explain moral rights on the basis of contractarianism, all of which seem destined to failure. He concludes that such references can do little harm as stylistic flourishes, but do not assist in the development a jurisprudence of substantive reasoning[156].

Natural Law

Theories which seek to find fundamental rights in natural law can be similarly criticised. As Ely argued, "all the many attempts to build a moral and political doctrine upon a conception of a universal human nature have failed.... Our society does not ... accept the notion of a discoverable and objectively valid set of moral principles"[157]. Cockrell points out that, on the whole, the Constitutional Court has resisted the temptation to seek guidance from "natural law". Cockrell argues that this is the correct approach for two reasons: firstly, the rights contained in the Bill of Rights are *institutional* rights, in that they are rights conferred by the legal system, which is necessarily an institutional rule system. There is therefore no reason to appeal to shadowy natural law when rights are institutionalised within the legal system. Secondly, "natural rights" do not necessarily equal "moral rights"[158]. A third criticism, applicable to each source referred to so far, is that sourcing extra-textual values in natural law provides judges with an unconstrained licence to interpret vague constitutional provisions as they see fit.

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[156] Cockrell 'Rainbow Jurisprudence' at 29-30.
[157] Ely Democracy and Distrust: A Theory of Judicial Review (1980) 51-4, quoted in Davis, Chaskalson and De Waal at 15.
[158] He then touches on the "richness of modern rights discourse" - Cockrell 'Rainbow Jurisprudence' ibid at 28..

African Jurisprudence

Seeking values in the realms of African jurisprudence has been a prominent theme in the South African Constitutional Court judgments to date. For example, Mokgoro J states that our Courts should recognise that indigenous South African values are relevant and are "embodied in the Constitution"[159]. To the extent that such values are embodied in the Constitution, their usefulness must be acknowledged, but, as Cockrell warns, such values do not justify themselves by virtue of their being "African", but will also have to "surmount a threshold of constitutional consistency"[160].

Foreign Legal Systems

As Kentridge AJ points out, the Court is entitled and obliged to consider the practices of open and democratic societies based on freedom and equality[161]. The Constitution expressly invites the Court to have regard to public international law and comparable foreign case law[162]. The Court has adopted a fairly conservative approach to foreign case law[163], although most judgments contain discussions on comparative law pertinent to the issue at hand. As Cockrell describes it, the Court has approached comparative law as if it were a "store-house of principles that can be raided to provide guidance" where appropriate[164]. Foreign case law is therefore a repository of principles to be adopted or rejected on substantive grounds. It is a source of valuable

[159] *S v Makwanyane* at para 300. Sachs J also refers to African law as a source of values (at para 365).
[160] Cockrell 'Rainbow Jurisprudence' at 25.
[161] *S v Makwanyane* at para 198. He was referring to section 35 of the interim Constitution.
[162] Section 39 of the final Constitution.
[163] For example, *S v Makwanyane* where Chaskalson P has warned that foreign case law will not necessarily offer a safe guide to the interpretation of the Bill of Rights (at paras 37). He concludes that the Court "can derive assistance from public international law and foreign case law, but we are in no way bound to follow it" (at para 39). See also *Bernstein v Bester* 1996 (4) BCLR 449 (CC) at paras 132-2 (Kriegler J); *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at para 127 (Kriegler J); *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC) at para 61.
[164] Cockrell 'Rainbow Jurisprudence' ibid at 26.

ideas, but does not absolve the Court from developing its own jurisprudence of substantive reasoning[165].

Conventional Morality

In the search for an extra-textual source of values, constitutional scholars have suggested a number of sources ranging from "neutral principles" (Wechsler[166]) to "conventional morality" (Wellington[167]). Conventional morality, argues Wellington, is a standard of conduct which is widely shared in a particular society, and judicial reasoning must proceed from society's set of moral principles and ideals. And it is the Supreme Court which is "well positioned to translate conventional morality into legal principle"[168]. Didcott J refers to a similar concept when he refers to "evolving standards of decency" and an "emerging consensus of values in the civilised international community"[169]. Kentridge AJ also refers to "evolving standards of civilisation" and "standards of humanity and decency which have evolved"[170], although he warns that evolving standards could all too easily culminate in the judge's own views[171].

A variation on this theme is Langa J's assertion that the State should impose its morality on society. He argues that the State is a "role model fc our society"[172] and that "[f]or good or for ill, it teaches the whole of our people by

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[165] Cockrell at 27.
[166] Wechsler 'Towards Neutral Principles of Constitutional Law' (1959) 73 Harvard LR 1, quoted in Davis, Chaskalson and De Waal at 15.
[167] Wellington 'Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication' (1973) 83 Yale LJ 221 at 244, quoted in Davis, Chaskalson and De Waal at 14.
[168] Wellington at 267.
[169] *S v Makwanyane* at para 177.
[170] *S v Makwanyane* at para 198-199.
[171] At para 199, where he quotes from *Thomson v Oklahoma* 487 US 815 (1988) (per Scalia J dissenting).
[172] *S v Makwanyane* at para 222.

its example"[173]. Mokgoro J has a similar idea when she states that "[t]he State is representative of its people and in many ways sets the standard for moral values within society"[174].

These theories are criticised as they do not resolve the issue of limiting a judge's discretion in the interpretive process. It is still up to judges to decide what these widely shared standards are, and therefore this cannot produce an objective system of judicial review[175]. Didcott J himself warned against value judgments "that can easily become entangled with or be influenced by one's own moral attitude and feelings"[176].

Cockrell, although endorsing the rejection of public opinion[177], argues that an engagement with "substantive reasoning" requires the Court to consider at least some aspects of "morality"[178]. In other words, the Court cannot operate in a moral vacuum. This "morality" should be understood to mean "critical morality", not "positive morality". This distinction he derives from Hart[179]: "positive morality" refers to morality actually accepted and shared by a given social group, while critical morality refers to those moral principles used in the criticism of actual social institutions (including positive morality) - it assumes a detached standpoint from which institutions of society might be criticised in the light of general principles and knowledge of facts. These "general principles" and "knowledge of facts", however, still do not resolve the problem of judicial discretion.

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[173] He quotes Brandeis J in his dissenting opinion in *Olmstead v United States* 277 US 438 485 (1928).
[174] *S v Makwanyane* at para 316.
[175] Davis, Chaskalson and De Waal at 15. They use the US abortion debate as an example of the difficulty of identifying widely shared standards.
[176] *S v Makwanyane* at para 177.
[177] Discussed below.
[178] Cockrell ibid at 22-23.
[179] Herbert Hart Law, Liberty and Morality (1963) 20.

Popular Morality

Linked to the concept of conventional morality is the issue of popular morality, or, as it is more commonly referred to, the question of public opinion. The question which frequently faces a Constitutional Court is: to what extent is it justifiable for a Court to have regard to public opinion as a source of values? Our Court faced this question early on its career when it had to decide on the future of the death penalty, a matter close to the heart of many South Africans. The South African Constitutional Court's official position so far has been that public opinion has no relevance in matters pertaining to the interpretation of the Bill of Rights, since the whole object of a Bill of Rights is to put certain issues beyond the reach of majoritarian preferences[180]. As Chaskalson P has said, "public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution"[181]. He finds authority for his arguments in two oft-quoted US cases, *Furman*[182] and *Barnette*[183], which draw a clear distinction between the wishes of the majority and the role of the Court in upholding values of the Constitution. He concludes that the assessment of public opinion is ultimately a legislative function, not a judicial one[184].

[180] Cockrell 'Rainbow Jurisprudence' ibid at 19.
[181] *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 88. In this case, which dealt with the highly controversial death penalty in South Africa, the Constitutional Court anticipated the public's negative response to its outlawing of the death penalty and it took the opportunity to indicate to the public what it perceives its role to be in the new constitutional state.
[182] *Furman v Georgia* 408 US 238 (1972), where Powell J refers to the "amorphous ebb and flow of public opinion".
[183] *West Virginia State Board of Education v Barnette* 319 US 624 (1943), where Jackson J argues that certain subjects must be withdrawn from the "vicissitudes of political controversy".
[184] He quotes with approval Justice Powell's comment in *Furman v Georgia*, who concludes that "[t]he assessment of public opinion is essentially a legislative, and not a judicial, function" (para 89).

A further argument against the relevance of public opinion is the difficulty relating to the assessment of public opinion. As argued under the issue of consensus and tradition, the problems of assessing level of generality, a time frame and relevant community remain. Kentridge AJ alludes to this problem when he warns that a constitutional matter is "not to be judged by the results of informal public opinion polls, still less by letters to the press"[185].

Some judges are unequivocal in their support of this position[186]. Some judges, as Cockrell points out, take account of popular morality "through the back door", in the guise of "African values"[187]. However, not all of the Constitutional Court judges have endorsed the official position. Kentridge AJ, for example, argues for a stronger role for public opinion[188]. He states that, where public opinion on a question is clear, it cannot be entirely ignored[189].

In spite of the Court's fairly clear rejection of public opinion as a determining factor in constitutional interpretation, it does accept that it may play some role. A distinction was generally drawn between "public opinion" and "accepted mores of one's own society", the latter of which appeared to be of more relevance to the judges. However, the Court failed to articulate exactly

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[185] *S v Makwanyane* at para 200. It seems that he would have found public opinion as evident in legislation or by referendum as far more convincing (at para 201).

[186] For example, Madala J states that, for the Court to decide on the constitutionality or otherwise of an enactment, "we do not have to canvass the opinions and attitudes of the public" - *S v Makwanyane* at para 256. See also Mohamed J, who argues that public opinion is only relevant when the legislative organ of government exercises its "political discretion" (at para 266). And Kriegler J, who barely touches on the issue at all, save to note that "[t]he issue is not whether I favour the retention or abolition of the death penalty, nor whether this Court, Parliament, or even overwhelming public opinion supports the one or the other view. The question is what the Constitution says about it" (at para 206). Didcott J argues that it would be wrong for the Court "to be influenced unduly by public opinion" (at para 188). He argues that this enquiry lies at the periphery, not the core, of the judicial process,

[187] For example, Mokgoro J in *S v Makwanyane* at para 300.

[188] *S v Makwanyane* at para 200, where he says that "[t]he accepted mores of one's own society must have some relevance to the assessment of whether a punishment is impermissibly cruel".

[189] As Cockrell points out (at 21), Kentridge AJ has noticed the direct link between legislation and public opinion when he states that "[b]oth Chaskalson P and Didcott J have shown that public opinion, even if expressed in Acts of Parliament, cannot be decisive" (at para 200).

what the role of either the former or the latter should be, and the issue of public opinion is therefore by no means settled[190].

3. The Criticisms - What and Whose Values?

Dworkin's model and those also advocating morality as an independent ground for decision-making can be criticised for not offering any limitations on a judge's discretion. These models empower a judge to have recourse to a set of values which the legislature may or may not have chosen to incorporate into the constitutional text. They are criticised on the grounds that once a "modality ... of decisionmaking was transformed into an external and ideological referent, it lost the legitimating force it hitherto contributed"[191]. Dworkin, in an attempt to counter this criticism, argued that, in the US context, legal issues and moral issues are fused because of the way the Constitution is worded[192] and that his rights thesis therefore does not advocate or presuppose any "ghostly entities like collective wills or national spirits"[193].

But the fact remains, theorists who propose a resort to morality which is not based in the Constitution itself have not confronted the problem of the legitimacy of so doing. A Court which has recourse to an open-ended set of values, which do not emanate from the legislature, is assuming the role of the legislature and is therefore in breach of the doctrine of separation of powers. So long as values can be sourced from anywhere outside of the Constitution itself,

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[190] Zlotnick 'The Death Penalty and Public Opinion' (1996) 12 SAJHR 70 at 72. Zlotnick's point that public opinion would be relevant if it corresponds with "core values" does not take the point any further - there would in such circumstances be no need to have recourse to public opinion, as recourse to the values alone would determine the decision.
[191] Philip Bobbitt Constitutional Interpretation (1991) at xiii.
[192] Dworkin, R Taking Rights Seriously (1977) at 185.
[193] Dworkin, R Taking Rights Seriously at xi.

judges are given too wide a discretion to impose the values of his or her choice onto the constitutional text. The value-based approach therefore quite simply allows for too much judicial discretion. By not limiting the source of values to the constitutional text, it does not ensure that a judge carry out his or her function in a manner which respects the doctrine of separation of powers. It potentially allows a judge to ascribe his or her personal values choice to the constitutional text and thereby creates the ideal conditions for the creation of a government by judiciary. As Klarman put it, as long as "fundamental rights exist only in the eye of the beholder" [194], this theory is a surrender to the countermajoritarian dilemma, rather than an attempt to cope with it.

But the question remains whether a theory which "jettisons original intent" inevitably leads to the consequence that "the Constitution is exactly what we want it to be"[195]. Is there no middle way which remains true to the legislature's Constitution and which incorporates values into the interpretive process? I argue that there is such a middle way and that it comes to us in the form of a search for the purpose of constitutional provision.

5. PURPOSIVE APPROACH

1. The Theory - Purpose of the Provision

The Constitutional Court has since its inception made repeated references to the "purposive" approach to constitutional interpretation and by 1996 it was being referred to as "trite that the Constitution is to be interpreted purposively and as a whole"[196]. This approach, as with the value-based interpretive

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[194] Klarman at 772, quoted in Davis, Chaskalson and De Waal at 15-6.
[195] Richard Posner (1986) Michigan LR 551, quoted in Davis, Chaskalson and De Waal at 108.
[196] Per Kriegler J in *Du Plessis v De Klerk* at para 123

model, seeks to emphasise the role of values, but adds to the interpretive equation the notion of seeking out the purpose of the constitutional provision in order to ascertain its meaning. The Court must seek "the nature of the fundamental principles contained in a Bill of Rights, which in turn makes the most sense of the purpose of a Bill of Rights within the context of a society proclaiming democratic aspirations"[197]. It is these "fundamental principles" which contain the basis for the democratic vision enshrined in the Constitution and they, not the concrete convictions of the original authors, constitute the guidelines in the process of constitutional interpretation[198]. Cockrell argues that those who seek to interpret the Bill of Rights must of necessity go behind the textual rule and engage with the substantive reasons which are incorporated therein (ie look to the purpose of the rule). In other words, the validity of legal rules now depends partly on compliance with "substantive criteria" (ie values)[199].

