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## Transformation and the Democratic Case for Judicial Review: The South African Experience

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*High Court of South Africa*

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# TRANSFORMATION AND THE DEMOCRATIC CASE FOR JUDICIAL REVIEW: THE SOUTH AFRICAN EXPERIENCE

Dennis M. Davis<sup>†</sup>

In 1994, South Africans voted in the country's first democratic election. In doing so, South Africans chose to be governed by a written constitution that included an ambitious bill of rights.<sup>1</sup> That document has been termed transformative by the Constitutional Court<sup>2</sup> and many commentators.<sup>3</sup> In a recent public lecture, Chief Justice Langa spoke of the text as a design to heal the wounds of the past and guide the country towards a better future.<sup>4</sup> Viewed in this way, the Chief Justice argued that the Constitution is in part a bridge between the unstable past and the uncertain future.<sup>5</sup> The Chief Justice continued in describing that a transformative constitution represents something greater, and may in fact be:

[a] way of looking at the world that creates a space which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected, and in which change is unpredictable, but the idea of change is constant.<sup>6</sup>

A careful reading of the Constitution supports the argument that the Constitution seeks the transformation of the society through the construction of a multi-cultural social democracy in South Africa.<sup>7</sup> This description of the Constitution as a societal transformative document is supported by the following seven provisions found within the text of the Constitution.

First, section 9 of the Constitution supports the conception of substantive equality in which the material conditions of citizens must be interrogated in promotion of the equality guarantee. In addition, section 9(3) contains a powerful

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<sup>1</sup> See Constitution of the Republic of South Africa Act 200 of 1993, S. AFR. (Interim) CONST. 1993 [hereinafter "Interim Constitution"] (initially the supreme law of South Africa was the Interim Constitution, passed by the 'white Parliament' following negotiations at the multi party negotiating forum). This Constitution was of application until the democratically elected Constitutional Assembly passed into law the Constitution of the Republic of South Africa Act 108 of 1996; see HASSAN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (Cape Town: Oxford 1998) (discussing its formulation).

<sup>2</sup> See *S v Makwanyane & Others* 1995 (3) SA 391 (CC) at para. 262 (S. Afr.) (proclaiming the transformative quality of the text in the Constitutional Court's first case addressing the issue, with then President of the Court Arthur Chaskalson).

<sup>3</sup> See Pius Langa, Chief Justice of South African Constitutional Court, Lecture at the University of Stellenbosch, South Africa: Transformative Constitutionalism (Oct. 9, 2006) available at <http://law.sun.ac.za/LangaSpeech.pdf> (discussing the most recent criticism).

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.*

<sup>7</sup> See generally Constitution of the Republic of South Africa Act 108 of 1996, S. AFR. CONST. 1996.

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anti-discrimination clause, which protects citizens not only against discrimination on the grounds of race and gender, but also on the grounds of sexual orientation, age, belief, opinion, and arguably, class.

Secondly, section 8 of the Constitution provides for the horizontal application of the Bill of Rights. In short, all power, whether originating in the state or in private organizations, is subject to scrutiny in terms of the provisions of the Bill of Rights, whenever this power is exercised in the public domain.

Next, section 23 protects a range of labour rights, including the right to strike, the right to organize collectively, and the right to form trade unions.

The fourth provision contains a range of socio-economic rights; these rights include the right to housing<sup>8</sup> and the right to health.<sup>9</sup> However interpreted, these clauses impose an obligation upon the State to ensure that no socio-economic programme can be introduced without taking account of the priorities of the poorest of the poor within South African society.

Section 31 of the Constitution contains a guarantee of cultural rights, and seeks to ensure that cultural identity is protected.

The sixth provision, which supports the Constitution as a societal transformative document, describes the foundational values of the constitutional text as an amalgam of equality, dignity, and freedom. Taken together, these values are different from the meaning of the parts. For example, it is not possible to contend for a negative conception of freedom as made famous by Isaiah Berlin.<sup>10</sup> The values of equality, dignity, and freedom provide the foundation upon which the constitutional text is based, a foundation upon which an egalitarian vision of South African society emerges. In terms of such vision, freedom without recognition of equality and dignity, and conversely equality, which crowds out freedom and individual dignity, cannot be sustained.

