

**SECTION TWO:
SOUTHERN AFRICA IN TRANSITION**

CHAPTER 5
"THE GLOWING FIRE OF OUR NEW PATRIOTISM".
THE CONSTITUTIONAL COURT, CIVIL SOCIETY AND
CONSTITUTIONAL PATRIOTISM IN SOUTH AFRICA

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Introduction

In an address to the South African Constitutional Assembly on 8 May 1996, the day of the adoption of the final Constitution (1), President Nelson Mandela declared: "Now it is universally acknowledged that unity and reconciliation are written into the hearts of millions of South Africans. They are an indelible principle of our founding pledge. They are the glowing fire of our New Patriotism". At the same occasion, Deputy President Mbeki asserted that the Constitution "constitutes an unequivocal statement that we refuse to accept that our Africanness shall be defined by our race, colour, gender or historical origins" (2). This is a patriotism of new South Africans who do not belong on the basis of race or ethnicity, but on the basis of a shared loyalty to a constitutional state and a commitment to national unity, reconciliation and human rights. The creation of such a "constitutional patriotism" (3) is intended to establish the legitimacy of the outcome of the transition as well as to promote national unity and reconciliation, both seen as crucial to the consolidation of democracy in South Africa.

Constitutional patriotism is seen as capable of meeting these challenges to the consolidation of democracy in South Africa as it ensures that the principles and values contained in the Constitution are perceived by citizens to be congruent or at least compatible with their own principles and values, and ensures a sense of belonging on the basis of a shared loyalty to the Constitution and not on the basis of ethnicity. The development of the New Patriotism in South Africa will require both the legitimacy of the Constitution itself, including the process by which it was drafted and its content, and the legitimacy of the powerful institution entrusted with its interpretation and enforcement, the Constitutional Court. In order to achieve this, both the Constitutional Assembly and the Constitutional Court have engaged in extensive legitimation strategies, and these are the focus of this paper.

Transition and Consolidation

The consolidation of democracy in South Africa requires, *inter alia*, that the political discourse of the transition and its outcome be legitimate and credible (4), and that there is a commitment to unity as opposed to ethnic division, and to a measure of reconciliation as a way of dealing with a brutal past (5). The shape of a post-apartheid, democratic South Africa was negotiated by reformers in the ruling regime and moderates in the liberation movement, and the transition is thus one characterised by "pacts between adversarial elites" (6). Jung and Shapiro point out that theorists of transitions to democracy would view South Africa as a "textbook case of a well-crafted transition" (7), as these theorists argue that a transition characterised by a pact between adversarial elites and which results in a relatively limited form of democracy is most likely to be successful. They argue that most parties to the negotiations soon realise that an insistence on radical democracy threatens the transition process as a whole and that it risks "provoking an antidemocratic reaction", which could plunge the country into a state of chaos. Limited democracy, which includes the protection of elite interests, is the only possible outcome of such a transition: for a democratic transition to succeed, "democracy itself must be limited" (8). The new South African democracy can be described as limited because it "effectively prevents the broad mass of citizens from participating in the daily governance of their lives" (9). This presents challenges for the creation of the legitimacy of the new democracy, particularly in the light of the historical role of civil society in the struggle for liberation in South Africa, which Mamdani calls "the home of the strongest and the most imaginative civil society-based resistance on the continent" (10). During the struggle, the South African liberation movement developed both a tradition and ideology of participation and "people's power", which were also to characterise a post-apartheid South Africa and the transition thereto (11).

A further challenge to the consolidation of democracy in South Africa is the creation of national unity. Szeftel (12) reviews the debate around the meaning and importance of ethnicity in the South African transition and for prospects for democratisation, and concludes that the new South African state will be challenged by many ethnic and communal demands, and that the way in which the state deals with this challenge "will ultimately be the test of its success or failure". Although mobilisation fueled by appeals to ethnic group membership has been relatively limited in the years following the formal transition to democracy in South Africa, this is more a reflection of a decline in overt ethnic claims in South African political discourse, where the notion of "the rainbow nation" is hegemonic, than of the disappearance of ethnic identities and loyalties.

The New Patriotism

Habermas, who developed the concept "constitutional patriotism", argues that "...democratic citizenship need not be rooted in the national identity of a people", but that "it does require that every citizen be socialized into a common political culture". This means that constitutional principles cannot take shape in social practices or act as the driving force for "the dynamic project of creating an association of free and equal persons until they are situated in the historical context of a nation of citizens in such a way that they link up with those citizens' motives and attitudes" (13).