In essence, the purposive approach seeks to give meaning to a constitutional provision by ascertaining the purpose of that provision in the light of the fundamental principles and values contained in the Constitution.

The *locus classicus* of purposive interpretation is found in the Canadian case of *R v Big M Drug Mart Ltd*[200] , which has been accepted by the South African Constitutional Court[201] as the authority on the purposive approach. The case introduces the following principles: firstly, that the proper approach to the definition of constitutional rights and freedoms is a purposive one. This means that the meaning of a right or freedom is to be ascertained by an analysis of the purpose of such a guarantee, and that it is to be understood

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[197] Davis, Chaskalson and De Waal at 123.
[198] Davis, Chaskalson and De Waal at 123.
[199] Cockrell 'Rainbow Jurisprudence' at 10.
[200] (1985) 18 DLR (4th) 321 per Dickson J (later Chief Justice).
[201] Per Kentridge AJ for a unanimous Court in *S v Zuma* at para 15.

in the light of the interests it was meant to protect. Our Court has happily adopted this position. As Mohamed DP stated, "[t]he relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment"[202].

Secondly, the case held that the purpose of a provision is to be sought by reference to a number of factors. These factors include the character and larger objects of the Charter itself, the language chosen to articulate the specific right or freedom, the historical origins of the concept enshrined, and, where applicable, the meaning and purpose of the other specific rights with which it is associated within the text. All these factors tend to show that a Court must bear in mind that Constitution is not enacted in a vacuum, and must be placed in its proper linguistic, philosophical and historical contexts. The South African Constitutional Court has elaborated on this point and found that the purpose of a constitutional provision is sought by referring to the context and legislative history of the provision. Kentridge AJ emphasised this in *S v Zuma* where he stated 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"[203]. Chaskalson P has confirmed that constitutional provisions must not be construed in isolation, but "in its context which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of Chapter 3 of which it is part"[204]. He reiterated this idea later, when he stated that "[l]ike all provisions of the Constitution they must be interpreted in their context, and if relevant, can be taken into account in interpreting other provisions of the Constitution"[205]. Mohamed J has stated

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[202] *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC) at para 26.
[203] *S v Zuma* 1995 (4) BCLR 401 (CC) at para 15.
[204] Chaskalson P in *S v Makwanyane* at para 10.
[205] *Western Cape* at para 34. Most of the other judges also refer to context when they seek meaning, for example, Kriegler J in *Mhlungu* at para 95.

that reference must be made to the "proper context" of a provision, which includes the section itself, the main section of which it forms a part, and the "larger context of the Constitution regarded as a holistic and integrated document with critical and important objectives"[206]. Regarding legislative history, Mohamed J has noted some reservations. He argues that it is theoretically possible that different Parliamentarians supported the same constitutional formula but for conflicting reasons. Some regard can therefore be given to legislative history, but it cannot ever operate decisively[207]. Along similar lines, the South African academic Jonathan Klaaren argues that, by seeing democracy as "historically and culturally contingent", a model of constitutional interpretation can have both reformist and revolutionary elements[208].

Thirdly, *R v Big M Drug Mart Ltd* emphasised that constitutional interpretation entails a generous rather than a legalistic interpretation, which is aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection. But a right must not be so generously interpreted as to overshoot its actual purpose. O'Regan J took this point further when she noted that a purposive interpretation will not always coincide with a liberal[209] and generous[210] interpretatior, as a generous interpretation may overshoot the purpose of the right: "This purposive or

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[206] *S v Mhlungu* at para 15.
[207] Mohamed J in *Du Plessis* at para 84.
[208] Klaaren, J 'Structures of Government in the 1996 Constitution : Putting Democracy Back into Human Rights' (1997) 13 SAJHR 3
[209] The liberal approach is popular in the US, for example, in *Boyd v United States* 116 US 616, the US Supreme Court said: "... constitutional provisions ... should be liberally construed ....", quoted in Marcus 'Interpreting the Chapter on Fundamental Rights' (1994) 10 SAJHR 92 at 94.
[210] The dictum of Lord Wilberforce in *Minister of Home Affairs (Bermuda)v Fisher* is popular in other jurisdictions such as Namibia, Zimbabwe and (the then) Bophuthatswana: "These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give individuals the full measure of the fundamental rights and freedoms referred to", quoted in Marcus at 94.

teleological approach to the interpretation of rights may at times require a generous meaning to be given to the provisions of Chapter 3 ... and at other times a narrower or specific meaning"[211].

The following two examples clarify the argument that a purposive interpretation of a constitutional right may have a widening or narrowing effect on the interpretation of a constitutional provision. Firstly, a purposive approach to the freedom of expression clause would in all likelihood give this right a fairly wide meaning. For example, in terms of the Tobacco Products Amendment Bill[212] Parliament is attempting to outlaw smoking in public places and prohibit the advertising of tobacco products. When and if the Bill is promulgated, it will no doubt be referred by the tobacco industry to the Constitutional Court. The Court will in all likelihood be required to give meaning to the freedom of expression clause[213], and it ought (as I have argued) to look at the purpose of freedom of expression and analyse why it was included in South Africa's Constitution. Was its purpose only the protection of freedom of expression for, say, political purposes? I think not. Our Constitution also emphasises personal freedom, freedom from state intervention. On the basis of values enunciated in our Constitution, the Court should be willing to conclude that our Constitution protects all freedom, not only political freedom. In other words, on a purposive interpretation of the freedom of expression, the ambit of freedom of expression could be fairly broad.

However, a purposive approach to the equality clause will almost certainly narrow the ambit of this right. In the context of the South African Constitution,

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[211] *S v Makwanyane* at para 325.
[212] The Bill has been passed by Parliament but is (as of today's date) awaiting approval from the President. The President has forwarded the Bill to his advisers with questions about its constitutionality. If he has such reservations, he must send it back to the National Assembly for reconsideration (section 79(1) of the final Constitution).
[213] Section 16 of the final Constitution.

it can be argued that the right to equality is not designed to protect all groups from unequal treatment, but only those "who suffer social, political and legal disadvantages in our society"[214], that the equality clause does not serve the purpose of protecting the historicaiiy rich and powerful, but rather the historically
oppressed and disadvantaged. Corporations, for example, would on this interpretation have difficulty in claiming the protection of the equality clause[215]. In this way, the scope of the right to equality is narrowed by seeking the purpose of the right.

The purposive model of interpretation has been accepted by many respected South African constitutional academics as the most appropriate for the South African Constitution[216]. However, their endorsement of this approach is generally followed by a proviso in one form or another that certain limits need to placed on the discretion of the judiciary when it seeks the purpose of a particular provision. For instance, Kentridge and Spitz argue that the text of the Constitution itself acts as a limiting factor upon possible interpretations by a judge[217], and that the text, together with the fact that the Constitution remains a legal instrument, provides a safeguard against judicial overreaching. In this way the countermajoritarian dilemma is confronted[218]. Davis, Chaskalson and De Waal also conclude that the purposive approach is the most appropriate theory for South Africa[219] but argue that the fundamental principles which guide the interpretive process are contained in the Bill of Rights itself. Such principles place meaningful restrictions on the

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[214] Wilson J in *Andrews v Law Society of British Columbia* (1989) 1 SCR 143 at 154, quoted in Davis, D 'Democracy - Its Influence on the Process of Constitutional Interpretation' (1994) 10 SAJHR 103 at 119.
[215] They may wish to argue that higher taxes relating to income or property are unconstitutional.
[216] For example, Kentridge and Spitz at 11-27; Davis, Chaskalson and De Waal at 122; Gilbert Marcus in 'Interpreting the Chapter on Fundamental Rights' (1994) 10 SAJHR 92.
[217] Kentridge and Spitz at 11-27.
[218] Kentridge and Spitz at 11-28.
[219] Davis, Chaskalson and De Waal at 122.

discretion of a judge in imposing his or her values upon a constitutional text[220].

Academics differ on how the purposive approach is justified in a constitutional democracy, in other words, on how it addresses the countermajoritarian dilemma. Kentridge and Spitz argue that the text itself, which was drafted by the legislature, limits a judge's discretion and therefore the countermajoritarian
dilemma is confronted. Davis, Chaskalson and De Waal argue that the fundamental principles contained in the text are the basis of the democratic vision itself. Nicholas Smith argues that giving effect to the purpose of a provision amounts to giving expression to the true intention of the legislature and that the purposive approach is therefore justified[221]. Smith is in good company when he resorts to original intent as a justification for the purposive approach. Eminent US academics, like Lon Fuller, have argued along similar lines[222]. But, as Anton Fagan queries, how do these academics distinguish between "originalism" or "intentionalism", on the one hand, and purposivism, on the other[223]? Most purposivists decry that their approach can merely be collapsed into a form of originalism. In any event, the same criticisms that are levelled against the intentionalist approach would then be levelled against the purposive approach. For example, how does one ascertain original intent, whose original intent, what if different drafters had different intents? Fagan argues that it is more likely that purposivists impliedly justify their approach along Dworkinian lines, namely, that they are adopting principles that both fit

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[220] Davis, Chaskalson and De Waal at 126.
[221] Smith 'The Purposes behind the Words - a Case Note on *S v Mhlungu*' (1996) 12 SAJHR 90 at 97.
[222] Fuller, L 'Positivism and Fidelity to Law: a Reply to Professor Hart' (1958) 71 Harvard LR 630, quoted with approval by Smith at 92. However, as Anton Fagan points out, Fuller did not repeat this argument in his later major work, The Morality of Law, published in 1964 (Fagan, A 'Constitutional Adjudication in South Africa' D Phil Thesis in Law (1997) at 92).
[223] Fagan, A ibid at 88-92.

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[223] Fagan, A ibid at 88-92.

and best justify the law[224]. I agree with Davis, Chaskalson and De Waal on this point. The purposive approach is justified not because of adherence to original intent, but rather because it is an attempt to give effect to the fundamental principles underlying the Bill of Rights and the Constitution as a whole, and therefore constitutes the fulfilment of the Court's constitutional duties.

2. The Criticisms - Still Too Vague

The purposive model of interpretation, as it is being applied in South Africa at present, for all its popularity remains remarkably vague. In spite of the Constitutional Court judges' unequivocal acceptance of the purposive approach in principle, supported by many constitutional academics, it is becoming readily apparent that there is no consensus amongst judges and academics alike as to what exactly is meant by this approach[225]. As Anton Fagan puts it, "the enthusiasm with which the purposive approach has been received is not matched by clarity on its exposition"[226]. This vagueness has created a number of important problems, each of which need to be clarified before the purposive approach can be accepted as a meaningful model of constitutional interpretation:

Meaning v Purpose

One of the foremost problems, in my view[227], is the issue of whether or not the text must take precedence over purpose whatever the outcome: is a

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[224] Fagan, A ibid at 92. He proceeds to argue that this method is in any event unjustifiable (see discussion below).
[225] *S v Mhlungu* is a prime example of the Court's confusion.
[226] Fagan, A ibid at 86.
[227] I concede that this problem is unlikely to arise in relation to the interpretation of the Bill of Rights because the rights themselves are so vaguely worded as to have no "plain" meaning. Nevertheless, the issue is still relevant to the interpretation of the rest of the Constitution and is important from a conceptual perspective.

judge entitled to ignore the language of a constitutional provision in favour of the purpose of such provision, or is he or she bound by the plain meaning even where it conflicts with its perceived purpose? Most of the Constitutional Court judges feel bound by the text, as is evident from the cases discussed under the doctrine of original intent. *S v Mhlungu* illustrates the Court's reluctance to depart from the language of the text, favouring rather a completely artificial "plain" meaning which coincided with the Court's perceived purpose of the provision in question. Mohamed J for the majority comes to a finding "contrary to that proffered by any ordinary reading of the section, context or no context"[228]. His most heart-felt[229] objection relates to the apparent effect of a plain reading of the text[230] which "seems to negate the very spirit and tenor of the Constitution and its widely acclaimed and celebrated objectives"[231]. The crux of his argument in this case is that the Court must strive to avoid such an arbitrary, unjust and "perhaps absurd" result[232], but only if the language of the text permits it[233]. Mohamed proceeds to argue that the relevant provision is capable of an alternative

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[228] Fagan, E 'The Longest Erratum Note in History - a case note on S v Mhlungu' (1996) 12 SAJHR 79 at 79.

[229] He uses phrases such as "I would be extremely distressed ..." (at para 8), and "[t]he contrast is ... stark and distressing" and "these distressingly anomalous consequences" (at para 46).

[230] He is referring to the arbitrariness of introducing a cut-off date to the application of the Constitution. He argues that this would deprive substantial groups of people in the country of the protection of the Constitution simply because their proceedings had begun prior to the commencement of the Constitution (*Mhlungu* at paras 4 - 8). This argument of Mohamed J is, I believe, misplaced. The unfairness which he discussed at such length, although lamentable, is a necessary consequence of such a dramatic change in legal systems. Even his conclusion deprives "substantial groups of people" of constitutional protection if they were unlucky enough to have their legal proceedings finalised by the time the Constitution was passed. A cut-off date is necessary, and this inevitably entails a sense of unfairness for the group who almost, but do not, qualify. Mohamed J acknowledges this (at para 44) but calls it an "anomaly" as opposed to a gross unfairness. As Kentridge AJ argues, such "anomalies and injustices" are the inevitable result of a transitional provision such as section 241(8) (para 79).

[231] *Mhlungu* at para 8.

[232] *Mhlungu* at para 7 and 8.

[233] He admits that his objections to the plain approach would be valid if the Constitution "were not reasonably capable of an alternative construction" and then proceeds to argue that the relevant provision is capable of such an alternative construction (at para 15).

construction[234]. He thereby manages to find what he argues to be a plain meaning of the text which coincides with his perceived purpose, not being prepared to separate the two concepts.