Finally, section 36 of the Constitution contains a limitation clause to ensure that the rights in the Constitution do not trump the policy of the democratically elected government. However, the government has to show adequate justification for the limitation if any policy restricts a constitutionally entrenched right. By ensuring a culture of justification rather than a juristocracy prevailed in the Constitution, the drafters sought to achieve a balance between constitutionalism and majoritarian democracy. The Constitution demands judges examine the justification for policy, rather than seek to impose their own policies, which would tilt the balance of power in favour of government by judiciary. A constitution which did not have this balance between constitutionalism and majoritarian democracy, and allowed judges to impose their own policies, would arguably erode democratic rule and invariably, erode the legitimacy of the constitutional enterprise.

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<sup>8</sup> *Id.* at § 26.

<sup>9</sup> *Id.* at § 27.

<sup>10</sup> ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 121-22 (Oxford University Press 1969).

## The Constitutional Court and Democracy

From 1994 to 2004, the South African public appeared to embrace the possibility of change as envisaged by the democratic model adopted in 1994. A decade later, if you listen to any talk radio program you will hear complaints about the Constitution; complaints that range from the unconstitutionality of the death penalty, to the recognition of gay marriage, and to the provision of procedural safeguards for the criminally accused. The common themes in the complaints are: 1.) a majority of citizens are opposed to these constitutional provisions as interpreted by the Constitutional Court; 2.) that hence it is undemocratic to prevent majority opinion from being implemented; and 3.) that the gap between majority opinion and the decision to declare the death penalty to be unconstitutional, for example, will cause the legal system to be viewed as illegitimate.

This vocal form of protest against the practice in a constitutional democracy where judges interpret a text called a written constitution, brings up two interrelated issues. First, why should the majority public opinion on important matters of public policy be constrained in perpetuity by a legal text, which, secondly, is interpreted by unelected judges who follow their own values in giving content to this text? The answers to these questions are not obvious, and unsurprisingly, South African judges hold differing opinions.

A recent decision of the Constitutional Court dealing with a challenge to an amendment to the laws governing termination of pregnancies is illustrative.<sup>11</sup> This decision reveals differences between the judges as to the role of courts in a constitutional democracy.<sup>12</sup> In this case, a group named Doctors for Life complained that the National Council of Provinces (“NCOP”)<sup>13</sup> passed certain health bills, including the Choice of Termination of Pregnancy Amendment Act,<sup>14</sup> without holding proper public hearings and ensuring adequate public participation. The failure of provincial legislatures to hold public hearings also became relevant, because the provinces are critical to the very purpose of the NCOP.<sup>15</sup>

Writing for the majority of the court, Justice Sandile Ngcobo correctly noted that this case contained an important question on the role of the public in the lawmaking process, and thus was “at the heart of our constitutional democracy.”<sup>16</sup> One important issue in the *Doctors for Life* case concerned the nature and scope of the constitutional obligations of a ‘legislative organ’ of the state to facilitate public involvement in its legislative process, along with the obligations

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<sup>11</sup> *Doctors for Life Int'l v Speaker of the Nat'l Assembly*, 2006 Case No. CCT 12/05 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/7605.PDF> [hereinafter *Doctors For Life Int'l*].

<sup>12</sup> *Id.* at para. 227.

<sup>13</sup> See S. AFR. CONST. 1996, *supra* note 7, at § 42-82 (The National Council of Provinces is the upper house of Parliament. It consists of 90 delegates, of whom each of the 9 Provinces are entitled to 10 delegates. It is modeled on the German Bundesrat).

<sup>14</sup> *Doctors for Life Int'l*, *supra* note 11, at para. 2-3.

<sup>15</sup> *Id.* at para. 5.

<sup>16</sup> *Id.* at para. 1.