In the South African context, the constitution-making process and the certification and interpretation of the Constitution by the Constitutional Court have been focussed on the development of such a constitutional patriotism in an attempt to legitimate the transition and create national unity. Constitutional patriotism can create legitimacy for the nature and outcome of the transition because it ensures that individual citizens accept the content of the Constitution as a valid expression of their own values and aspirations. This legitimates the entire transition and the new order, as the Constitution was presented throughout the process of transition, by means of an extraordinary and unprecedented emphasis on the notion of a constitution, as the embodiment of that transition and new order. This is vividly illustrated by the speeches made by leaders on the day of the adoption of the new Constitution, where the Constitution was described as the embodiment of the entire South African history, the negotiations process and the future of the new South Africa (14).

The development of constitutional patriotism is also aimed at creating national unity. The challenge is to create a South African nation, but one cemented by a shared loyalty to the constitution, and not to an ethnic group. Anderson defines a nation as "an imagined political community" - it is imagined because the members of the nation "will never know most of their fellow-members, meet them, or even know of them, yet in the minds of each lives the image of their communion". It is imagined as a community, as the nation is always conceived as "a deep, horizontal comradeship" (15). In a heterogeneous, divided and strife-torn society, the creation of the "image of communion" and of the conception of "a deep horizontal comradeship" in the minds of members is particularly challenging. In South Africa, this process is seen as lying at the heart of the consolidation of democracy. Nodia (16) notes that nationalism has been cast in the role of villain, mainly because it is seen as "fundamentally antidemocratic", but argues that nationalism can in fact be crucial in the creation and consolidation of democracy, particularly if the "ethnic flesh of nationalism" can be tamed, and a "patriotic esteem" for the new democratic society created.

The Constitutional Assembly and the Constitutional Court have been important actors in attempts to create this New Patriotism of democracy, constitutionalism and human rights by taming the "ethnic flesh" of South African nationalism. As indicated earlier, the success of this strategy will, among other factors, depend on the extent to which the Constitution itself, including the drafting process and the content, as well as the institution responsible for its interpretation and enforcement, the Constitutional Court, can attain legitimacy.

The Making of a Constitution

The Constitutional Assembly (CA) played an important role in strategies to create constitutional patriotism, and this role took two forms. The CA focussed on strategies aimed at establishing the legitimacy of the content and making of the Constitution, and quite explicitly promoted the Constitution as a symbol of national unity in an attempt to encourage a "patriotic esteem" for the document and that which it represents.

The main objective of the Constitutional Assembly (CA) was to "produce a consensus constitution that reflects the concerns and values of as broad a cross-section of both the political spectrum and society as a whole as possible", and it was to accomplish this by launching the largest public participation programme in the history of South Africa (17). Gloppen (18) identifies four requirements for the legitimacy of a constitution, three of which will be synthesised into the two requirements for legitimacy which constitute the central aim of the CA. The first is the legitimacy of the content of the Constitution, which includes the actual provisions, e.g. those that regulate the distribution of power and the provision of rights, as well as the "normative acceptability of the constitution in relation to the (significant) political culture (s) in society". The second is the legitimacy of the process of constitution-making. The CA attempted to address both of these requirements by means of its public participation programme (the PPP), which was implemented through a comprehensive multi-media advertising campaign, public submissions and petitions to the CA and workshops held country-wide. It was hoped that this programme would firstly convince South Africans that the Constitution contains their views, values and aspirations, and so legitimate its content, and secondly legitimate the constitution-making process by creating opportunities for the input and participation which had become a common demand in South African civil society during the struggle against apartheid: as Hassen Ebrahim, Executive Director of the CA pointed out, the legitimacy of the constitution lies in ownership of it by the people (19).