Many academics argue along similar lines. Eduard Fagan, who criticise the methodology of both the majority and minority judgments in *Mhlungu*, criticises particularly the majority judgment on the grounds that, firstly, it was based on a misconception about the operation of language, and, secondly, it did violence to the language of the text[235], implying that such violence should never be contemplated in respect of the text.

However, some academics are arguing in favour of a purposive approach which draws a distinction between plain meaning, on the one hand, and the purpose of a constitutional provision, on the other. Nicholas Smith argues that the Court is free to disregard the plain meaning of the language where it feels that the words do not accurately reflect the purpose of the law[236]. He argues that the purposive approach, which is not a recent innovation in South African jurisprudence[237], is a "technique" of interpretation whereby "the Court alters the reach of the enactment by not applying the ordinary meaning

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[234] He refers to the purposive approach as well as resorting to dictionary definitions (at para 26).

[235] Fagan, E 'The Longest Erratum Note in History - a case note on S v Mhlu. .1996) 12 SAJHR 79 at 84. Regarding the first point: the judges base their argument on the misconception that any meaning is as good as any other meaning, so long as such meanings can all be squeezed semantically into the text, and that the court's role is to choose what it considers to be the best meaning. Regarding the second point: Mohamed J's concession that the minority's interpretation is consistent with the plain meaning of the words (*Mhlungu* at para 2) does not prevent the majority from giving the subsection an "unusual meaning" (Fagan at 85). Fagan also criticises the majority judgment for its repeated reference to the "numbers game", which, he argues, makes no sense as, firstly, no evidence was lead as such magnitude, and, secondly, even if one person were affected, the court would be expected to intervene (at 86).

[236] Smith 'The Purposes behind the Words - a Case Note on *S v Mhlungu*' (1996) 12 SAJHR 90.

[237] The principle was applied in the well-known case of *Venter v R* 1907 TS 910, which was referred to by Sachs J in *S v Mhlungu*.

of the text"[238]. For this reason, purposive interpretation "is, in a sense, not really interpretation at all". Purposive interpretation is "not essentially a linguistic enterprise; it is an attempt to discover the *point* of the legislation, not the *meaning* of the words used to communicate that purpose"[239]. He concludes that "meaning" needs to be conceptually severed from "purpose"[240], that the purposive approach is not about semantics. In other words, on this interpretation of the purposive approach, the Court is free to disregard the plain meaning of the language where it feels that the words do not accurately reflect the purpose of the law, and, when it does so, it should not couch its judgments as attempts to find the meaning of the words[241]. Smith acknowledges the difficulty which the Courts will have with ignoring the plain meaning of a provision as they are (or should be) reluctant to usurp the role of the legislature[242]. Smith justifies the departure from plain meaning in favour of purpose on the grounds that, in interpreting legislation purposively, the Court is in fact trying to honour the intention of the legislature[243].

Anton Fagan refers to a distinction between explicit meaning and implied meaning of the constitutional text, arguing that where the explicit meaning is indeterminate, the Court can have recourse to the implied meaning (which could effectively be referred to as the purpose) of the text in question[244]. He accepts this, so long as the constitutional text is given its "ordinary meaning",

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[238] Smith at 92.
[239] Smith at 93 (Smith's emphasis).
[240] Smith at 94.
[241] He accuses the majority in *Mhlungu* of doing just this.
[242] He states that "[a]s long as judges have significant discretion to interpret constitutional provisions in accordance with their own values or ideological persuasions", the countermajoritarian dilemma remains (Smith at 97). Smith refers to Hogg's attempts to limit this by suggesting that, in seeking purpose, the Court can be guided by the language of the text, the context, the pre-Charter history and the legislative history - Hogg 'Interpreting the Charter of Rights: Generosity and Justification' (1990) 28 Osgoode Hall LJ 817, quoted by Smith at 96.
[243] Smith at 97.
[244] Fagan, A at 93.

and acknowledges that both explicit meaning and implied meaning are part of "ordinary meaning". In this sense, Fagan's approach to interpretation effectively incorporates the purposive approach but using the terminology of implied meaning rather than purpose[245]. It is unclear from his argument whether he accepts that the implied meaning can amount to a departure from the plain meaning of the text, but it would appear that this would be acceptable to him in cases where the plain meaning is indeterminate.

The concept of severing meaning from purpose is not new in South African law. It is already an established principle of statutory interpretation that a Court can depart from the plain meaning of a statutory provision in certain circumstances. In terms of the so-called golden rule of interpretation, if "a rigid grammatical construction of the language employed leads to a result which is manifestly absurd, unjust, unreasonable, inconsistent with other provisions, or repugnant to the general object, tenor or policy of the statute, the court will be justified in departing from the plain sense and in modifying or extending it in such a manner as will secure a conclusion which will eliminate such objection and give expression to the true intention of the Legislature"[246].

There is therefore cogent authority for the view that the Court is entitled, in certain circumstances, to depart from the plain meaning of a constitutional provision and to give it a meaning which reflects the purpose of that provision. The obvious question which arises is: what are these "certain circumstances" which permit the Court to ignore the words of the Constitution? I argue in the following Chapter that, on this approach, the Court first looks at the language of the particular provision it is required to interpret. When and if the language of the constitutional text, on a plain

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[245] Although he doubts that purposivists would agree that their theory is merely about implied meaning (Fagan at 93).

[246] Malan J in *Volschenk v Volschenk* 1946 TPD 486 at 487-8, quoted in Cockram, G-M; Interpretation of Statutes; Juta; Cape Town; 1987 at 44.

reading, leads to consequences which are at odds with the values underlying the Constitution as a whole[247], or the language of the text is so broad as to have no plain meaning[248] (in other words, it is indeterminate), then and in this event, the Court may stretch, and even depart from, the ordinary meaning of the words, and give a meaning to the provision which is in keeping with the purpose of the provision. I argue that allowing a judge to depart from the plain interpretation does not place too much discretion in his or her hands. His or her discretion is limited by the search for the purpose of a particular provision, which must be undertaken in the light of values apparent in the Constitution itself.

Source of Values

The issue of separating meaning from purpose is, however, not the only issue on which no consensus exists. A second issue relates to the source of values. Proponents of the purposive approach have been particularly vague on the source of the values which underlie the interpretive process. Do they have in mind "simply the principles held by the framers or ratifiers"[249]? Or are they to be understood along the lines suggested by Ronald Dworkin, namely, as a scheme of principles that both fits (in the sense of its relationship with the law) and best justifies (introducing moral considerations) a community's constitutional law[250]? References are still being made to forms of conventional morality, as well as to consensus and social contract[251].

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[247] As the majority concluded in *S v Mhlungu*.
[248] As is the case with most of the fundamental rights contained in the Bill of Rights.
[249] Fagan, A ibid at 88.
[250] Fagan, A ibid at 87-88.
[251] As discussed above.

Although many academics are attempting to emphasise that values should emanate from the constitutional text itself, neither they nor the Court is unanimous on this point.

As Anton Fagan argues, the purposive approach fails to produce a test or criterion which determines membership of, and which can be employed in order to identity, the set of principles underlying the constitutional law[252]. In "collapsing the purposive approach", Fagan notes that it does not provide answers to two hard questions: firstly, how does the Court identify principles which underlie the constitutional law, and secondly, by virtue of what does a principle or value underlie the Constitution? Fagan concludes that the purposive approach fails because it collapses into an "all things considered" approach (like the value-based approach) which, he argues, is unjustifiable in a constitutional democracy granting the Court superior decision-making authority[253]. Fagan's criticisms are aimed at the purposive approach, but I believe they are more applicable to the value-based models of interpretation discussed above. His criticisms are relevant to the purposive approach in so far as this approach allows for recourse to extra-textual values, but this latter point is by no means unanimously accepted by proponents of the purposive approach[254].

Structural Considerations

A third criticism of the purposive approach argues that, although this model is able to discern that some goal or principle or value or interest is socially important, this does not assist in determining what law or public policy ought

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[252] Fagan A ibid at 86.
[253] Fagan, A at 123-4.
[254] I, for one, propose a model of purposive interpretation which only allows for recourse to intra-textual values.

to be[255]. On its own, so it is argued, the purposive approach does not articulate the extent to which the judiciary should play a role in achieving that goal through greater constitutional review. This is so because the purposive model does not address the issue of the allocation of responsibility between the political and adjudicative processes. In order to remedy this inadequacy, it is argued that the structures of government need to be taken into account, which would add the dimension of dictating to what extent the judiciary should exercise its power of judicial review. This structural approach is discussed below.

Conclusion

The only criticism that can successfully be levelled against the purposive approach is that, at present, in South Africa, it is not being articulated or applied with any uniformity. But, after some minor surgery, I argue that the purposive approach is indeed the most appropriate model of constitutional interpretation for the South African context.

6. STRUCTURAL APPROACH

1. The Theory - Institutional Interrelationships

A further model of interpretation is beginning to emerge in South Africa, which looks to structural or institutional features of government as the basis of constitutional interpretation. Generally intended to supplement, not replace, the value-based approach, this model minimises judicial discretion by emphasising the relationship between the institutions of government. The structural approach to constitutional interpretation attempts to introduce into

[255] Klaaren, Course Note dated 14 May 1998, handed to Advanced Constitutional Law LL.M class at the University of the Witwatersrand, Johannesburg.

the interpretive exercise an effective recognition of and respect for the institutional structures of government[256]. By "structural" is meant that the judiciary, in exercising its power of judicial review, must draw rules of interpretation from the relationships between the structures of government[257], that it must recognise and respect the roles and functions of the three institutions of government and must respect their independence[258]. A structural approach "derives constitutional rules by inference from the relationships the Constitution mandates between the structures it sets up"[259]. It begins with an analysis of the institutional relationships created by the Constitution and infers rules for a specific situation from those relationships. In this manner judicial discretion is curtailed.

Essentially this approach draws the interpreter's attention to the institutional capacities and weaknesses of the respective branches of government. As Heinz Klug points out, the "capacity of the courts and a constitutional court in particular is an essential prerequisite to the judiciary's effective assertion of the power of constitutional review"[260]. He refers to the "comparative institutional weakness of the judicial branch", which acts as a limiting factor on the manner in which the Court exercise its power of judicial review over the "more resourced and powerful arms of government" [261]. The judiciary is ultimately reliant on both the legislative and executive branches to enforce its holdings and protect its independence[262]. As Klug points out, the Court's role

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[256] Klaaren, J 'Structures of Government in the 1996 South African Constitution : Putting Democracy Back into Human Rights' (1997) 13 SAJHR 3 at 3. This model enjoys some popularity in the US - Philip Bobbitt Constitutional Interpretation (1991) at 12 and 15.
[257] Klaaren at 16.
[258] Klaaren at 15.
[259] Klaaren at 19. He refers to the work of C Black Structure and Relationship in Constitutional Law (1969) as being the "locus classicus americanus" on this approach.
[260] Klug, H 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 186. Klug is not proposing a model of constitutional interpretation. He is undertaking an institutional analysis of issues which he believes are prior to and underlie a theory of constitutional interpretation.
[261] Klug at 189.
[262] Klug at 189.

depends for its effectiveness on its acceptance by the other branches of government and by the "wider legal culture and political system"[263], irrespective of the express constitutional grant of the power of judicial review to the judiciary.

The purpose of structural arguments is effectively to caution the Court to "carefully negotiate its way through conflicts which would elicit direct attacks on the independence of the judiciary or the tenure of individual judges"[264]. Klug argues that the Constitutional Court appears to be heeding this advice in cases such as *Western Cape*, where the Court managed to emerge from an extremely politically sensitive situation and "everyone applauded"[265].

It is apparent that arguments along structural lines are essentially based on separation of powers issues. As Klaaren notes, one can argue "in terms of the separation of powers doctrine that that doctrine ought to be concerned at least as much with identifying an appropriate division of labour among co-operating branches as it should be with providing a check on an overpowering government through division"[266]. And this it does. Not only does the doctrine of separation of powers dictate to a large degree what the role of each branch of government is, it also acts as check on the overconcentration of power in the hands of one branch. For this reason, as I have argued, the doctrine of separation of powers dictates an appropriate

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[263] Klug at 187.
[264] Klug at 189. In South Africa pre-1994, judges generally showed such deference to Parliament and the executive in any event. However, in such an anti-democratic society, it is submitted that Klug's cautionary advice would not have been appropriate. In other words, judges to a certain degree were not obliged to show deference to the undemocratic legislature and executive.
[265] Klug at 201.
[266] Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 SAJHR 549 at 553.

model of constitutional interpretation which effectively allows the Court to exercise its review function in a democratic manner.

Klaaren, although welcoming the move away from a formalist approach towards a more value-based substantive reasoning, is not in favour of a purely value-based purposive approach[267], and he argues that it needs to be supplemented by structural considerations. He argues that, in making greater use of a structural approach, a normative perspective is appropriate for South African constitutional interpretation. Such a normative approach will have three features[268], the most relevant of which (from a separation of powers perspective) is his argument that such a normative perspective must include a critical view of the existing structures of power in South Africa. The emphasis here is on "critical" in the sense that existing government structures must be critically examined, and beneficial changes or alternative structures suggested, where appropriate. These existing structures (which include state institutions, bureaucracies and hierarchies) must also be examined to ensure that they are not being used to perpetuate unjust inequalities of power in South African society[269]. He is arguing for open and critical debate around, rather than blind acceptance of, existing structures of government.

A further argument which Klaaren includes along separation of powers lines relates to the role of the Court in a constitutional democracy. He argues that the Court ought to see itself as supervisor or facilitator in matters of central

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[267] Klaaren at 19.
[268] The three features are, firstly, that neither democracy nor human rights must be privileged at the expense of the other, secondly, that interpretation must be historically and culturally contextual, and thirdly, that it must be critical - Klaaren at 4. Klaaren notes that these three features are but a start, and are not on their own sufficient for a normative theory of interpretation (at 9).
[269] Klaaren at 8.

government. He refers to the Court's obligation to encourage an "institutional process of co-ordinate constitutional construction"[270]. In this way, all government institutions can play a role as constitutional interpreters and can thus contribute towards an understanding of the Constitution[271]. His emphasis is on "co-operative government" between the three horizontal institutions of central government, as mandated by Chapter 3 of the final Constitution in respect of the three vertical spheres of government[272]. He is calling for the Court's power to be exercised "sparingly and in a manner facilitative of democracy"[273] for institutional reasons. The judiciary has institutional limitations on what it can and cannot "command, supervise, order, devise and implement"[274]. Klug argues along similar lines when he proposes that the Court should not position itself as the sole guardian of the Constitution, but should "lessen its political exposure" (and address the counter-majoritarian dilemma) by insisting that the other branches of government play a large role in defending the Constitution in the "daily, co-ordinate construction, of their own constitutional roles and activities"[275]. He believes that it is the other branches of government who best protect the Constitution.