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of legislative committees.<sup>17</sup> Another important issue concerned the extent to which the Constitutional Court may interfere in the processes of a legislative body in order to enforce the obligation to facilitate such public involvement.<sup>18</sup>

Justice Ngcobo exhaustively examined the constitutional importance of public involvement in the law making process.<sup>19</sup> He noted that:

In the overall scheme of the Constitution, the representative and participatory elements of our democracy should not be seen in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy.<sup>20</sup>

Later in his judgment, Justice Ngcobo observed that within African communities, the “imbizo” or “legotla” are the traditional methods of public participation, which should infuse the constitutional idea of participation in the legislative process.<sup>21</sup> Hence the principles to be protected by the court included the duty to provide meaningful opportunities for public participation in the law-making process, and the duty to take measures that ensured that “people have the ability to take advantage of the opportunities provided.”<sup>22</sup>

The majority of the court went on to hold that the NCOP has an important role to play in the national law-making process.<sup>23</sup> The NCOP represents the provinces to ensure that provincial interests are taken into consideration in the national law-making process.<sup>24</sup> In doing so, the provinces give voting mandates to their NCOP delegations.<sup>25</sup> Further, Parliament and the provincial legislatures have broad discretion to determine how best to fulfill their constitutional obligation to facilitate public involvement in a given case, as long as it is reasonable to do so.<sup>26</sup> The Court would not prescribe to Parliament what the manner or mechanisms of public participation should be, as the Court determined that the choice should be left to Parliament since the Court’s only task is to ensure that reasonable steps were taken.<sup>27</sup>

However, the Court went on to say that the duty will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity

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<sup>17</sup> *Id.* at para. 206.

<sup>18</sup> *Id.* at para. 211.

<sup>19</sup> *See id.* at para. 135.

<sup>20</sup> *Id.* at para. 115.

<sup>21</sup> *Id.* at para. 101 (discussing the Imbizo or legotla as indigenous descriptions for public consultation of the applicable community).

<sup>22</sup> *Id.* at para. 129.

<sup>23</sup> *Id.* at para. 84.

<sup>24</sup> *Id.* at para. 86.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at para. 145.

<sup>27</sup> *Id.* at para. 129; *see also id.* at para. 146.

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to be heard in the making of laws that will govern them.<sup>28</sup> In determining whether Parliament has acted reasonably, the Court will need to consider a number of factors, including the nature of the legislation and what Parliament itself has assessed as being the appropriate method of facilitating public involvement in a particular case.<sup>29</sup>

On the facts, Justice Ngcobo found that the Traditional Health Practitioners Act<sup>30</sup> and the Choice on Termination of Pregnancy Amendment Act<sup>31</sup> had generated great public interest at the NCOP, as evidenced by requests for public hearings.<sup>32</sup> In recognition thereof, the NCOP decided that public hearings would be held in the provinces and advised the interested groups of this fact.<sup>33</sup> However, a majority of the provinces did not hold hearings on these Bills because there was insufficient time to do so. Although this was known to the NCOP, they still did not hold public hearings.<sup>34</sup> For these reasons, Justice Ngcobo held that the failure by the NCOP to hold public hearings, in relation to the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act, was unreasonable.<sup>35</sup> He concluded that the NCOP did not comply with its obligation to facilitate public involvement, as contemplated by Section 72 of the Constitution.<sup>36</sup>

The majority of the Court thus decided that Parliament, in particular the NCOP, had not discharged its constitutional obligation of conducting sufficient public hearings before passing legislation of considerable public interest.<sup>37</sup> Therefore, the court insisted upon a dialogical process between the democratically elected legislature and the public before the amendment became law.<sup>38</sup>

In contrast, Justice Zac Yacoob, in a minority judgment, held that the Court should not impose obligations of consultation upon a democratically elected legislature.<sup>39</sup> By doing so the Court would undermine the scope of the legislature and the right to vote, which was designed to elect public representatives who would then have autonomy to make decisions on behalf of the public.<sup>40</sup> The core of Justice Yacoob's reasoning is found in the following passage:

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<sup>28</sup> *Id.* at para. 145.

<sup>29</sup> *Id.* at para. 128.

<sup>30</sup> Traditional Health Practitioners Act 35 of 2004.

<sup>31</sup> Choice of Termination of Pregnancy Amendment Act 38 of 2004.