This element of the legitimisation strategy thus attempts to establish a measure of continuity with the South African struggle "tradition" of participation. The Freedom Charter was drawn up after extensive consultation with large

numbers of South Africans in a spectacular display of participatory democracy at work. The emphasis on participation in the liberation movement was a reaction to the extreme oppression and exclusion experienced under the apartheid regime, but was then already seen as a "tradition" (20), perhaps even as part of a romanticized version of the African community such as is represented in *ubuntu*, which emphasises reciprocity, solidarity, human dignity. On publication of the ANC's Constitutional Guidelines in 1988, the continuity with the Freedom Charter was heavily emphasized (21), and finally, the CA and the writing of the Constitution in 1995 and 1996 becomes a continuation of the "tradition" of participation (22). The value of participation becomes a powerful symbol of the past, of the struggle and of solidarity, and the CA constantly played that card as part of the legitimisation strategy. The central aim of the CA was thus to draft and adopt a final constitution for South Africa that would be "legitimate, credible and accepted by all South Africans". To this end, the drafting process "involved many South Africans in the largest public participation programme ever carried out in South Africa". The process took nearly two years, during which the political parties represented in the CA "negotiated the formulations contained in this text which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly". The draft finally adopted by the CA on 8 May 1996 thus claims to represent "the collective wisdom of the South African people and has been arrived at by general agreement" (23).

The PPP had three arms: a community liaison programme, which included public meetings or workshops and an educational programme; a media campaign; and invitation of written submissions from the public. Over two million of these submissions were received (24), and the CA administration insisted that "[e]ach one is valued, recorded, considered and archived as a national treasure for generations to come" (25). *Constitutional Talk*, the official newsletter of the CA, was widely distributed, the South African Broadcasting Corporation (SABC) provided regular air time on radio and television, and the CA advertised widely in the print media. *Constitutional Talk* regularly reported on the enthusiastic community participation in the public meetings and educational workshops. The process of legitimisation thus focussed on creating a feeling of "ownership" of the Constitution by "the people". This is the reason for the emphasis on participation, collective wisdom and common agreement, and for the conscious continuities created with the writing of the Freedom Charter. For this purpose it was also very important for participants to believe that their submissions would be taken seriously. When asked about the criticism that submissions are not taken seriously, Cyril Ramaphosa, chairperson of the CA, reacted angrily that "people who have criticised the public participation programme ... have not really followed up what we are doing at the Constitutional Assembly". He insists that submissions from the public are taken seriously, and gives several examples of petitions and hearings that "enlightened" the members of the CA (26). Hassen Ebrahim

couches his comments in similar language when he argues that the value of participation is not diminished by the fact that all views were not incorporated into the Constitution, and that the purpose was to enable the drafters to make decisions "informed" by the views of the public (27).

It was also important to provide a carefully circumscribed arena for participation in the process, in order to minimise the impact of dissenting voices. A good example of this strategy is the ANC's response to the publication of a survey conducted by Prof Hennie Kotze and his team from the University of Stellenbosch, and which indicated disagreement by ANC members at the grassroots level with ANC policy, particularly on the death penalty and abortion. The ANC released a furious statement which implied that the survey was aimed at supporting and strengthening the National Party position in the Constitutional Assembly by influencing "the direction of debates in the current session of the Constitutional Assembly", and which insisted that "[a]ll political parties must submit to the democratic authority of the national and constitutional assemblies and not seek to unduly influence the process through other means". They argued that public hearings had been conducted and all interested parties had the opportunity to state their view, and that this was an unacceptable way of participating in the process (28).

A second element of the role of the CA in the creation of constitutional patriotism was an explicit promotion of the Constitution as a symbol of national unity and reconciliation. Hassen Ebrahim describes the Constitution as "a unifying factor" which can "transcend political and ethnic differences" (29). The Constitution became the "birth certificate" (30) of the nation, it is "One Law for One Nation", it is ethnically neutral. It is an African Constitution, but our Africanness is not defined by our ethnicity (31), it is defined by our allegiance to the new Constitution. In an attempt to exclude ethnicity from the political arena, the CA and the writing of the new Constitution became the basis for nation-building and national unity, and the Constitution itself a powerful symbol of national unity and reconciliation.