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[270] Klaaren at 4. Heinz Klug also uses this phrase - Klug 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185 at 187.
[271] Klaaren believes that the Court in *Certification 1* played this facilitative role. The Court gave a "limited but genuine" hearing to all interested parties, including its respected partner, the Constitutional Assembly, and then refrained from giving specific orders which it was institutionally incapable of implementing (Klaaren at 26-7).
[272] See sections 40 to 41 of the final Constitution, which oblige national, provincial and local spheres of government *inter alia* to exercise their powers and perform their functions in a manner which does not encroach on the geographical, functional or institutional integrity of government in another sphere (s.41(1)(g)) and to co-operate with each other in mutual trust and good faith (s.41(1)(h)).
[273] Klaaren at 25.
[274] Klaaren at 26.
[275] Klug, H 'Striking Down Death - a Case Note on *S v Makwanyane*' (1996) 12 SAJHR 61 at 65.

As Klaaren points out, hints of this structural approach are apparent in cases such as *Western Cape*[276] and *Certification 1*[277], but he notes that in *Zantsi*[278], where the Court dealt with structures of government, formalistic reasoning pervaded[279]. The only example of the Court's engaging more obviously in the structural approach is *Transvaal Agricultural Union v The Minister of Land Affairs and the Commission on the Restitution of Land Rights*[280]. In this case, Chaskalson P focused not on the wording of the relevant sections of the interim Constitution, but rather he examined the organisational operation and constitutional functions of the Commission on Restitution of Land Rights. He rejected the Applicant's argument on the grounds that it would cause delays and required the establishment of a large bureaucracy. Klaaren welcomes this case as showing the "hallmarks of the structural approach" [281]. Sachs J has also expressed views along the lines of Klaaren's structural approach. Klaaren sums up Sachs' approach in *Western Cape* as referring to the "structural position of Parliament in a constitutional democracy as the centrepiece of participation and deliberation"[282]. In the recent case of *Soobramoney v Minister of Health, Kwazulu-Natal*[283], Sachs J again stated in a concurring but separate judgment that "[i]mportant though our review

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[276] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC). Here Chaskalson P explored the internal workings of Parliament, the institutional relationships between its component parts. This, Klaaren argues, amounts to a structural approach (Klaaren at 20). He also refers to the judgment of Sachs J, where he examines why it is Parliament who is entrusted with full legislative authority (Klaaren at 21).
[277] *Ex Parte Chairman of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (4) SA 744 (CC). Here the Court examined the Judicial Services Commission as an institution with its own dynamics and brought a critical perspective to bear on the issue (Klaaren at 21).
[278] *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC).
[279] Klaaren at 17.
[280] 1996 (12) BCLR 1573 (CC). Although the Court dismissed the case for lack of jurisdiction, it nonetheless covered certain substantive issues.
[281] Klaaren at 22.
[282] Klaaren 'A Case Note on *Executive Council, Western Cape Legislature v President of Republic of South Africa & Others*' (1996) 12 SAJHR 158 at 161, referring to para 204 of *Western Cape*.
[283] 1998 (1) SA 765 (CC).

functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious"[284].

2. The Criticisms - Values?

The structural approach, like the model of interpretation which I propose, argues that the doctrine of separation of powers acts as a limiting factor on judiciary discretion. However, the emphasis is somewhat different. Whereas the structural approach emphasises more the practical and pragmatic factors relating to the institutional capacities of the three branches of government, my emphasis is placed on the institutional legitimacy of such branches. In other words, I argue that the respective roles of the branches of government dictate that the Court is obliged to respect the language chosen by the legislature in drafting the Constitution and therefore recourse can only be had to the words and values contained in the constitutional text itself. The structural approach argues, on the other hand, that principles of interpretation are to be found by analysing the institutional relationships created by the Constitution and inferring rules for a specific situation from those relationships.

I do agree with the conclusion, namely, that the institutional structures of government need to be recognised and respected by the judiciary when its engages in constitutional review. More particularly, the Court should not give orders which it will not be able to enforce due to the judiciary's inherent institutional weakness.

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[284] Sachs J at para 58.

3. Judicial Remedies

It is appropriate to include a brief discussion on judicial remedies under the issue of structural capacities of the three branches of government, and more particularly to look at their limits.

The most potent remedy which the Court has been granted is the power to declare a legislative enactment to be unconstitutional and therefore invalid[285]. It may then grant relief which is "just and equitable"[286] or "appropriate"[287]. Remedies arguably fall into different categories depending which constitutional provision gives rise to them[288]. can be divided into defensive remedies, which include the notions of "reading down", "reading in", invalidity (whether temporary or permanent) and severance, on the one hand, and affirmative remedies, which include a declaration of rights, declaration of invalidity, damages and interdicts (temporary or final), on the other hand[289].

The remedy of "reading down"[290] is based on the doctrine of judicial restraint and declares that where a constitutional provision is capable of two readings, one of which is constitutional, the Court is obliged to apply the reading which is constitutional[291]. When the Court avails itself of this remedy, it is therefore showing deference to the legislature and giving it the benefit of the doubt, a commendable remedy in view of the Court's role vis-à-vis the legislature as determined by the doctrine of separation of powers.

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[285] Section 2 as read with section 172 of the final Constitution.
[286] Section 172(1)(b) of the final Constitution.
[287] Section 38 of the final Constitution.
[288] Klaaren, J 'Judicial Remedies' in Chapter 9 of CONLSA at 9-2. The primary remedy clauses in the final Constitution are the supremacy clause (section 2) and the fundamental rights remedy clause (section 38 of the final Constitution).
[289] Klaaren at 9-5.
[290] This is a Canadian phrase. The German equivalent is "interpretation in conformity" - Klaaren at 9-5.
[291] Klaaren at 9-5.

Regarding the issue of severance, the Court has indicated its reluctance for institutional reasons to perform "textual surgery" where it encounters unconstitutionality. For example, Mokgoro J has stated that "[f]or this Court to attempt textual surgery would entail it departing fundamentally from its assigned role under our Constitution. It is trite but true that our role is to review, rather than re-draft, legislation", which is an "essentially legislative function"[292].

"Reading in" is more difficult to justify than the previous two categories as it entails the adding of words to the legislation in question[293]. This remedy the Court ought to be reluctant to apply, again in view of its role vis-à-vis the legislature. As Klaaren puts it, courts should not engage in reading in or severance without being satisfied that such a remedy comports with the objective of the legislation at issue. In this manner, the courts respect the role of the legislature in the democratic political process[294].

The court's use of the interdict as a remedy in constitutional matters is more controversial as it arguably amounts to allowing the Court to interfere to an unjustifiable degree in the political affairs of a nation. In particular, structural interdicts involve the Court in "ongoing supervision of an institution or public agency as a last resort"[295]. As Klaaren points out, this type of interdict raises the difficult issues of the legitimate limits of judicial power. It is therefore suggested that the Courts make use of this remedy in exceptional circumstances only[296], following the Canadian case law to the effect that

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[292] *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others* 1996 (1) SACR 587 (CC) at para 73. In this case the Court declared unconstitutional legislation prohibiting possession of obscene photographic material on grounds that it invades the right to personal privacy and is neither reasonable not justifiable.
[293] Klaaren at 9-6.
[294] Klaaren at 9-17.
[295] Klaaren at 9-13.
[296] Klaaren at 9-12. However, as Klaaren points out, in South Africa at present, with so much unconstitutional legislation on the statute books, it is likely that the exception may become the rule, as least initially.

interdicts must be "the exception rather than the rule"[297]. This is so particularly regarding the structural interdict, which should be used only where the "political process has failed to deliver"[298].

This is a somewhat brief reference to some of the remedies available to a Court when it concludes that state action is unconstitutional. Essentially, what is apparent from this brief account is that the Court's concern about legitimacy does not end once it has completed its interpretive task. Once the Court has given meaning to a constitutional provision in a manner consistent with democratic principle (purposively, as I argue), the structural or institutional implications still need to be considered when the Court chooses an "appropriate" remedy. The Court is still in a position to raise questions of its democratic legitimacy at this stage of the adjudicatory process.

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[297] *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd* [1987] 1 SCR 110, referred to in Klaaren at 9-11. The Indian Supreme Court has had no such reservations, where the Court has ordered committee investigations into alleged environmental hazards and ultimately ordered factories and quarries to be closed down - Klaaren at 9-13.

[298] Klaaren at 9-13. This notion of a failed political process can be linked to my argument that an activist Court is only justif[illegible]he political processes are being threatened - see Chapter 7 below.

CHAPTER 7

A TEXTUALLY-DRIVEN PURPOSIVE APPROACH

1. THE THEORY - TAMING THE TURBULANCE OF POLITICS

1. A Recap

That the judiciary is not democratically entitled to interfere in spheres of government which are not properly its concern, and that the Court should therefore show a certain amount to deference to Parliament, has been accepted by our Constitutional Court. Chaskalson P has stated that the role of the judges "is not to 'second guess' the executive or legislative branches of government or interfere with affairs that are properly their concern"[1]. And again he held that, where the Court is faced with differing reasonable policy options, it must allow the government the "deference due to legislators", but must not give them unrestricted licence to disregard an individual's constitutional rights[2]. He repeated this idea of deference to Parliament when he stated that "[i]n a democratic society the role of the legislature as a body reflecting the dominant opinion should be acknowledged"[3]. He emphasised that the Court must "bear in mind that there are functions that are properly the concern of the Courts and others that are properly the concern of the legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate". Chaskalson P's argument is impliedly based on separation of powers concerns, which concerns are even more apparent in the judgments of Sachs J. In *Makwanyane*, he distinguished between issues which should occupy the mind of the

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[1] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC) at para 99.
[2] *S v Makwanyane* at para 107.
[3] *Ferreira v Levin* 1996 (1) BCLR 1 (CC) at para 183.

legislature (positions which are "essentially emotional, moral and pragmatic in character"[4]) and those that should concern the Court. In *Du Plessis v De Klerk* he refers to "separate but complementary powers as well as separate but complementary judicial functions"[5] and bases his finding partly on the institutional weakness of the judicial branch[6].

It is also generally accepted that the making of a decision in a case involving fundamental rights will involve a moral or value judgment on the part of a Court. Because of the open-ended nature of constitutional interpretation, a Court will inevitably be required to make value judgments. As Ackermann J puts it, "whatever guidelines are employed, a process of weighing up has to take place ... and thereafter a value judgment made"[7]. Even Kriegler J, who generally fiercely asserts that constitutional interpretation is a legal process which must begin and end with the text, acknowledges that one cannot deny that the judicial process, particularly in the field of constitutional adjudication, "calls for value judgments in which extra-legal considerations may loom large"[8]. In fact, almost every Constitutional Court judge has at some stage indicated their acceptance of the fact that values do play some role in the interpretive process. For example, Didcott J refers to an "emerging consensus of values" which must be taken into account in a value judgment[9]. Sachs J describes the Constitution as "intensely value-laden"[10]. Kentridge AJ accepts that "it would not be right to ignore ... the 'fundamental concerns' of

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[4] *S v Makwanyane* at para 349.
[5] *Du Plessis v De Klerk* at para 178.
[6] At para 180. He argues that the judicial function does not lend itself *inter alia* to the kinds of factual inquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities which is required in political and economic decision-making.
[7] *S v Makwanyane* at para 165.
[8] *S v Makwanyane* at para 207.
[9] *S v Makwanyane* at para 177.
[10] *S v Mhlungu* at para 111.

the Constitution ... or 'spirit and tenor of the Constitution'"[11]. The Court has also stated that "[i]n reaction to our past, the concept and values of the constitutional state ... are deeply foundational to the creation of the 'new order'"[12]. And again that the judicial process "cannot operate in an ethical vacuum"[13], that "implicit in the provisions and tone of the Constitution are values of a more mature society"[14], that "[a]ll Constitutions seek to articulate ... the values which bind its people ..."[15], and that "[o]ur new Constitution ... is value-based"[16]. Regarding constitutional interpretation, the Court has somewhat vaguely stated that it must take place "in the light of the values which underlie the Constitution"[17] and that it requires "a holistic, value-based" framework[18].

And yet again it is generally accepted that such a moral or value judgment cannot be at the whim of the presiding judge. As Kentridge AJ has stated, it is not easy to "avoid the influence of one's personal intellectual and moral preconceptions", but the "Constitution does not mean whatever we might wish it to mean"[19]. Didcott J also warned against the "trap of undue subjectivity" when judges are faced with value judgments, which can easily become entangled with their own moral attitude and feelings[20]. The judiciary has offered as a rationale behind this line reasoning that judges do not claim a "superior wisdom" for themselves, but rather are bound to carry out the wishes of the legislature as expressed through the language of the

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[11] *S v Mhlungu* at para 63, where he quotes approvingly from *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75 (E) at 86A and *Shabalala v Attorney-General, Transvaal and Another* 1995 (1) SA 608 (T).
[12] *S v Makwanyane* at para 156 per Ackermann J.
[13] *S v Makwanyane* at para 207 per Kriegler J.
[14] *S v Makwanyane* at para 222 per Langa J.
[15] *S v Makwanyane* at para 262 per Mohamed J.
[16] *S v Makwanyane* at para 313 per Mokgoro J.
[17] *S v Williams* 1995 (3) SA 632 (CC) at para 37 per Langa J.
[18] *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC) at para 46 per Sachs J.
[19] *S v Zuma* at para 17.
[20] *S v Makwanyane* at para 177.