<sup>32</sup> *Doctors for Life Int'l*, *supra* note 11, at para. 156.

<sup>33</sup> *Id.* at 158.

<sup>34</sup> *Id.* at 188.

<sup>35</sup> *Id.* at 189.

<sup>36</sup> *Id.* at 195; *see also* S. AFR. CONST. 1996, *supra* note 7, at § 72(1)(a) ("Public access to and involvement in National Council," provides that the NCOP must "facilitate public involvement in the legislative and other processes of the Council and its committees").

<sup>37</sup> *Doctors for Life Int'l*, *supra* note 11, at para. 213.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at para. 283 (Yacoob, J., dissenting); *see also id.* at 337 (Yacoob, J., dissenting).

<sup>40</sup> *Id.* at para. 292 (Yacoob, J., dissenting).

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Citizens of this country cast their votes in favour of political parties represented in the National Assembly and the provincial legislatures. . . It is these elected representatives that govern the people and their representative activities are the activities of the people. In passing legislation . . . members . . . do not act on their own whims but represent the people of this country. To undermine these representatives is to undermine the political will of the people . . . Constitutionally speaking it is the people of this country who, through their elected representatives pass laws.<sup>41</sup>

Whereas the minority judgment places great importance on the principle of representative democracy, the majority insists, with considerable persuasion, that the South African Constitution enshrines a principle of public deliberation which not even the peoples' representatives can take away. The division in the Court illustrates the point of debate, namely: how far should the rule of the Constitutional Court extend over the country's public representatives, including the will of the voters?

### A Juristocracy?

It should be accepted as trite that constitutional jurisprudence is never so text based that it can be wrenched away from the controversies of political theory. But if judges are free to give content to open ended constitutional rights in terms of their own political and jurisprudential commitments, how does the nation ever achieve constitutional rule based upon a shared set of norms? And if that cannot be achieved, then, are we not driven back to a majoritarian conception of democracy, which at the very least has the capacity to respond to the political will of the "people"? Viewed within the context of the case discussed above, this debate appears to admit a number of different answers. First, the Court extends judicial review beyond the concerns of traditional rights. It insists that the democratic model contained in the South African Constitution is one of deliberative, participative democracy, rather than representative democracy, where citizens vote but once every four or five years. Second, judicial review is confined to narrower questions of specified rights, and third, that rights should exist without the enforcement mechanism of judicial review.

Ronald Dworkin claims in a recent book that while citizens have a basic right to democratic procedures, including the right to vote and to participate actively in politics, there is no basic right to one form of democratic design.<sup>42</sup> In the South African case, the design chosen and on which citizens voted, was that of constitutional democracy. It cannot be said that by so choosing this model, the citizenry were duped into an undemocratic form of government. It was chosen by "we the

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<sup>41</sup> *Id.*

<sup>42</sup> RONALD DWORKIN, *JUSTICE IN ROBES*, 147-50 (The Belknap Press of Harvard University Press 2006).

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people” to ensure that certain foundational rights were enjoyed by all, regardless of access to political power at a transient moment in the history of the nation.<sup>43</sup>

Referring to the argument that this form of political model concentrates too much power in the hands of the individual judge, who is free to impose his or her views on the nation, Dworkin argues that judges do make value judgments when they decide these cases.<sup>44</sup> However, he adds that these are value judgments that need to make sense of the scope and ambition of the constitution read as a whole.<sup>45</sup> In addition, the doctrine of *stare decisis* ensures judges are constrained by the reading of previous judicial colleagues confronted with the same clauses.<sup>46</sup> In other words, judges are not free to impose their own view on the constitution, regardless of the text.<sup>47</sup> Some reading of the constitutional text as a whole and reference to precedent is required.<sup>48</sup>