The emphasis on participation as a legitimisation strategy had mixed results. A Community Agency for Social Enquiry (CASE) survey in 1995 found that while 50% of the sample felt "part of the process of drawing up a constitution" and that "the CA wants ordinary people to participate", only 39% believed that the CA would treat their submission seriously (32). These figures remained constant in a follow-up survey conducted by CASE in 1996. In addition, while 44% of respondents in the 1996 survey indicated that they don't know how to participate in the Constitution-making process, 83% indicated that the CA should be consulting the public about the new Constitution, 84% wanted to read the new Constitution, and 75% felt that the Constitution would have a meaningful, positive effect on the way the new South Africa is governed (33). CASE concludes that these are very positive results for the CA and the Constitution-making process because although there is an indication of scepticism about the extent to which the CA actually seriously considers each

submission, large numbers of people are very positive about the Constitution-making process as well as the final Constitution. The results of the CASE survey also indicate the success of the Constitution-making process as a nation-building exercise. It has to be very rare for 84% of citizens to want to read their Constitution, particularly in an age of political disillusionment and apathy, and the fact that 75% believe that the Constitution will have a positive impact on the future South Africa is another indication of the extent to which the nation has developed a new "patriotic esteem" for the institutions of democracy. Several submissions by the public to the CA confirm this view when they remark on the pride they feel, and the time and care they took in making their submissions. One 9-year old signed her submission "Your citizen"(34). The one notable failure of this strategy was, of course, the IFP's withdrawal from the CA. The IFP is a powerful symbol of ethnic nationalism and group solidarity in South Africa, and the failure to include this organisation in the process of writing the Constitution was an important setback to the process of building national unity on the basis of the Constitution. Ramaphosa (35), for example, remarked that "at a political level, the absence of the IFP no doubt in the end impoverishes the process that we are involved in". The IFP also challenged the Constitution in the Constitutional Court, particularly what the IFP sees as its failure to provide for enough powers to provincial governments, and thus in effect rejecting the very basis of the New Patriotism.

Despite a number of difficulties, it appears that the CA succeeded to a large extent in creating a degree of constitutional patriotism by legitimating the drafting and content of the Constitution and by promoting the Constitution as a symbol of national unity. The CA is the principal figure in the creation myth (36) of the new South Africa, a myth which will play a crucial role in forging a new South African identity, but this process is now to a significant extent in the hands of the Constitutional Court, which has been entrusted with the interpretation and enforcement of the new Constitution.

The Guardians of the Constitution

The South African Constitutional Court is an extraordinarily powerful institution. It is empowered by section 167(4) of the Constitution to, among other matters, "decide on the constitutionality of any parliamentary or provincial Bill", "decide on the constitutionality of any amendment to the Constitution", and "decide that Parliament or the President has failed to fulfil a constitutional obligation". The Court was, of course, also empowered by the Interim Constitution (38) to certify the final Constitution as complying with the Constitutional Principles contained in the interim document, which it declined to do at first. The Court finally did certify an amended version.

The Court can play an important role in strategies to create constitutional patriotism, and therefore in the consolidation of democracy in South Africa.

Similar to the CA, this role of the Court has been primarily in the creation of legitimacy for the drafting and content of the Constitution, and in the promotion of the Constitution as a symbol of national unity and reconciliation. In order to play this role, however, the Court has had to legitimate its own power. In terms of the law-government relationship of constitutionalism, established by the Constitution (39), the Court, as a non-elected body, has the power to interfere in the affairs of the democratically elected government, and to make decisions which contradict the will of the majority, only, of course, if these are in violation of the Constitution. A good example of the latter is the Court's decision to abolish the death penalty on the grounds that it violates several rights contained in the Interim Constitution (40). This provoked a public outcry over the "undemocratic" nature of the system and calls for a referendum on the issue (41). It is clear that the legitimacy of the Court itself can not be taken for granted, and the Court has thus engaged in several legitimisation strategies.

The Court's judgements so far indicate that they attempt to justify their approach to interpretation, their power, and the content of their decisions on four fundamental and interlinked grounds. The first of these grounds of justification is the text of the constitution, seen in the context of its history, which means that debates around the drafting of a clause could also be taken into account under certain circumstances. The second ground of justification is the argument that the Constitution represents the will of the people of South Africa, as it is the result of legitimate and representative negotiations. One of the CA slogans, 'You've made your mark, now have your say' (42), for example, clearly implies that "you" will write the new Constitution, and if it contains "your" opinions and values, constitutionalism doesn't really diminish popular power and participation. However, it appears that the Constitution is not particularly representative of the attitudes and values of ordinary South Africans, as submissions to the CA and opinions expressed in the media indicate a rejection of abortion, strong opposition to pornography and strong support for the death penalty, all of which have been thwarted by the new Constitution. The third ground of justification is a notion of the true meaning of democracy and the Court's responsibility to protect democracy defined in this way, and the fourth is an identification of the values underlying the Constitution (many of which are made explicit in the text of the Constitution) as well as the vision of a future South Africa embodied in and underlying the Constitution.