Constitution[21]. I contend that the rationale behind this principle is that the judiciary is not democratically entitled to give the Constitution a meaning which is line with a judge's personal values and ideals. Some have argued that the reason why a judge cannot do so is that it is countermajoritarian. My contention is that the doctrine of separation of powers, as a fundamental principle underlying the achievement of democracy, dictates the Court is not entitled directly or indirectly to make law. If a judge has recourse to his or her own personal convictions in the interpretive process, he or she runs the risk of usurping the role of the legislator, thereby effectively breaching the doctrine of separation of powers.

What is not generally accepted, however, is how to prevent the judiciary from importing its own personal ideology into the interpretive process. Constitutional theorists differ on the manner in which the power of judicial review should be exercised in order for the Court to retain its democratic legitimacy. Various models of interpretation have been proposed and implemented by the Court in an attempt to prevent judicial overreaching. Some deny the presence of values in the interpretive process altogether, as a means of curtailing judicial ambition[22]. Others allow the Court have regard to any values in a free-floating manner, and claim that judicial legitimacy is not prejudiced because the legislature wanted it this way[23]. As a form of median between these two extreme positions, a model developed in terms of which a Court is required to seek the purpose of a constitutional provision and to do so in the light of values which are expressed in the Constitution itself[24].

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[21] Kentridge AJ in *S v Makwanyane* at para 192.
[22] For example, the doctrine of original intent and Ely's political process theory.
[23] For example, some versions of the value-based approach.
[24] The so-called purposive or teleological approach.

It is fairly uncontroversial to argue at this stage of South Africa's constitutional game that values should not be free-floating. This is not to imply that they have no role to play whatsoever, merely that the Court is not entitled to invoke any values it chooses in a random manner. As Cockrell proposes, a moral judgment should not be an "all-things-considered" moral judgment, for else it will become difficult to establish the democratic credentials of the practice of constitutional review[25].

I have argued that a Court must exercise its power of judicial review in a manner which allows itself to be limited by the doctrine of separation of powers. In other words, a Court, in giving meaning to a constitutional provision, must respect the functional and institutional integrity of the three branches of government, namely, the legislature, the executive and the judiciary. The respective constitutional roles of the three branches dictates to a large extent which branch is primarily responsible for what government function, thereby avoiding the accumulation or concentration of power in the hands of one branch alone. I argue in favour of a model of constitutional interpretation which limits a judge's discretion by enforcing respect for the role of the legislature as democratically entitled lawmaker.

2. Textual Consideration

What the separation of powers means, first and foremost, is that the judiciary must respect the language used by the legislature in the constitutional text[26]. That a plain reading of the text is a starting point has repeatedly been articulated by the South African Constitutional Court. As has been stated, it is

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[25] Cockrell, A 'The South African Bill of Rights and the "Duck/Rabbit"" (1997) 60 Modern Law Review 513 at 534.
[26] See for example, Mohamed J in *Western Cape* at para 136, Kriegler and Didcott JJ in *Du Plessis* and Kentridge AJ at para 33.

"the legal text which tames and limits the turbulence of politics"[27]. The Constitution must be read "as it stands"[28] and the Court must attribute to such language its ordinary meaning[29]. The ordinary or plain meaning of a constitutional provision must be sought in the light of the context of that provision[30]. As Cachalia et al

have argued, the Constitution cannot be read "clause by clause nor can any clause be interpreted without an understanding of the framework of the instrument"[31]. Du Plessis and De Ville call this a "systematic interpretation"[32].

Kentridge AJ argues that a departure from the clear and unambiguous meaning of the provision ("doing violence to the language of the Constitution"[33]) is a breach of the Court's duty to promote the values which underlie a democratic society based on freedom and equality. Anton Fagan, who is a determined "anti-purposivist", agrees. He argues that language is the all-determining factor and other elements (for example, purpose) are only relevant if they can be incorporated under "implied meaning"[34]. I do not agree. A "grammatical interpretation" focuses on the plain meaning of words,

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[27] Jonny Steinberg in a newspaper article entitled "Split by a hair's breadth of difference" in Business Day dated 20 October 1998.

[28] Both Madala J and Sachs J used this phrase in *S v Makwanyane* (at paras 256 and 349 respectively), although Sachs J does not show an inordinate amount of deference to the language of the text - see for example, his judgment in *Mhlungu* where he states that a purposive reading of the Constitution always involves a degree of strain on the language (at para 125). And also in *Western Cape* where he rejects a plain interpretation in favour of a purposive interpretation (at para 204).

[29] Fagan, A 'In Defence of the Obvious - Ordinary Meaning and the Identification of Constitutional Rules' 1995 (11) SAJHR 545, as well as 'Constitutional Adjudication in South Africa' D Phil Thesis in Law dated 1997.

[30] Chaskalson P in *Makwanyane* at para 10 and in *Western Cape* at para 34.

[31] Cachalia, Cheadle, Davis, Haysom, Maduna and Marcus Fundamental Rights in the New Constitution (1994) at 9.

[32] Du Plessis, L and De Ville, J 'Bills of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects' (1993) Stell L R 356 at 357.

[33] *Mhlungu* at para 84.

[34] Fagan, A 'Constitutional Adjudication in South Africa' ibid at 93. He argues that "ordinary meaning" includes both explicit and implied meaning. He acknowledges that he would accept the purposive approach if all it meant was that a search for implied meaning equated with a search for purpose

but it does not attribute finality to them[35]. As Kentridge and Spitz acknowledge, the words of the Constitution are not in themselves definitive, that the text is "a starting point rather than a finishing point" in interpretation[36]. Du Plessis and Corder have also warned that language should not be elevated to the foremost structural element of a legislative text so that other elements are only reckoned with when language fails[37].

So what is the role of the text and when can it be departed from? Is the Court bound to give effect to a plain reading of the text which gives rise to consequences which are, in the judge's opinion, contrary to the values encapsulated by the Constitution, values chosen by the legislature to form part of the Constitution? What if the wording of the Constitution is so vague or broad as to make the provision in question indeterminate?

The text acts as a starting point to interpretation and, where it is clear, acts as a limit on a judge's discretion. This therefore, as Kentridge and Spitz argue, provides a safeguard against judicial overreaching[38]. However, and this argument may be somewhat controversial, if the plain meaning gives rise to consequences which are contrary to the values which have been incorporated into the Constitution by the legislature, then in these circumstances, the Court is entitled to take the enquiry one step further and to seek the purpose of the constitutional provision in question, not so much to give effect to the original intent of the drafters, but to give effect to the values and principles which underlie the Constitution as a whole. As Kriegler J puts it, it does not matter what the Court or Parliament wants, it only matters what the Constitution says[39].

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[35] Du Plessis and De Ville ibid at 357.
[36] Kentridge and Spitz at 11-15.
[37] Du Plessis and Corder Understanding South Africa's Transitional Bill of Rights (1994) at 65.
[38] Kentridge and Spitz at 11-28.
[39] *S v Makwanyane* at para 206-7.

3. The Ratio Legis

As I have just argued, where the language of the text is indeterminate, or where the plain meaning leads to a consequence which the judge believes to be contrary to the values in or underlying the Constitution, the Court is entitled to have regard to the *ratio legis* or purpose of the constitutional provision in question[40]. "Textual sterility" is not a notion that sits comfortably on the shoulders of judicial review, as Madala J in *Du Plessis* warns[41]. Chaskalson P also warned, in a different context, that constitutional provisions must not be interpreted with "technical rigidity". He argued that the Constitutional Principles must therefore be applied "purposively and teleologically to give expression to the commitment" contained in the (interim) Constitution[42].

In order to prevent the Court's being hamstrung by words when it can see behind such words a meaning which is clearly more in line with the constitutional values, it should be entitled to prefer the purposive approach to the textual reading. The Court is entitled to depart from the plain meaning of the words in these circumstances. I am not proposing divination as opposed to interpretation, as Kentridge AJ warned against[43]. I argue that, in terms of the purposive approach, other factors exist which serve to limit a judge's discretion and to ensure that interpretation does not take place in an "all things considered" manner.

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[40] This approach is referred to as the purposive or teleological approach (as enunciated by Kriegler J in *Du Plessis* at 123), neither of which have any settled definition.

[41] *Du Plessis v De Klerk* at para 157. Woolman and Davis use this phrase to describe Madala's approach - Woolman, S and Davis, D 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions' (1996) 12 SAJHR 361.

[42] *Certification I* at para 34 and 36.

[43] Kentridge AJ in *S v Zuma* stated that "if the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination" (at para 18).

As I have already discussed, the purpose of a constitutional provision is sought by reference to a number of factors. These factors include the character and larger objects of the Constitution as a whole, the language chosen to articulate the provision, the historical origins of the concept enshrined, and, where applicable, the meaning and purpose of the other specific rights with which it is associated within the text[44]. In other words, in giving meaning to a constitutional provision by seeking its purpose, the Court must essentially take into account the text and the context of the provision in question. The Constitution was not enacted in a vacuum, and the Court must therefore place it in its proper linguistic, philosophical and historical contexts. The South African Constitutional Court has emphasised the context and legislative history of the provision[45].

I argue that recourse to these factors does not constitute recourse to an "all things considered" moral or value judgment on the part of the judge. The judge's discretion is limited in that he or she is bound to take into account only what appears in the Constitution itself. Text, context, objects are all derived from the constitutional instrument, placed there by the legislature in the form of the Constitutional Assembly. Legislative history, although not apparent from the text and although it has its own inherent practical difficulties, is unquestionably a justifiable aid in determining the purpose of a provision.

But what about values? Clearly, during the above interpretive processes the Court will be faced with value choices. I argue below that the Court is only entitled to have recourse to values which have been written into the constitutional text by the legislature. In this way, the Court shows deference

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[44] *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 per Dickson J (later Chief Justice).
[45] See Chapter 6 below for a discussion on the South African judiciary's approach.

to Parliament and remains to true their respective roles in terms of the separation of powers.

4. Source of Values

As I have stated, during the above interpretive processes the Court will be faced with value choices. In determining whether the ordinary meaning is contrary to the values in or underlying the Constitution, or in determining the *ratio legis* of a particular provision, it is clear that a value judgment on the part of the judge is called for. Values act as "reliable signposts *en route* to a decision"[46].

But the question remains: to which, and to whose, values can a judge justifiably have recourse? Is a judge entitled to source a system of values which will guide the interpretive process from outside the constitutional text? Many academics believe that a judge can. Davis, Chaskalson and De Waal argue that "constitutional choices cannot be made without recourse to a system of values which is external to the text in the sense that the values emanate from the ideas which underpin the text rather than the express wording thereof"[47]. Mokgoro J in *Makwanyane* notes that the interpretive task involves the making of value choices which can only be done "by referring to a system of values extraneous to the constitutional text itself"[48]. Sachs J in *Makwanyane* infers that values can be located outside the text. He refers to "the traditions, beliefs and values of all sectors of South African society" which need to be taken into account[49].

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[46] Davis, Chaskalson and De Waal at 4.
[47] Davis, Chaskalson and De Waal at 4.
[48] *Makwanyane* at para 302.
[49] *Makwanyane* at para 361.

However, and I believe that I am in good company here, I do not agree with the proposition that a judge may have recourse to "non-constitutional" values. This merely resurrects the criticisms levelled at the value-based models of interpretation and even the purposive model to the extent that it allows for such "free-floating" values. In other words, a judge is given too much discretion in deciding what such values should be. I argue that the values to which the Court gives effect must be those values which are apparent in or underiie the Constitution itself[50]. As Sachs J states, the search is for values "shared by the whole nation as expressed in the text of the Constitution"[51]. A judge has no democratic entitlement to source such values from outside the Constitution, be it from the judge's own sense of what it right or from what he or she perceives the general public to feel is right. Kentridge and Spitz assume that the text must determine values. They argue that the "object of the Court is to determine and to give effect to the values of the Constitution, obviously as expressed in the actual wording used by the drafters of the Constitution"[52]. Alfred Cockrell notes that Kentridge AJ's oft-quoted dictum in *Zuma*[53] seems to draw a distinction between values and constitutional text, and argues that it is misleading to speak of "values underlying the Constitution", at least if by this is implied that values are not incorporated into the Constitution[54]. Cockrell also warned that, if values are found from sources outside of the Constitution itself, they become too "free-floating" and allow for an "all-things-considered moral judgment", which brings the democratic

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[50] Mohamed J in *Du Plessis* at para 75. Professor Cockrell also argues along similar lines - Cockrell, A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1. This a point of departure from academics such as Dennis Davis, Stuart Woolman and Jonathan Klaaren.

[51] *S v Makwanyane* at para 362. Although later he refers more loosely to values "consistent with the text and spirit of the Constitution (at para 374).

[52] Kentridge and Spitz at 11-15, where they quote Kentridge AJ in *Mhlungu* at para 63.

[53] At para 17-18, that "If the language of the lawgiver is ignored in favour of a general resort to 'values', the result is not interpretation but divination".

[54] Cockrell 'Rainbow Jurisprudence' at 34. However, he later refers to values as being part of a "body of discourse outside of the Constitution", which has caused the interpretive enquiry to expand "away from the rule of the Constitution itself" - Cockrell 'The South African Bill of Rights and the "Duck/Rabbit"' (1996) 60 Modern Law Review 513 at 531.

integrity of the Court into question[55]. He argues that the Court's judgment on these matters should not take priority over that of the legislature. The judiciary, after all, is made up of "[j]udges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics"[56]. Mohamed J, I believe, is articulating a similar approach when he held that a decision "does involve in some measure a value judgment, but it is a value judgment which requires objectively to be formulated, having regard to the ordinary meaning of the words used" in the relevant section[57]. And the somewhat ominous warning from fairly influential quarters has been sounded that the legitimacy of the Courts depends on "whether they give effect to the values enshrined in the constitution"[58]. The Court's function is to enforce the constitutional rules, and it is not entitled to source its rules from anywhere less concrete than the Constitution itself. The doctrine of separation of powers demands that the judiciary respect the legislature as democratically entitled lawmaker. The legislature has chosen to preserve certain foundational values in the Constitution. The judiciary is democratically obliged to respect the legislature's choice and to enforce them.