Dworkin readily accepts that even the application of precedent requires a value judgment.<sup>49</sup> Judgments of relevant similarity are not made by mechanistic use of analogy. Rather, the judge has to determine whether the present dispute is of sufficient legal equivalence to the previously decided case so as to be followed.<sup>50</sup> Thus the judge does not, on this argument, decide cases by relying on her own values.<sup>51</sup> Instead, she strives to quarry out some more objective approach by asking what would be just in this situation. The concept of justice is sourced in the principles which underlie the legal system they are enjoined to protect.<sup>52</sup> Dworkin thus argues that judges must take account of the consequences of their decisions, not by their political or personal preferences, but directed by principles embedded in the legal system read as whole.<sup>53</sup> These are principles that guide the process of adjudication as to which consequences are relevant, and how these should be weighed.<sup>54</sup>

No matter the plausibility of this theory, the meaning of the constitutional text is invariably controversial and will remain contested. Legal values, such as predictability and clarity, simply do not stack up. These values give way invariably to argumentation and contestation of legal principle. As Jeremy Waldron observes in his review of Dworkin’s book:

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<sup>43</sup> For a thoughtful discussion on the negotiations that guided the transition to democracy, see ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTY: THE INSIDE STORY OF SOUTH AFRICA’S ROAD TO CHANGE* (University of Chicago Press 1992).

<sup>44</sup> DWORKIN, *supra* note 42, at 144.

<sup>45</sup> *Id.* at 117-39.

<sup>46</sup> *Id.* at 123.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 117-39.

<sup>49</sup> *Id.* at 144.

<sup>50</sup> *Id.* at 127.

<sup>51</sup> *Id.* at 117-39.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

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Citizens cannot plausibly insist that judges turn themselves into machines, that they reason in exactly the same way, or that they avoid any intellectual exertions that might show up the differences in values between them. But they can insist that any judge addressing their case should try as hard as he can, by his own lights, to judge them by standards that they have applied to others.<sup>55</sup>

A Dworkinian account of adjudication should not be adhered to since Dworkin's theory has been rigorously exposed from a non-foundationalist perspective. Non-foundationalists contend that a judge engages with the legal materials in question, and shapes these to fit the resolution of the dispute before her, in a manner that advances justice. Given that justice is an interpretive concept, and that judges may well seek to justify the chosen interpretation initially in the community's own understanding of what justice consists, this notion of a community meaning is invariably a contested concept. There is no single foundationalist key to unlock the problem. A "right" answer, in short, depends upon the reading of an individual judge or judges, located within a particular legal community with its own transient, but specific reading.

When judges seek to advance justice through law, "[they] do not pronounce ex cathedra, but creatively reshape old material into new designs".<sup>56</sup> As the Canadian constitutional scholar, Alan Hutchinson, comments, the "legal past" does not pull judges back, but rather "impels them forward" in their quest for justice.<sup>57</sup> As he states:

As such, great judges do not ignore the past nor obsess about it, but they work the past so as to realise its present possibilities for future innovation: they commit themselves to persuading us that the legal materials in the justice they might give rise to can be and ought to be seen in a very different light and shape. . . Judges are to be judged by the political merit of their practical performances, and not the conceptual coherence of their theoretical reflections.<sup>58</sup>

If the non-foundationalist account of adjudication is accepted, then there is simply no easy walk to judicial objectivity. No set of principles which Hercules, Dworkin's model judge, would be able to glean from the body of legal materials would allow him to produce but one correct answer in the image of *Law's Em-*

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<sup>55</sup> Jeremy Waldron, *How Judges Should Judge*, 53 *NEW YORK REVIEW OF BOOKS* (2006), available at [http://www.nybooks.com/articles/article-preview?article\\_id=19216](http://www.nybooks.com/articles/article-preview?article_id=19216).

<sup>56</sup> ALAN HUTCHINSON, *IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION* 322 (Duke University Press 2000). Apart from Hutchinson's work, which usefully exposes Dworkin, reference must be made to A Critique of Adjudication by Duncan Kennedy, the most rigorous progressive examination of adjudication and its profound limitations and ambiguities. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (Harvard University Press 1997). Within the South African context, see the seminal article: Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 *S. AFR. J. OF HUM. RTS.* 146 (1998).