These four grounds of justification can be identified in several of the Court's judgements to date. In the *Makwanyane* case, decided in terms of the Interim Constitution, all the judges explain and justify their approach to interpretation in detail. Chaskalson, P. argues that the best approach to interpretation is one which is "generous" and "purposive", "gives expression to the underlying values of the Constitution", and takes into account the history and context of the Constitution (43). Justices Mahomed (44) and O'Regan (45) echo this view when they argue that both the memory of the violent, oppressive, authoritarian

and racist past of the South African society, and the vision of a new, democratic and egalitarian society embodied in the Constitution, should inform the process of interpretation of the Constitution. In *S v Mhlungu and others* (44) Mahomed, J. argues that literal interpretation would "negate the very spirit and tenor of the Constitution" which includes a "ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action" and "invade the widely acclaimed and celebrated objectives" of the Constitution (45). In the same case, Sachs, J. argues that "[w]e need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country..". He also argues that interpretation will "take the form of a principled judicial dialogue between members of the Court and other courts, legal profession, law schools, Parliament, and, indirectly, with the public at large" (46).

The judges also explain and justify their power to rule on these issues. In *Makwanyane*, Chaskalson, P. argues that although the death penalty was the subject of considerable debate during the drafting of the Constitution, the authors of the document expressly did not make specific provision for this issue in the text, and he argues that this is a clear indication that the intention was to leave this decision to the interpreters of the Constitution. He also emphasises that the Constitution was the product of extensive multiparty negotiations, in order to indicate the democratic nature of the process that led to the final document, and perhaps to argue for the idea that the Constitutional Court, in this indirect way, does have a democratic mandate for its decisions. Finally, he emphasises the need for the Court to approach this task with courage and conviction, as shrinking from it would mean a return to parliamentary sovereignty (47). The Court has dealt with the issue of the powers of the Court and the legislature respectively as well as the shift from parliamentary sovereignty to constitutionalism, in several cases. In the *Executive Council of the Western Cape Legislature* (48) case, Chaskalson P emphasises the supremacy of the Constitution, and the Constitution as the foundation for establishment of a fundamentally different, new order. He emphasises that "our role as justices of this Court is not to 'second guess' the executive or legislative branches of government or interfere with affairs that are properly their concern. We have also made it clear that we will not look at the Constitution narrowly. Our task is to give meaning to the Constitution and, where possible, to do so in ways which are consistent with its underlying purposes and are not detrimental to effective government". Sachs J also emphasises the powers of parliament and central role of parliament in a democracy. He argues that legislative authority is entrusted to parliament because "the procedures for open debate subject to ongoing press and public criticism, the visibility of the decision making process, the involvement of civil

society in relation to committee hearings, and the pluralistic interaction between different viewpoints which parliamentary procedure promotes, are regarded as essential features of the open and democratic society contemplated by the Constitution" (49).

The *Certification* judgement (50) opens with the acknowledgement that "[j]udicial 'certification' of a constitution is unprecedented and the very nature of the undertaking has to be explained. To do that, one must place the undertaking in its proper historical, political and legal context; and, in doing so, the essence of the country's constitutional transition, the respective roles of the political entities involved and the applicable legal principles and terminology must be identified and described". The Court also in that judgement emphasises that the impartiality of the decision on the certification of the Constitution is safeguarded by the appointment and dismissal mechanisms as well as the composition and the powers of the Court and Judicial Services Commission. In a recent interview, one judge on the Court also argued that, ironically, the entire certification process was an important element of the legitimisation of the Court, as it illustrated the Court's independence from the ruling elite as well as the high regard in which the Court is held by that elite (51).