Limiting values to only those located within the Constitution will, I believe allay Kentridge AJ's fears that, if the language used by the lawgiver is ignored in favour of a general resort to "values", the result in not interpretation but divination[59].

The difference between the value systems in the US and in India illustrates that underlying value systems make a difference to constitutional interpretation. Whereas the US Constitution is interpreted predominantly to

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[55] Cockrell 'Duck/Rabbit' at 535.
[56] Kriegler J in *S v Makwanyane* at para 207.
[57] *S v Makwanyane* at para 278.
[58] M Gumbi (Legal Adviser to Deputy President Thabo Mbeki) in her article entitled 'Diversity not answer to bias on the Bench' in the Business Day dated May 11, 1998.
[59] Kentridge AJ in *S v Zuma* at para 18.

protect individual rights, the Indian Constitution is interpreted with an emphasis on community or group rights. The German Constitution also talks of "important community interests"[60]. It remains to be seen in which direction our Constitution is moving, given that South Africa has a constitutional text which arguably supports both[61].

Limiting a judge's choice of values to those within the borders of the Constitution is limiting them to a fairly broad spectrum of values. Both the interim and final Constitutions contain a number of provisions which expressly mention values which are important in the interpretive process. For example, the values of open government, constitutional democracy, human dignity, equality, freedom, social justice, peaceful co-existence, fundamental rights, national unity, reconciliation, understanding, reparation, ubuntu (the list goes on) are all included[62]. In addition to these expressly mentioned values, it is argued that the Bill of Rights as a whole acts as a "locus of open-ended values"[63]. Is it of any assistance, in the South African context, to demand that the values to which the Court can have recourse must appear in the Constitution? Does the Constitution clearly express what values it holds dear? Broad provisions such as "the values which underlie an open and democratic society based on human dignity, freedom and equality"[64] are not what one could describe as specific. As Davis, Chaskalson and De Waal put it, there is a "considerable ideological and jurisprudential struggle on the part of the judiciary to develop a coherent set of constitutional values which emanate clearly from a Bill of Rights"[65]. On the other hand, their

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[60] *S v Makwanyane* at para 108.
[61] I do not believe that it is necessary to take this point any further for the purposes of this thesis.
[62] See the preamble, postamble, the whole of Chapter 3, particularly sections 33 and 35 of the interim Constitution. And the preamble, section 1 and the whole of Chapter 2, particularly sections 7, 36 and 39 of the final Constitution.
[63] Cockrell 'Rainbow Jurisprudence' at 8.
[64] Section 39 of the final Constitution.
[65] Davis, Chaskalson and De Waal at 4.

broadness is such that any of the constitutional theories referred to in Chapter 6 can arguably bring the values which they choose to endorse into the South Africa Constitution. A Court as fortunate as the South African Constitutional Court has recourse to wide range of values. But this may not always be the case for our judiciary. And the principle remains: a Court is only entitled to give effect to the value system chosen by the legislature.

In this way, the issue of the countermajoritarian dilemma or the issue of the Court's assuming an undemocratic and illegitimate power for itself is addressed. The Court is not giving effect to free-floating values of the judge's particular choice. The Court is giving effect to the political ideals of a democratically elected and accountable legislature, which has the democratic legitimacy and capacity to determine what the content of the Constitution should be. This deference to Parliament is determined by the doctrine of separation of powers.

There is, of course, an exception to this rule which I have attempted to establish over the previous few Chapters. This exception relates to the Court's ability to protect the ideal of constitutional democracy itself from invasion by the legislature. I argue that the Court is entitled in certain specified circumstances not to show deference to Parliament and that it can have recourse to values which may fall outside the borders of the Constitution. I agree with Cass Sunstein when he argues that the values which protect democratic processes are immutable. I elaborate below.

2. THE LIMITATIONS CLAUSE

Before bringing this thesis to a close with my arguments regarding an activist Court, the question of South Africa's limitation clause[66] needs briefly to be dealt with. The effect of the limitations clause is not only to incorporate certain values into the interpretive process, but it also lays down the interpretive procedures which the Court should follow. The import of the clause as a whole, and the reason for its inclusion into the Bill of Rights, is that it expressly permits the state to interfere with an individual's fundamental rights. But what it also does is confirm the Court's express entitlement to interfere with state activity where it finds that the state has acted unreasonably and unjustifiably. As Mureinik has described the (interim) Constitution, it is a "bridge from a culture of authority to a culture of justification"[67]. The Bill of Rights is a self-imposed standard against which state conduct is measured. Although the legislature created this prior constitutional commitment and placed the obligation on itself (and its partners in government) to "respect, promote and fulfil" this standard of conduct[68], it nevertheless reserved for itself some measure of control by including an express provision to the effect that it is entitled to fall short of the standard, provided its actions pass a test of reasonableness and justifiability.

The introduction of the limitations test has created a two-stage enquiry into the constitutional validity of government action. The first stage looks at the meaning and scope of the right in question and ascertains whether the action complained of breaches the right so defined. The second stage then ascertains whether such breach is reasonable and justifiable, and therefore

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[66] Section 36 of the final Constitution, which provides that rights may be limited in a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[67] Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31 at 32.

[68] Section 7(2) of the final Constitution.

nevertheless constitutional. Kentridge AJ summed this up: "First, has there been a contravention of a guaranteed right? If so, is it justified under the limitations clause?"[69] The Court does not look at whether the state is "clearly wrong", but rather at "whether the decision of the state is justifiable according to the criteria" prescribed by the limitations clause[70]. Measuring government conduct under this clause involves the weighing up of competing values by the Court and ultimately an assessment based on proportionality[71]. The Court tests the state's actions according to whether, firstly, they are rationally connected to their stated objective, secondly, they impair the right as little as possible, and thirdly, there is proportionality between the effects of the actions and its objectives[72].

There is a difference of opinion on whether, during the first stage of interpretation, the Court should be prepared to give a broad interpretation to the right in question, in the full knowledge that the limitations enquiry will "catch" any unconstitutional behaviour. Chaskalson P is of the opinion that this is the correct approach[73]. I do not believe that this justifiable. There is no need to introduce broad or generous interpretations merely because a second test is to follow. Kentridge and Spitz agree. They argue that the limitations clause does not "obviate the need for the careful delineation of rights at the first stage"[74]. The Court must interpret the rights provision in accordance with the principles proposed above, namely, it must look at its purpose in order to ascertain its meaning and scope. If on such an interpretation of the right in question, the state action is constitutional, then

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[69] *S v Zuma* at para 21.
[70] Chaskalson P in *S v Makwanyane* at para 102. It is interesting to note that Chaskalson P raised the issue of the countermajoritarian dilemma in the context of the limitations clause (at para 107).
[71] Chaskalson P in *S v Makwanyane* at para 104.
[72] Chaskalson P in *S v Makwanyane* at para 105, where he refers to the oft-cited Canadian judgment of *R v Oakes* (1986) 19 CRR 308 at 337. The test for proportionality is more or less encapsulated in section 36(1)(a)-(e) of the final Constitution.
[73] *S v Makwanyane* at para 95.
[74] Kentridge and Spitz at 11-32.

there is no need to test the action's reasonableness and justifiability. If, however, the state's action breaches the right so defined, then the state must justify to the Court that its actions are

reasonable and justifiable. A further point in this regard is that it is irrational to give a generous interpretation to the rights and then to insist on a stringent standard of justification under the limitations clause. The Court must adopt the same standard for both the interpretation of rights and the interpretation of the limitations clause[75].

What the Court is essentially doing is striking a balance between deference (allowing the democratic process of an elected Parliament to take its natural course), while ensuring that the framework of values as contained in the Constitution continue to form the broad context within which social, political and economic activity takes place[76]. In the context of the South African (and Canadian) Constitution and the specific wording of its limitations clause, it is therefore probably more appropriate to ask not when can the Court interfere with Parliament's actions, but rather when can Parliament's actions interfere with an individual's rights. This is so because the legislature itself imposed a high standard of conduct against which it agreed to be tested, and the Court, as a forum of principle and as the body selected and most suited to testing whether the state has complied with its promise, is therefore obliged to carry out the legislature's wishes as expressed in the Constitution.

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[75] Hogg 'Interpreting the Charter of Rights' (1990) 28 Osgoode Hall LR 817 at 819, quoted in Davis ibid at 117.

[76] Davis, D 'Democracy - Its Influence on the Process of Constitutional Interpretation' (1994) 10 SAJHR 103 at 112.

3. CONSTITUTIONAL AMENDMENT

Ultimately my argument rests on the contention that it is Parliament's function to ensure that the Constitution reflects the public will. I argue that if the Constitution is growing outdated so that it ceases to encapsulate a new generations values and ideals, it is Parliament's function, and not the Court's, to bring it up to date. Kentridge AJ referred to this idea when, in looking at the potential iniquities which may follow upon his interpretation of a constitutional provision, he argued that it is open to Parliament (national or provincial) to remedy the situation by enacting relevant legislation[77]. This argument may not be valid in countries like the United States where amendment procedures are extremely onerous, and therefore legislative involvement is often not a viable alternative to judicial involvement. But the procedures laid down by the South African Constitution relating to constitutional amendment, although more onerous than those relating to the amendment of ordinary legislation, are nevertheless fairly straightforward by comparison to the procedures in some constitutional democracies.

Provisions of the South African Constitution can be amended fairly easily, but amendment is nevertheless subject to certain limitations. Limitations on amendment fall into two categories, the first of which relates to the procedural limitations required by the Constitution, and the second of which relates to the more nebulous category of substantive limitations. The procedural requirements vary for different provisions in the Constitution. All provisions of the Constitution, including the Bill of Rights, can be amended by a two-thirds majority in the National Assembly as well as in the National Council of Provinces, except for amendments to section 1, which require a 75% majority in the National Assembly and a two thirds majority in the

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[77] *S v Mhlungu* at para 81.

National Council of Provinces[78]. Other procedures include that the amendment must appear in a separate Bill, that it must be published in the national Government Gazette at least 30 days prior to the introduction of the Bill, and that it cannot be voted on until 30 days have elapsed since its introduction[79]. The idea behind these procedural requirements is clearly to avoid the "political agendas of ordinary majorities in the national Parliament" and that it is appropriate that the foundational provisions should therefore be less vulnerable to amendment than ordinary legislation[80].

The procedural aspects make it relatively easy for Parliament to amend the Constitution. This was in fact a concern of the Constitutional Court when it was required to certify the final draft of the Constitution. Constitutional Principle XV demanded that the final Constitution contain "special procedures involving special majorities" for amendment to the Constitution[81]. The Court concluded that the draft final Constitution did not contain sufficient special procedures and therefore sent the Constitutional Assembly back to the drawing board[82]. The Court was also concerned with the amendment procedures relating to the Bill of Rights, and concluded that a two-thirds majority in one House was not enough[83]. Hence the requirement in the final Constitution that such an amendment also requires a two-thirds majority in the National Council of Provinces.

Substantive limits on amendments of the Constitution are more controversial. Chaskalson P has noted that the interim Constitution did not require that the Bill of Rights should be immune from amendment or practically

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[78] Section 74 of the final Constitution. The two thirds majority in the National Council of Provinces is not required where an amendment does not affect the provinces.
[79] Sections 74(4), (5) and (6).
[80] Chaskalson P in *Certification I* at para 153.
[81] Contained in Schedule 4 to the interim Constitution.
[82] *Certification I* at paras 151-6. In *Certification II*, the Court indicated its acceptance of the amendment procedures in the form in which they appear in the final Constitution.
[83] *Certification I* at paras 157-9. The Court was required to look at Constitutional Principle II.

unamendable[84]. The Court is therefore acknowledging that the Bill of Rights can be amended. But do any substantive limits exist on the power of Parliament to amend the Constitution? For example, does Parliament have the power to do away with, say, the Bill of Rights altogether, or the Constitutional Court, or the power of judicial review? In other words, could Parliament do away with constitutional democracy itself? The South African Constitution contains no expressly stated substantive limits on amending power[85]. However, a number of arguments are put forward in terms of which substantive limits are implied. For instance, it could be argued that the Constitutional Principles contained in the interim Constitution, although now repealed, are expressive of the fundamental principles underlying the final Constitution and thereby place limits on Parliament's amending power[86]. In other words, it could be argued that, because the final Constitution could not be promulgated until it complied with these Principles, it would be anomalous now to allow Parliament to amend the Constitution to the extent that it does not comply with some or all the Principles[87]. It might also be argued that section 1 of the final Constitution serves to limit the amending power[88]. This section lays down the founding values of the Republic of South Africa (although it does not contain important basic values such as separation of powers, judicial review and an independent judiciary)[89]. Although section 1 itself it amendable (albeit by a 75% majority in the National Assembly and with the support of 6 of the 9 provinces), it could be argued that amendments inconsistent with the values of section 1 would be impermissible unless this

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[84] *Certification I* at para 159.
[85] Klaaren, J 'National Government' in Chapter 3 of CONLSA at 3-19.
[86] Klaaren ibid at 3-19. Henderson, A 'Cry, the Beloved Constitution? Constitutional Amendment, the Vanished Imperative of the Constitutional Principles and the Controlling Values of Section 1' (1997) 114 SALJ 542.
[87] Klaaren ibid at 3-20. It is interesting to note Chaskalson P's warning in *Certification I* that a "future Court should approach the meaning of the relevant provision ... on the basis that the meaning assigned to it by the Constitutional Court in the certification process is its correct interpretation" (at para 43).
[88] Henderson ibid at 548.
[89] Henderson argues that these values could be implied if the section is read purposively - Henderson ibid at 552.

section itself was amended. On the other side of the coin, this section is also used to argue that there are no substantive limits on Parliament's amending power. It is argued that if section 1 can be amended (which it can), then surely any other provision in the Constitution can also be amended[90]. Section 1 is therefore an ambiguous basis to argue that substantive limits exists on Parliament's amending power.