<sup>57</sup> HUTCHINSON, *supra* note 56, at 323

<sup>58</sup> *Id.*

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pire.<sup>59</sup> Where then does this lead us in an attempt to develop an understanding of adjudication? Hutchinson suggests that by way of a case-by-case development of the law, judges will not feel obliged to revere present legal or political arrangements or revise them for the sake of it, but rather, “[t]hey will work to adapt legal doctrine so that it can accommodate to the understanding and practice of social life as a fluid game of dynamic possibilities.”<sup>60</sup>

This approach espoused by Hutchinson appears similar to that advocated by Chief Justice Langa. This is particularly true where the Chief Justice argues that transformation is inherently fluid as the country moves haltingly toward a just future, where justice is never settled nor ultimately determined.<sup>61</sup> In the same way, adjudication is never settled, for contestation and dialogue about judicial decisions can never be circumvented. For this reason, the Dworkinian demands for coherence and integrity notwithstanding, the interpretations of the judiciary will continue to be controversial, as will the extent to which the judiciary constitutionally interferes in the formulation and execution of public policy.

It is for this reason that theorists like Jeremy Waldron and Mark Tushnet have argued that because disagreements about rights are not unreasonable and that legitimate differences are inevitable, it is important that such disagreements are resolved by means of responsible deliberative mechanisms.<sup>62</sup> They contend that ordinary legislative procedures do this best, and that recourse to the elitism of a judiciary adds little to the process, save to produce a disenfranchisement and legalistic obfuscation of the fundamental moral disagreements in society about rights.<sup>63</sup>

Waldron contends that we overestimate the purchase of judicial review as a means to protect rights.<sup>64</sup> Deliberative processes by way of the legislature are the more democratic route.<sup>65</sup> Yet Waldron concedes that his model only works where four assumptions operate.<sup>66</sup> These include, first, that democratic institutions are in reasonably good working order; second, a set of judicial institutions in reasonably good working order to settle disputes and uphold the rule of law; third, that there is a general commitment on the part of most members of a society to the idea of individual and minority rights; and fourth, that there is a persistent and good faith disagreement about rights.<sup>67</sup>

Significantly, Waldron accepts that the development of a rights culture can and often is accompanied by a Bill of Rights, but that the intervention of an elitist

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<sup>59</sup> See generally, RONALD DWORKIN, *LAW'S EMPIRE* (The Belknap Press of Harvard University Press 1986).

<sup>60</sup> HUTCHINSON, *supra* note 56, at 327.

<sup>61</sup> Langa, *supra* note 3, at 4.

<sup>62</sup> Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1366-69, 1371-73, 1386-95 (2006); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, 137-52 (Princeton University Press 1999).

<sup>63</sup> Waldron, *supra* note 62; Tushnet, *supra* note 62.

<sup>64</sup> Waldron, *supra* note 62, at 1353.

<sup>65</sup> *Id.* at 1349-50, 1353.

<sup>66</sup> *Id.* at 1360.

<sup>67</sup> *Id.*

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conception of review by unelected judges converts a rights enterprise into something undemocratic.<sup>68</sup> Waldron objects to strong judicial review where courts have the power to set aside legislation passed by a democratically elected legislature.<sup>69</sup> He appears to adopt the view that as rights are invariably the subject of normative disagreement, it would be best if the disputes are settled in the most democratically constituted of institutions, namely, the legislature.<sup>70</sup>

Outside of Waldron's birth country of New Zealand, it is difficult to conceive of countries where recourse alone to legislative deliberation is going to promote and protect a rights culture. In many instances, it is the legislative product of the legislature that undermines the rights of citizens. The admission of inherent disagreement about the nature of rights means that a legislature can hardly be immune from this problem. To argue that an electorate may vote out such a body at the next election is hardly of comfort to those who may suffer for years before an amendment is effected. This view also ignores the importance of having rules for the political game that allow for fair participation and which trump the kind of prejudice that relegates the potential role of a segment of society to second class citizenship.