The Court has also attempted to deal with the issue of public opinion on matters before them. In *Makwanyane*, the judges deal with the issue of popular opinion in detail, as the extensive public support for the death penalty formed an important part of the retentionist argument. Chaskalson, P. argues that "public opinion may have some relevance to the enquiry", but if this were to be the decisive factor, "there would be no need for constitutional adjudication", and we would have returned to a system of parliamentary sovereignty and retreated from the new order established by the Constitution. He points out that the reason for establishing a system of constitutionalism was to "protect the rights of minorities and those who cannot protect their rights adequately through the democratic process", including the "social outcasts and the marginalised people of our society" (52). All the judges concluded that the autonomy of the judges of the Court from the will of the majority or public opinion is fundamental to the successful operation of the Court (53). While they acknowledge the importance of public opinion on the matters before the Court, they insist that the Constitution would be worthless if it did not have an autonomous body, which is not subject to the will of the democratic majority, to guard and enforce its provisions. Their justification for this stance lies, *inter alia*, in a particular view of democracy. In this view, democracy is not merely a matter of casting a vote. It also refers to a system of basic values of which a respect for human life and dignity are the foundation, it requires the protection of rights essential to the successful operation of a democracy, including the rights to freedom of expression and association, and it strives towards substantive equality of all members of that society. The accountability

of the Constitutional Court will therefore lie in its fidelity to these values and aims, and not in a reflection of the will of the majority.

In addition to strategies aimed at legitimating its own power, reading of the Constitution and decisions, the Court has focussed on creating legitimacy for the drafting and content of the Constitution itself, and on promoting the Constitution as a symbol of national unity and reconciliation. In a recent interview, one judge on the Court explicitly argued for the role of the Court in legitimating the new order, as the Court is "someone to make the Constitution alive". The judge also pointed out that when the Court overturns a decision of the executive, and the executive accepts that, as happened with the Western Cape decision, it illustrates the stability and predictability of the new constitutional order and in this way contributes to its legitimacy (54).

Strategies to legitimate the new order and promote the Constitution as a symbol of unity are also apparent in several of the Court's judgements. In the *Certification* judgement, for example, the Court spoke of the way in which, during the transition, the threatening "impasse was resolved by a compromise which enabled both sides to attain their basic goals without sacrificing principle" (55) and of how the Constitutional Principles must be applied in such a way that they give expression to the nation's commitment to create a new order, a democratic constitutional state based on protection of human rights (56). This new order envisaged by the Constitution is, however, described as congruent with African tradition, particularly with the notion of *ubuntu*. In the *Makwanyane* judgement, Langa, J. argues that the new Constitution provides a framework "in which a new culture must develop and take root", and that this culture is one based on the values of a "more mature society", which include a respect for human life and dignity. In this regard, he lays great emphasis on the concept of "ubuntu", the achievement of which is named in the postscript of the Interim Constitution as one of its goals (57). Madala J (58) argues that the concept of ubuntu "carries in it the ideas of humaneness, social justice and fairness", and that this is a value fundamental to African society which has been incorporated into the Constitution and which should therefore have an important influence on the process of interpretation (59).

The theme of the Constitution as representative of a vision of a new South Africa shared by all South Africans is common in the Court's writing. Justice Didcott (60) argues that the Constitution is animated by an "altruistic and humanitarian philosophy", and that interpretation should be true to "the civilised, humane and compassionate society to which the nation aspires and has constitutionally pledged itself". The Court can be seen as accountable to the will of the people when it is faithful to the values incorporated into the Constitution drafted by the people's representatives. In the *AZAPO* judgement, Mohammed J emphasises the importance of "a firm and generous commitment to reconciliation and national unity" for the building of a new democratic order, the necessity of amnesty provisions in order to "facilitate the consolidation of new democracies", accepted by several other countries, and

that the Act gives expression to the "extraordinarily generous and imaginative commitment of the Constitution to a philosophy which has brought unprecedented international acclaim for the people of our country" (61).

It is clear that the judges are at pains to present the Constitution as one drafted by means of a legitimate process, as well as one which is congruent with the values and aspirations of South Africans, important prerequisites for the development of constitutional patriotism. The role of the Court in the creation of such a patriotism is stated explicitly by Langa, J. in *S. V. Williams* (62), where he asserts that the Court has a role to play in the promotion and development of a new culture founded on the recognition of human rights and to ensure that the rights, "particularly of the weakest and the most vulnerable, are defended and not ignored".

Conclusion

Both the Constitutional Assembly and the Constitutional Court have played a central role in strategies to create constitutional patriotism in South Africa, particularly by legitimating the drafting and content of the Constitution, promoting the Constitution as a symbol of unity and reconciliation and, on the part of the Court, legitimating its own power. Constitutional patriotism is seen as having the potential to meet the two challenges to the consolidation of democracy in South Africa: the legitimation of the new order and the creation of national unity. There is some evidence that legitimation strategies employed by the Constitutional Assembly attained a measure of success, but the success of strategies employed by the Constitutional Court have not been investigated empirically, and this is an important area for further research.