Those who of the view that there are no substantive limits on Parliament to amend the Constitution essentially base their arguments on the fact that deference to Parliament means that Parliament can make any changes it wishes to the Constitution, provided it follows the correct procedures. On the other hand, those who favour substantive limits argue that some amendments to the Constitution amount to more than mere amendments. Certain amendments amount to an abrogation of constitutional democracy itself. For this reason, these latter theorists argue that the Constitution has certain core or basic features which Parliament is never free to amend. Thus, it is argued, the "basic features" doctrine places substantive limitations on the manner in which the legislature can amend the constitutional text.

The "basic features" doctrine has its origins in India. In the watershed case of *Kesavananda v State of Kerala*[91], the Indian Supreme Court bravely[92] concluded that Parliament cannot amend the Constitution so as to "touch the foundation or to alter the basic institutional pattern" of the Constitution[93]. This principle the Court had to read into the Indian Constitution as the text itself seemingly conferred unlimited power of amendment on the Indian

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[90] Klaaren ibid at 3-22.
[91] AIR 1973 SC 1461, discussed in Chapter 5 above.
[92] This was described as "an outstanding feat of judicial statesmanship" in William Wade's 'Constitutions - Bedrock or Quicksand?' in Public Law in Britain and India (1992) 1 at 12, quoted in Henderson ibid at 553.
[93] Per Khanna J at para 1437, quoted in Klaaren ibid at 3-21.

Parliament[94]. The Court managed to this by interpreting the word "amendment" to exclude the power to completely abrogate the Constitution and to replace it with an entirely new Constitution. Although the Court had unilaterally and controversially taken it upon itself to limit Parliament's power in this manner, in the case in question the Court concluded that the right to property was not an essential feature of the Constitution and could therefore be repealed. In fact, the Court seldom exercises this doctrine and has only applied it to amendments relating to the rule of law and the separation of powers between the judiciary and the legislature[95].

In South Africa, in the *Kwa-Zulu Natal*[96] case, the Court left open the question of whether or not the basic features doctrine would be incorporated into South African law[97]. Mohamed DP referred to the Indian authority on this doctrine and noted that the basic features which the Court protected in this manner included the supremacy of the Constitution itself, the rule of law, the principle of equality, the independence of the judiciary, and judicial review[98].

The basic features doctrine is controversial for all the reasons that an "all things considered" approach to constitutional interpretation is controversial. It places too much discretion in the hands of the judiciary in a way that is hard to justify in a democratic system of majoritarian government. As it has been argued, it gives "a very wide discretion to the judges to say what they consider to be the basic and unalterable law of the land"[99]. In effect, in reaction to a proposed amendment to section 1 of the final Constitution, the

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[94] Article 368 of the Indian Constitution, cited in Klaaren ibid at 3-21.
[95] Klaaren ibid at 3-21.
[96] *Premier of Kwa-Zulu Natal and others v President of the Republic of South Africa and other* 1995 (12) BCLR 1561 (CC), per Mohamed DP.
[97] In the case in question, the Court concluded that the proposed amendments did not conceivably fall within the category of basic features (at para 49).
[98] *Kwa-Zulu Natal* at para 48.
[99] Wade 'Constitutions - Bedrock or Quicksand?' ibid at 12, quoted in Henderson ibid at 553.

Court would be confronting a 75% majority of an elected Parliament. This could be described not merely as activist but as revolutionary[100].

Can a Court justify this power? I believe that it can and should. As I argue below, a Court is entitled not to defer to Parliament in a democratic system of government when the Court is acting to protect that system of government itself. In other words, the Court is justified in defying Parliament when Parliament is seeking to abrogate or destroy the essential features of constitutional democracy itself. This does not limit self-government through representative government, but rather it is essential for the continued survival of representative government.

4. THE ACTIVIST COURT

Ultimately, having proposed and based my argument on the notion that the judiciary must show deference to Parliament, the million dollar question arises: when is the Court entitled not to show deference to Parliament? When is the Court entitled to move beyond the Constitution and review legislative and executive acts without recourse to the legislature's values? In other words, when is an activist Court justifiable in a constitutional democracy? By activist, I mean a Court which, by exercising its power of judicial review, strikes down legislative enactments on the basis of values which are not sourced in the Constitution. In this sense, the Court is defying Parliament by not having recourse to Parliament's chosen values, but rather to its own.

Cass Sunstein emphasises an overriding commitment to a certain conception of democracy, which entails "serious limits on the appropriate role of the Courts. But it also suggests that constitutionalism does not entail unlimited

[100] Henderson ibid at 554.

majoritarianism, and that Courts do have an important, though secondary, part to play"[101]. He argues that a general commitment to "deliberative democracy" helps to explain when an aggressive role for the Constitution is most appropriate. It also explains why Courts should usually be reluctant to intrude into politics[102].

I agree with Sunstein when he argues that an aggressive role for the Court is justified (in other words, recourse to "non-Constitution" values) in only two circumstances: firstly, when the rights involved are central to the democratic process (for example, the right to vote and to speak), and secondly, when groups or interests which face obstacles to organisation or pervasive prejudice or hostility (for example, homosexuals) are unlikely to receive a fair hearing in the legislative process[103]. In this sense, Sunstein argues that the Court's notion of what values are immutable are limited to those values which protect democratic processes and which prevent prejudice. I agree that the Court's power of judicial review makes it a priority to protect these processes. For this reason I agree with the reasoning behind the "basic features" approach to constitutional amendment, in terms of which the Court is entitled to prevent the legislature from making amendments to the Constitution which have the effect of abrogating its basic features[104]. Such features include its democratic, secular nature and constitutional government itself. The Court can impose this on Parliament and not have recourse to values enunciated in the Constitution. As Davis, Chaskalson and De Waal argue, a Court "may legitimately review legislative and executive acts without reference to the

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[101] Sunstein The Partial Constitution at 11.
[102] Sunstein at 123.
[103] Sunstein at 142.
[104] For a discussion on this doctrine, see above.

legislature's values when those acts interfere with the possibility of equal participation in the affairs of society"[105].

My argument has parallels with the judgment of Khanna J in the Indian case of *Kesavananda*[106]. Khanna J's conclusion (that a Constitution contains certain core features which cannot be removed by Parliament) is based on a respect for Parliament's democratic credentials. He did not share the majority's general fear of parliamentary power and criticised his fellow judges' argument as essentially an argument of fear and distrust in the majority of representatives of the people"[107]. But he was prepared to limit Parliament's power in order to protect the "basic institutional character of the state", which Parliament must leave intact"[108]. In other words, Khanna's basic argument is that Parliament must be shown due deference by the Court, except where Parliament attempts to tinker with constitutional democracy itself. In these circumstances, the Court will be prepared to defy Parliament in order to protect democratic rule.

Only in the circumstances referred to above is a Court democratically entitled to move beyond the constitutional text and have recourse to values not provided therein. Such values are limited to those values which ensure the continuation of democratic and constitutional rule. This approach is therefore justifiable (in the sense that it is not countermajoritarian) because it is required in order to protect democracy itself. As Sunstein puts it, many rights are indispensable to democracy and, "[i]f we protect such rights through the Constitution, we do not compromise self-government at all. On the contrary, self-government depends for its existence on firmly protected democratic

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[105] Davis, Chaskalson and De Waal at 22.
[106] Discussed in detail in Chapter 5 above.
[107] *Kesavananda* at para 1427, quoted in Davis, Chaskalson and De Waal at 43.
[108] Davis, Chaskalson and De Waal at 43.

rights. Constitutionalism can thus guarantee the preconditions for democracy by limiting the power of majorities to eliminate those preconditions"[109].

Democracy itself therefore sometimes requires the Court to act undemocratically. The Court has the legitimate capacity to defy an elected Parliament when that Parliament threatens the continued existence of democratic and constitutional government. Other than in these dire circumstances, the Court is obliged to give the respect to Parliament which it, as the duly elected representative of the people, deserves.

[109] Sunstein at 142.

CHAPTER 8

CONCLUSION

This thesis attempted to explore the democratic entitlement of the judiciary to impose its will on the government of a nation. The issues which were raised related to the democratic entitlement of the judiciary to trump the majoritarian wishes of the legislature. The questions which were posed included whether the power of judicial review is countermajoritarian in a constitutional democracy, what factors serve as limitations on a judge's discretion in the interpretive process, what or whose values play a determining role in constitutional interpretation, and when is political interference on the part of the judiciary justifiable. I attempted to address these issues by rolling them into a theory of constitutional interpretation which effectively declares that the judiciary will only retain its democratic credibility if it shows deference to the legislature.

In arriving at this conclusion, I set off by looking backwards, at the history of statutory interpretation in South Africa in the period leading up to the introduction of the interim Constitution and its justiciable Bill of Rights in 1994. I offered a fairly uncontroversial explanation for the difficulties which the South African judiciary is having in adjusting to its new constitutional obligations. The judiciary, seeped in the English tradition of parliamentary sovereignty, is struggling to break out of a mindset of slavish deference to Parliament and to embrace its new role as watchdog of government. The Constitutional Court itself has to date failed to articulate clearly a comprehensive theory of constitutional interpretation.

The next step was to gain some insight into the countermajoritarian dilemma, and to ascertain whether it is in fact a dilemma at all. I noted that arguments against the power of judicial review are predicated on the idea that majoritarianism is the most fundamental aspect of democratic rule. I mentioned various theories which have developed in an attempt to overcome the countermajoritarian dilemma, for example, the argument that, because the Constitution is the document of "the people", the people themselves have consented to constrain themselves. I argued that the fact that the power of judicial review is not majoritarian is not relevant. However, the dilemma still matters because judicial review could be perceived as being undemocratic. I argued that constitutional democracy is a specific kind of democracy which embraces more fundamental aspects than majoritarianism. Constitutionalism means that there are characteristics fundamental to democracy which cannot be amended or destroyed even by a majority government. I concluded therefore that, merely because the power of judicial review is countermajoritarian, this does not render it undemocratic. Judicial review is therefore justifiable in a constitutional democracy.

However, having concluded that the power of judicial review itself is justifiable in a democracy, I argued that the judiciary may nevertheless be criticised if it exercises the power in a manner which is inconsistent with democratic principles. I argued that the Court must exercise its power of judicial review in a manner which is most consistent with democratic principles. Democratic principle therefore acts as a limiting factor on the manner in which the judiciary exerts its authority over its partners in government. I concluded that this essentially means that the judiciary must adopt a model of constitutional interpretation which is in line with one of the most fundamental principles underlying democratic rule, which I argued to be the doctrine of separation of powers.

Respect for the doctrine of separation of powers means that the Court, when called upon to give meaning to a constitutional provision, must have respect for the different roles, functions and capacities of the three branches of government to which each is democratically entitled. After examining the application of this doctrine in South Africa, I argued that the interrelationship between the doctrine of separation of powers and the Constitution assists in determining the roles of each branch of government. I concluded that the role of the judiciary is, firstly, that of arbitrator of disputes (its traditional role) and, secondly, watchdog of government (its extended role resulting from its constitutional power to strike down actions of Parliament and the executive). This role of the Court acts as a limitation on judicial power. The judiciary's share of power in the constitutional scheme of government relates to dispute resolution and not to the administration of government. It is obliged to respect the role of the legislature, as maker of laws and formulator of policy. I argued that, by adhering to the principles underlying the doctrine of separation of powers, namely, by respecting that each branch of government has differing democratic roles and entitlements, the Court's exercise of its power of judicial review will be justifiable. Because the independence of the judiciary is critical to the functioning of a healthy democracy and ultimately determines whether or not the Court is able to fulfil its constitutional obligations impartially and without prejudice, fear or favour, I briefly looked at the selection procedures for South African judges and concluded that it remains to be seen whether South Africa's Constitutional Court will be essentially independent.

In order to substantiate my argument that the judiciary is not entitled to participate actively in the administration of democratic government, I looked at the examples set by and comparative experiences of the USA and India. The US Supreme Court has been the subject of much criticism for the manner in which it systematically and routinely encroaches into the

legislative and executive arena. I looked particularly at the arguments of Robert Nagel and Robert Bork, who, although proposing different solutions, argue that the Supreme Court has gone too far. I concluded that, in a more volatile political climate such as South Africa's, an activist Court may expect to receive more than mere criticism, and a call for its removal from the political landscape altogether is not inconceivable. The experience of the Indian Supreme Court I argued was more pertinent to South Africa because the Indian Parliament also initially carried tremendous popular and moral support. But when the Indian judiciary defied the Indian legislature in the manner in which it interpreted its Constitution, the Indian Supreme Court was almost done away with. The result of such confrontation was not a country with a Supreme Court seen as being the champion of people's rights, but rather a Supreme Court seen as the last bastion of elitism. I concluded that the Indian experience illustrates that fears relating to the legitimacy of the Court's position in South Africa are well-founded.

I then analysed the models of interpretation which are enjoying some popularity in constitutional circles at the moment, having first noted that constitutional interpretation is indeed different to the interpretation of ordinary legislation and that it requires its own set of interpretive principles. I concluded that none of these models of constitutional interpretation, which have developed in comparative jurisdictions and locally, offers a complete model of interpretation ensuring that the judiciary exercise its power of judicial review democratically. Briefly my arguments ran as follows: Beginning with the doctrine of original intent, I argued that this ultimate form deference to Parliament on its own falls short, predominantly because of its failure to take into account the value-laden nature of constitutional review and because practically it is difficult to determine exactly who intended what at the time of ratification of the constitutional text. I then dealt with the political process theory of John Hart Ely, and again concluded that its attempt to deny

the value-laden nature of judicial review renders it unsuitable as a model of interpretation. I referred to similar objections raised to Michael Klarman's version of the political process theory. However, Cass Sunstein's version of the political process approach, which acknowledges the substantive nature of judicial review, I accepted not as a complete model of interpretation but rather to justify when an activist Court is legitimate. His model allows a Court to interfere with Parliament's wishes only to protect constitutional and democratic government itself.

At the other end of the spectrum, I looked at models of interpretation based on ethics or fundamental values. In terms of these models, the Court is required to give content to open-textured and indeterminate constitutional provisions by looking to sources of guidance other than the constitutional text. I noted that value-based theorists differ on what these sources should be. I criticised Dworkin's model and those also advocating morality as an independent ground for decision-making as they do not offer any limitations on a judge's discretion.