The example of the case of gay marriage may suffice. In *Minister of Home Affairs v. Fourie*, Justice Sachs, on behalf of the majority of the Constitutional Court, held that, "[a] democratic, universalistic, caring and aspirationally, egalitarian society embraces everyone and accepts people for who they are."<sup>71</sup> He then referenced to the vision of an open and democratic society contemplated by the Constitution.<sup>72</sup> Justice Sachs noted that:

There must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. . . . [T]he test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.<sup>73</sup>

In deciding that the law was unconstitutional in not granting the same status to gay marriage as it did to heterosexual marriages, the Court asserted that the present law "manifestly affects" the dignity of gays and lesbians as full members of South African society.<sup>74</sup> In this decision, the Court protected the autonomy of all who make up South African society, thereby promoting the conditions in which all may participate fairly in the political process. The decision, on its own, does not undermine democracy. On the contrary, it promotes a form of democracy that recognises the role of democratically elected institutions, both in the defer-

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<sup>68</sup> *Id.* at 1358.

<sup>69</sup> *Id.* at 1349-50, 1353.

<sup>70</sup> *Id.*

<sup>71</sup> *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), para. 60 (S.Afr.).

<sup>72</sup> *Id.* at para. 89.

<sup>73</sup> *Id.* at para. 94.

<sup>74</sup> *Id.* at para 114.

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ence courts show to the role of these bodies, and by the application of a limitation clause in the Bill of Rights, in terms of which legislation may be held to trump a constitutionally entrenched right. In addition, the protection and promotion of self-autonomy allows for individuals to coalesce into civic movements that in turn can enjoy a dialogic relationship with both the courts and the legislature.

### A Response to Waldron, Tushnet, and the South African Majoritarians<sup>75</sup>

The case in favour of the constitutionally entrenched model which includes a judicial role can be summarised as follows. First, the design of the South African Constitution was intended to ensure that neither judges, the executive, nor legislature ran the country exclusively. But how they do it together, and more particularly the role that the judiciary plays in this democratic model, should always be the subject of rigorous public debate. Second, the very purpose of a constitution of the model embraced by South Africa is to secure for each permanent resident<sup>76</sup> the conditions under which each person can enjoy the value of autonomy, and can participate in the formulation and development of public reason.

To the extent that the South African Constitution extends way beyond the protection of civil and political rights, it may be argued that the model guarantees, in part, a juristocracy whereby judges can trump the distributive decisions best left to the legislature and executive.<sup>77</sup> The provisions in the South African Constitution of socio-economic rights, often viewed with suspicion by majoritarians and libertarian constitutionalists, can be justified within this theoretical framework. In a recent contribution to this debate, Canadian theorist, Alan Brudner, captures the point:

A claim of right to social and economical equality is consistent with the worth of the contingent person if it is justified by a principle of equal concern for each person's success in leading a self-authored life with the contingent endowments in which his personhood is uniquely . . . expressed. . . . [P]eople may claim protection against the external circumstances of their own lives that are unfavourable to self-authorship. . .<sup>78</sup>

This second response to the type of majoritarianism illustrated by Waldron must come with a caution: where the courts do not respect the legislature's reasonable judgment as to whether the legislative programme promotes and protects

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<sup>75</sup> As an indication of the way in which (hopefully) transient considerations influence the discourse, the current crime wave in South Africa has powered a furious attack on the Constitutional Courts finding that the death penalty is unconstitutional. An article that appeared in the Cape Times, authored by a recent appointment to the Bench Judge John Murphy, makes a call for a referendum with great enthusiasm. In this case, the judge was not seized with a difficult, emotionally draining case. Rather, a sitting judge wrote an article for the popular press in which he called for a public reconsideration of the constitution as interpreted by the constitutional court, contending that current public opinion must be given its day. John Murphy, *Face Death Penalty Head-on*, CAPE TIMES, Oct. 5, 2006.

<sup>76</sup> I employ this term, rather than the term "citizen," as rights in the constitution are enjoyed by a larger group than citizens.

<sup>77</sup> See generally S. AFR. CONST. 1996, *supra* note 7.

<sup>78</sup> ALAN BRUDNER, CONSTITUTIONAL GOODS 264 (Oxford University Press 2004) (emphasis omitted).