A prior question, however, is whether this is an appropriate strategy in the quest for the consolidation of democracy in South Africa. Wilson investigates the attempt to construct a supra-ethnic rights-based national identity in South Africa, particularly in the light of the wide-spread belief (in academic and ANC circles) that "a constitutionalist state project and expressions of 'pre-political' nationalism can be wholly distinct from each other". He rejects this view, and asserts that the construction of a culture of human rights and constitutionalism cannot be separated from nation-building, and that they are in fact "drawn into the services of a reformulated nationalist imperative in the 'New South Africa'" (63). Davis also identifies what he calls "the development of a project of exclusive nationalism in which identification with certain values buys an admission ticket to a new South Africa" (64). These values are not linked to ethnicity, but to a particular form of civic nationalism, one which consists of "an unswerving loyalty to nation building in the image of the majority". This points to the development of an authoritarian, manipulative and exclusive constitutional nationalism which may consolidate democracy in South Africa in the formal sense, but will profoundly affect the nature of the democracy

which becomes entrenched. As indicated earlier, Ginsburg (65) argues that the new South African democracy is a limited one which depends heavily on the demobilisation of South African civil society, and which may not be able to deal creatively with conflict, ensure greater public participation, and eradicate inequality. A vibrant, powerful and mobilised civil society is essential if the new South African democracy is to deal with these challenges, and the creation of a form of constitutional patriotism based on critical engagement with the Constitution and its interpretation and enforcement by the Constitutional Court could contribute to this process.

The Court itself can play an important role in this process by encouraging the development of a constitutional patriotism in South African civil society which would combine a commitment to constitutionalism and human rights with a critical engagement with the Constitution and its guardian, the Constitutional Court. This would entail the development of a "rigorous jurisprudence of substantive reasoning" (66) which would allow the Court to weigh up competing values rationally and fairly, avoids appeals to loosely defined and potentially coercive notions of *ubuntu*, the rainbow nation, reconciliation and unity, and, crucially, encourages critical engagement with the Court and the Constitution. In this way, the development of a constitutional patriotism which can contribute to the consolidation of a meaningful democracy which can deal creatively with conflict, ensure greater public participation, and eradicate inequality, becomes possible.

Notes

- (1) *Constitution of the Republic of South Africa*, Act 108 of 1996.
- (2) Constitutional Assembly, *Adoption Day 8 October 1996*, CA Home Page on the World Wide Web at <http://www.constitution.org.za>, 1996.
- (3) J. Habermas, *Between Facts and Norms*, Cambridge Massachusetts, 1996, p. 500.
- (4) G. O'Donnel and P. Schmitter, *Transitions from Authoritarian Rule*, 1986, p. ix.
- (5) M. Szeftel, "Ethnicity and Democratization in South Africa", *Review of African Political Economy*, 1994, 21, 60, 185-199.
- (6) G. Adler and E. Webster, "Challenging Transition Theory: The Labor Movement, Radical Reform, and Transition to Democracy in South Africa", *Politics and Society*, 1995, 23, 75-106.
- (7) C. Jung and I. Shapiro, "South Africa's Negotiated Transition", *Politics and Society*, 1995, 23, 269-308.
- (8) A. Przeworski quoted in Adler and Webster, *op cit.*, p. 84.