I then dealt with South Africa's most popular model of interpretation, namely, the purposive approach, which I noted is a form of value-based approach emphasising the need to look at the purpose of a constitutional provision. The purpose of a constitutional provision is ascertained by referring to a number of factors emanating from the constitutional text, including the text itself and the context of the provision in question. The only valid ground for criticising this model of interpretation, in my view, is that at this stage of its development in South Africa it is glaringly vague. I noted that there is no consensus on whether the ordinary meaning of the text can be departed from in favour of its purpose. Nor is there any agreement on the source of the values to which a judge can have recourse, more particularly, whether values need to sourced within the Constitution or can be sourced from an external

source. I therefore concluded that, to the extent that the purposive approach allows for an "all things considered" approach to value judgments, the purposive approach can be criticised along the same lines as the pure value-based models, namely, it allows for too much judicial discretion.

Lastly, I referred briefly to a fairly new model of interpretation in South Africa, namely, the structural or institutional approach. This model seeks to emphasise the relationship between institutions of government and to draw rules of interpretation from these relationships. It encourages the Court to recognise and respect the roles, functions and independence of the three institutions of government. I agreed with the conclusion of this model, namely, that the institutional structures of government need to be recognised and respected by the judiciary when its engages in constitutional review. I concluded that, from a pragmatic perspective, the Court should avoid handing down judgments, particularly on socio-economic rights issues, with which it knows the legislature or executive cannot comply. I briefly discussed how judicial remedies can also dictate to a large degree how the Court confronts the countermajoritarian dilemma.

I then laid down my proposal for an appropriate model of constitutional interpretation which was predicated on the fact that, what the quest for democracy leads to, as determined by the doctrine of separation of powers, is a need for the judiciary to show defence to Parliament. My argument ran as follows: Firstly, deference to Parliament means that the judiciary must respect the language used by the legislature in the constitutional text and must attribute to such language its ordinary meaning. The ordinary meaning of a constitutional provision must be sought in the light of the context of that provision, as well as the character and origin of Constitution itself. I noted that this point, namely, that a plain reading of the text is a starting point, has repeatedly been articulated by the South African Constitutional Court. This

interpretation focused on the literal meaning of words but did not attribute any finality to it.

I noted that emphasising the plain meaning of a constitutional provision is often not that useful when interpreting provisions such as the vague and broadly phrased rights clauses. Therefore I argued that, in the case of indeterminacy or (and I acknowledged that this may be controversial) where the plain interpretation leads to a meaning which the judge believes to be contrary to the values in or underlying the Constitution, the Court is entitled to have regard to the *ratio legis* or purpose of the constitutional provision in question. And the value judgments which the Court will inevitably have to make during these processes cannot be made in an "all things considered" manner. The values to which the Court gives effect must be those values which are contained in the Constitution itself. I emphasised that deference to Parliament dictated that the Court is obliged to follow the legislature's choice of values contained in the Constitution. Only in this way can the purposive approach be justified in a democracy.

Having adopted a purposivist approach to interpretation, I then looked at some of the issues raised by the South African Constitution's limitations clause and the two-stage enquiry which it introduces into the interpretive process. I noted that what the Court is essentially doing is striking a balance between deference (allowing the democratic process of an elected Parliament to take its natural course), while ensuring that the framework of values as contained in the Constitution continue to form the broad context within which social, political and economic activity takes place. I argued that whatever model of interpretation is applied during the first stage must also be applied to the limitations clause during the second phase and therefore disagreed with the judiciary's frequent assertion that a generous or broad

interpretation is called for during stage one because any unconstitutional behaviour could still be "caught" in stage two.

The issue of constitutional amendment also required some attention as ultimately my argument rests on the contention that it is Parliament's function to ensure that the Constitution reflects the public will. I argued that it is relatively easy in South Africa to amend the Constitution, particularly compared to some constitutional democracies such as the United States. I therefore argue that, if the Constitution is growing outdated, then it is up to Parliament and not the Court to bring it up to date. I discussed the basic features doctrine, which is particularly relevant to my conclusion regarding when a Court is justified in defying Parliament's wishes.

And finally, having proposed and based my argument on the notion that the judiciary must show deference to Parliament, I attempt to address the question: when is the Court entitled not to show deference to Parliament? When is a Court entitled to move beyond the Constitution and review legislative and executive acts without recourse to the legislature's values? In other words, when is an activist Court justifiable in a constitutional democracy? I agreed with Sunstein when he argues that the Court is entitled to protect values which are immutable, and that such values are limited to those which protect democratic processes and which prevent prejudice. I concluded that only in these circumstances is a Court democratically entitled to move beyond the constitutional text and have recourse to values not provided therein. I argued that this approach is justifiable in a constitutional democracy because it is required in order to protect such constitutional democracy itself.

I do not propose that this model will offer the "right" answer to a constitutional problem. But I do argue that it as a model of constitutional interpretation

which not only provides guidelines as to how a judge should give meaning to a constitutional provision, but it also justifies the use of the power of judicial review in a constitutional democracy. Although some academics argue for a model of interpretation which should consistently produce similar results, no matter the different judges' predilections[1], I do not believe this is either necessary or possible. It is generally accepted that there is not only one meaning which can correctly be attributed to a constitutional provision. Kentridge AJ notes in *Zuma* that he is aware of "the fallacy of supposing that general language must have a single 'objective' meaning"[2]. I agree that "[n]o single method of reading the text is ... sovereign or can be 'proved' to be 'the correct one'"[3], and with Sachs J when he says "I regard the question of interpretation to be one to which there can never be an absolute and definitive answer..."[4]. What is required from a judge is that the meaning he or she gives to a constitutional provision must be capable of being justified within the context of the Constitution as a whole and must instil a sense of rationality, fairness and justice. What this essentially boils done to is the simple principle that not only must justice be done, it must also be seen to be done. I argue that the above approach allows the judiciary to carry out its constitutional obligations with courage and impartiality, while simultaneously limiting the opportunity for judges to be seduced into participating too actively in the political game, a game in which it is only democratically entitled to umpire, and not to play.

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[1] Davis, Chaskalson and De Waal.
[2] *S v Zuma* at paras 17-8. He re-iterates this view in *Mhlungu* at para 84.
[3] Du Plessis 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12 SAJHR 214 at 221.
[4] Sachs J in *S v Mhlungu* 1995 (7) BCLR 793 (CC) at para 129.

CHAPTER 9

BIBLIOGRAPHY

CASES :

1. *Certification I* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)
2. *Certification II* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC)
3. *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC)
4. *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC)
5. *Executive Council, Western Cape Legislature v President of Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1298 (CC)
6. *Ferreira v Levin* 1996 (1) South Africa 984 (CC), 1996 (1) BCLR 1 (CC)
7. *Golak Nath v State of Punjab* AIR 1967 SC 1643.
8. *Kesavananda v State of Kerala* AIR 1973 SC 1461
9. *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC)
10. *Nortje v Attorney-General of the Cape* 1995 (2) SA 460 (C), 1995 (2) BCLR 236 (C)
11. *Premier, Kwazulu Natal Legislature v President of Republic of South Africa & Others* 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC)
12. *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)
13. *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E), 1995 (1) BCLR 75 (E)
14. *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC)
15. *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)
16. *S v Pennington* 1997 (4) SA 1076 (CC)
17. *S v Williams* 1995 (3) SA 632 (CC)
18. *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)

19. *Shabalala v Attorney-General (Transvaal)* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)
20. *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC)
21. *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC)

BOOKS AND ARTICLES :

1. Baxter, L; Administrative Law; Juta; Cape Town; 1984
2. Bobbitt, Philip; Constitutional Interpretation; Massachusetts; 1991
3. Bork, Robert; The Tempting of America : The Political Seduction of the Law; New York; The Free Press; 1990.
4. Cachalia, A; Cheadle, H; Davis, D; Haysom, N; Maduna, P; Marcus, G; Fundamenta' Rights in the New Constitution; Juta; Cape Town; 1994
5. Carpenter, G; Introduction to South African Constitutional Law; Butterworths; Durban; 1987
6. Chaskalson, M; Kentridge, J; Klaaren, J; Marcus, G; Spitz, D; Woolman, S (eds); Constitutional Law of South Africa; Juta; Cape Town; loose-leaf (revised 1996)
7. Cockram, G-M; Interpretation of Statutes; 3rd Edition; Juta; Cape Town; 1987
8. Cockrell, A 'Rainbow Jurisprudence' (1996) 12 SAJHR 1
9. Cockrell, A 'The South African Bill of Rights and the "Duck/Rabbit"" (1997) 60 Modern Law Review 513
10. Corder, H 'Administrative Justice in the Final Constitution' (1997) 13 SAJHR 28
11. Corder, H 'Lessons from (North) America (Beware the "legalisation of politics" and the "political seduction of the law")' (1992) 109 SALJ 204
12. Croley 'The majoritarian difficulty : Elective judges and the rule of law' (1995) Chicago Law Review 689, 690

13. Davis, D 'Administrative Justice in a Democratic South Africa' (1993) Administrative Law Reform 21
14. Davis, D 'Democracy - Its Influence on the Process of Constitutional Interpretation' (1994) 10 SAJHR 103
15. Davis, D 'Integrity and Ideology: Towards a Critical Theory of the Judicial Function' (1995) 112 SALJ 104.
16. Davison and Rees-Mogg; The Sovereign Individual; Macmillan Publishers; London; 1997
17. Du Plessis, L 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12 SAJHR 214
18. Du Plessis, L and De Ville, J 'Bills of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects' (1993) Stell L R 356 at 357
19. Dworkin, Ronald; Taking Rights Seriously; Duckworth Publishers; Great Britain; 1977
20. Ely, John Hart; Democracy and Distrust : A Theory of Judicial Review; 1980
21. Fagan, A 'In Defence of the Obvious - Ordinary Meaning and the Identification of Constitutional Rules' 1995 (11) SAJHR 545
22. Fagan, A 'Constitutional Adjudication in South Africa' D Phil Thesis in Law submitted to Oxford University 1997.
23. Fagan, E 'The Longest Erratum Note in History - a case note on S v Mhlungu' (1996) 12 SAJHR 79
24. Gutto, S 'The Constitutional Court's Opening Salvo in Confronting Fundamental "Mischief" of the Past and Sowing Seeds for the New South African Jurisprudence' (1996) 12 SAJHR 47
25. Henderson, A 'Cry, the Beloved Constitution? Constitutional Amendment, the Vanished Imperative of the Constitutional Principles, and the Controlling Values of Section 1' (1997) 114 SALJ 542

26. Henderson , A 'Putting Section 1 to Work : Some Preliminary Thoughts on the First of the Founding Provisions of the New Constitution' (1998) 115 SALJ 215

27. Kentridge, J and Spitz, D; 'Interpretation' at 11-22 in Chaskalson, Kentridge, Klaaren, Marcus, Spitz and Woolman (eds) Constitutional Law of South Africa; 1996 ("CONLSA")

28. Kirby, J 'What is it really like to be a Justice of the High Court of Australia - a conversation between law students and Justice Kirby' (1997) 19 Sydney Law Review 520

29. Klaaren, J 'Constitutional Court Statistics for the 1995 Term' (1996) 12 SAJHR 39

30. Klaaren, J 'A Case Note on *Executive Council, Western Cape Legislature v President of Republic of South Africa & Others*' (1996) 12 SAJHR 158

31. Klaaren, J 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' (1997) 13 SAJHR 549

32. Klaaren, J 'Structures of Government in the 1996 Constitution : Putting Democracy Back into Human Rights' (1997) 13 SAJHR 3

33. Klug, H 'Constitutional Law' (1995) Annual Survey of South African Law at 1

34. Klug, H 'Striking Down Death - A Case Note on *S v Makwanyane*' (1996) 12 SAJHR 61

35. Klug, H 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 SAJHR 185

36. Komesar, N 'Back to the Future - An Institutional View of Meaning and Interpreting Constitutions' (1987) 81(2) North Western Univ LR 191

37. Kriel, R 'On How To Deal With Textual Ambiguity' (1997) 13 SAJHR 311

38. Marcus, G 'Interpreting the Chapter on Fundamental Rights' (1994) 10 SAJHR 92

39. Motala, Z 'Towards an Appropriate Understanding of the Separation of Powers, Accountability of the Executive and Public Service Under the New South African Order' (1995) 112 SALJ 503

40. Mureinik, E 'Constitutional Jurisprudence' (1995) Annual Survey of South African Law 25

41. Mureinik, E 'A Bridge To Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31

42. Nagel, RF; Constitutional Cultures - The Mentality and Consequences of Judicial Review; University of California Press; California; 1989

43. Rogers, J; Investment Biker; Adams Media Corp; Massachusetts; 1994

44. Sacks, V 'Multiculturism, Constitutionalism and the South African Constitution' (1997) Public Law at 672

45. Sarkin, J 'The Political Role of the South African Constitutional Court' (1997) 114 SALJ 134

46. Smith, N 'The Purposes Behind the Words - a case note on S v Mhlungu' (1996) 12 SAJHR 90

47. Sossin, L 'The Politics of Imagination' (Fall 1997) Vol XLVII University of Toronto Law Journal 523

48. Sunstein, Cass; The Partial Constitution; Massachusetts; 1993

49. Tribe, L American Constitutional Law (1988)

50. Van Wyk, Dugard, De Villiers and Davis; Rights and Constitutionalism in the New South African Order; Juta; Cape Town; 1996

51. Wefing, JB 'State Supreme Court Justices : Who are they?' (1997) 32 New England Law Review 47

52. White, J 'Administrative Law' (1995) Annual Survey of South African Law 43

53. Woolman, S and Davis, D 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions' (1996) 12 SAJHR 361

54. Zlotnick, M 'The Death Penalty and Public Opinion' (1996) 12 SAJHR 70

55. Zlotnick, M 'A Case Note on *S v Mhlungu*' (1996) 12 SAJHR 146

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Name of thesis Constitutional Interpretation Under The New South African Order Hofmeyr A J 1998

PUBLISHER:
University of the Witwatersrand, Johannesburg
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