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rights to the maximum extent possible with available public means, or the executive's similarly based implementation, then the courts encroach into the political territory of representative politics. Again this is better stated in theory than it is implemented in practice. The question that must be addressed concerns the problem of the elected bodies developing policies that run counter to the vision of the constitution. Then the best that courts can do is to adjudicate in terms of an articulated theory of the constitution, which in turn is the subject of public deliberation. Both the pressure from civic movements and the deliberative role of the legislature constitute pressure points upon the judiciary in its development of the constitutional text.

### Conclusion

Perhaps it is necessary to conclude with the following reminder that constitutions are not all the same and not one size fits all. Yash Ghai warns of this in his conclusion to an analysis of comparative constitutions, in which he suggests that similar language and seemingly common concepts are deceptive. He states, "comparative constitutional law has become mired in formalism and pseudo-universalism and the wonderful multiplicity of the constitution has become lost."<sup>79</sup>

We should develop our analysis not in the pseudo-democratic claim about majority opinion at a point in history, but with the possibility of embracing three coordinating strands for the South African democracy. These include: a deliberative legislature, a judiciary which promotes the procedural and substantive conditions for political participation, and civil society where those conditions are utilized by autonomous citizens uniting in a common political purpose.

This roots the Constitution in South African history, but with a clear transformative possibility. The representative model of democracy has a much contested pedigree in South Africa because it was employed to shore up white rule from 1910 to 1994. However, it is now the subject of transformation, namely, from a mechanism of white oppression of the majority, to that of means where public representatives elected by the people can produce a legislative programme for the reconstruction of the country. The Bill of Rights finds its political roots in the African Claims of 1943 and the Freedom Charter of 1955, where the African National Congress took the lead and campaigned for a Bill of Rights for the country, in which "all should enjoy human rights" became a foundational part of the political opposition to apartheid.<sup>80</sup> Hence fundamental human rights were part of the political discourse that led to the adoption of the Constitution.

However, the history of South Africa is also one of a rich deliberative democracy in which civil society led the political way, by ensuring that the activity of civic groupings shaped the very political programmes that became the stuff of

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<sup>79</sup> Yash Ghai, *A Journey Around Constitutions: Reflections on Contemporary Constitutions*, 122 S. AFR. L.J. 804, 831 (2005).

<sup>80</sup> For the texts of these two documents, see Ebrahim, *supra* note 1, at 396, 415.

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struggle.<sup>81</sup> Hence the idea, as set out by Justice Ngcobo in the case of *Doctors for Life International*, in which civil society is able to convert Parliament into a transmission belt for the implementation of the wishes of “the people,” is one that is grounded in a rich and effective political tradition.<sup>82</sup>

The debate conducted around the democratic claim of constitutional review is all too often couched in binary terms. On the one hand, there is the exhortation that the disputes about rights should be left to the democratically elected body and, on the other hand, proponents argue that only a dispassionate institution such as a judiciary should adjudicate on these disagreements. South African legislation and policy are developed and executed by bodies chosen, whether directly or indirectly, by the people. Although for the phrase “we the people” to participate meaningfully, and to guarantee the autonomy of each individual to experience a self-authored life, a Bill of Rights which is developed by a judiciary, subject in turn to critical public evaluation, contributes to the enhancement of democracy. In turn, that process of critical evaluation of all three arms of state, is generated by means of a civil society made up of self-authored beings whose autonomy cannot be taken away by the irate holders of public power, save in terms of clear public justification.

This three pronged model of democracy moves beyond the sterile debates about the democratic pedigree of judicial review. By contrast, it promotes a form of deliberative democracy which holds the promise of transformation of democracy beyond public participation every five years at the ballot box. It also eschews the elitism of a judiciary subsuming politics into a complex, arcane legalese of which only the modern day philosopher kings can decipher. It is a model of democracy that is deeply rooted in the political history of South Africa.

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<sup>81</sup> For an example of the nature of civic political struggle and its tradition within South Africa, see JEREMY SEEKINGS, *THE UDF: A HISTORY OF THE UNITED DEMOCRATIC FRONT IN SOUTH AFRICA 1983-1991*, (Ohio University Press) (2000).

<sup>82</sup> See generally *Doctors for Life Int'l*, *supra* note 11.