- (9) D. Ginsburg, *The Limits of Democracy*, Unpublished Paper, 1996, p. 4.
- (10) M. Mamdani, *Citizen and Subject*, Kampala, 1996, p. 297.
- (11) See, e.g. T. Lodge, *All, Here and Now*, New York, 1991.
- (12) Szeftel, *op cit.*, pp 198-199.
- (13) Habermas, *op cit.*, pp 499-500.
- (14) Constitutional Assembly, *Adoption Day 8 October 1996*, CA Home Page on the World Wide Web at <http://www.constitution.org.za>, 1996.
- (15) A. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 1991, pp 6, 7.
- (16) G. Nodia "Nationalism and Democracy", in *Nationalism, Ethnic Conflict, and Democracy*, eds. L. Diamond and M. Plattner, 1994, pp. 3, 9, 15.
- (17) Constitutional Assembly, *op cit.*
- (18) S. Gloppen, *Constitution-making and Legitimacy*, Unpublished Paper, 1996, p3.
- (19) Constitutional Assembly, *Annual Report*, 1996, p 145.
- (20) R. Suttner and J. Cronin, *30 Years of the Freedom Charter*, 1986, pp 4, 260.
- (21) ANC, "Constitutional Guidelines for a democratic South Africa", *The South African Journal on Human Rights*, 1989, 5.
- (22) IDASA, *Democracy in Action*, 1995, p 15.
- (23) *Constitution of the Republic of South Africa*, Act 108 of 1996.
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- (26) Mayibuye, "We have a mandate we cannot fail to execute". Interview with Cyril Ramaphosa, October, 1995, p.8.
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- (31) Thabo Mbeki, *Adoption Day*, CA Home Page on the World Wide Web at <http://www.constitution.org.za> (1996).
- (32) Community Agency for Social Enquiry (CASE), *Bringing the Constitution and the People Together: Assessing the Impact of the Media Campaign of the Constitutional Assembly*, 1995.
- (33) Constitutional Assembly, *Annual Report*, 1996.
- (34) *Constitutional Talk*, 1995.
- (35) Mayibuye, *op.cit.*, p. 9.
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- (37) *Constitution of the Republic of South Africa*, Act 200 of 1993.
- (38) Section 2 of the Constitution provides that the "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."
- (39) *S v Makwanyane and Mchunu CCT/3/94*
- (40) See, e.g. *The Star*, 15/2/95 and 28/6/95, and *The Sunday Times*, 11/6/95.
- (41) *Constitutional Talk*, Special Newspaper Supplement, 1995.
- (42) *op cit.*, at pp. 4-7.
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- (46) *ibid* at para 8.
- (47) *ibid* at para 127-129.
- (48) *Makwanyane* at pp. 12-18..
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- (54) See Kriegler J, *ibid*, at p. 50, and Madala J, *ibid*, at p. 173.
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- (58) *Makwanyane, op cit.*, at pp. 158-162.
- (59) *ibid*, at pp. 166-167.
- (60) Justice Sachs (*ibid* at 229) similarly argues that judges should "take account of the traditions, beliefs and values of all sectors of South African society", and that the Constitution already reflects these values, as it emerged from "an inclusive process in which the overwhelming majority were represented", *ibid*, at p. 229.
- (61) *Makwanyane, op cit.*, at pp. 123-124.
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CHAPTER 6 COMMISSIONS OF INQUIRY AND POLICY-MAKING IN SOUTH AFRICA. BETWEEN THE 'GRAND TRADITION' AND DEMOCRATIC CORPORATISM

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Adam Ashforth (1990), in his study of policy-making in South Africa, argues that reports of Commissions of Inquiry are "schemes of legitimation" (1990, p.8). According to Ashforth, "schemes of legitimation elaborate the ways in which the state in its principal, if fictional, guise as speaking subject (author of the 'law') should address its subjects - in this instance, the ways in which state power 'speaks' to the 'Natives'. Commissions of Inquiry are characterised by statements expressed in a language observing the rules of 'objective knowledge'" (1990, p.8).

These reports are designed to do two things: firstly, they are designed to suggest new policy options within the constraints of government policy. Secondly, to persuade government why it is necessary to "develop new terms for referring to social reality" (1990, p.8 -9). These 'schemes of legitimation', Ashforth calls, the 'Grand Tradition'.

Using discourse analysis Ashford examines institutional processes of Commissions of inquiry and identifies three phases; The first, the investigative phase where commissioners hear oral and other evidence, are not only modes of scientific investigation but are also 'performances that serve to authorise a form of social discourse' (1990, p.9). The second phase begins with the publication of the Commissions report, Ashforth calls this the persuasive phase where a dialogue takes place between the state and society. The report becomes 'an authoritative statement' and 'a plan of action' (1990, p.9-10). The third phase - the historical - begins when the report is placed in the archives and becomes a subject of historical research. 'Commission reports, then, could be said to embody discourses that shape social reality within modern states and reflect realities that constrain political discourse' (1990, p.11).

The study examines five reports of commissions of inquiry that address the 'native question' since the beginning of the century. Ashforth treats the reports as literary texts rather than repositories of objective facts. These reports become, what he calls the 'grand tradition', and through discourse analysis he attempts to explain the policy-making process in South Africa.

At the centre of this policy-making process is the 'expert', the bearer of truth. Ashforth's argument is that the experts' function is not simply to solve