

**CLAUDE LEON PUBLIC LECTURE**  
**ON THURSDAY 29 SEPTEMBER 2011 AT**  
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***STRIKING A BALANCE BETWEEN THE WILL OF THE PEOPLE***  
***AND THE SUPREMACY OF THE CONSTITUTION***

### **Introduction and salutations**

I am delighted to escape, albeit it momentarily, the rigors of judicial life in Braamfontein for the serene setting of Cape Town. For that I owe gratitude to Prof. Pierre de Vos who has invited me to present the Claude Leon Public Lecture for this year.

As the date of the lecture neared, my agony increased over what to talk about given these tumultuous times in our beloved Republic. As the Chinese curse goes, “may you live in interesting times”. We are well cursed in this country. It is so that every dawn is a new day. But in our country every dawn seems to pose trenchant questions about our polity. The questions are about our society in transition, about good governance, about the effectiveness of constitutionally ordained public institutions, about our unequal society and its proxy of race, about an economy that creates wealth but not jobs, about fair labour practices and higher productivity, about meaningful access to social goods and services – education, health and housing – for vulnerable groups, about corruption and efficient use of public resources, about free expression and an open society, about the potency of civil society, about the environment and about everything else. There are clearly more questions than answers.

These open, if not critical conversations suggest that there are no holy cows or orthodoxies beyond public scrutiny. No boundaries are finite and no lines

are incapable of being re-drawn or even crossed. In many ways, we live in a society of unimaginable freedom and infinite possibilities. The overarching constraint is whether our institutional arrangements and the cognate norms are well suited to realise the just society the preamble to the Constitution envisions.

In the past few months persistent questions have sprung up about the legitimacy of the Constitution. The argument starts from the premise that the Constitution is an awful bargain shaped by inapt concessions during the negotiations in 1993. The compromise, the argument goes, is characterised by two primary blemishes. First, the will of the people does not find full voice within constitutional arrangements. For that reason the legislative and executive power in the hands of the parliamentary majority is empty. Second, the constitutional constraints over the exercise of public power stand in the way of government to deliver on social equity. That is another way of saying that the constitution has shielded the historic economic inequality from change and in turn obstructs the effective economic participation or freedom of the majority. The sub-text of this argument is that the will of the people on the project of transforming society is frustrated by the supremacy of the Constitution and the role courts fulfil in policing its compliance.

These are intractable issues related to our constitutional arrangements. They demand difficult answers. In the time and space, at my disposal, I can only confront a few questions prompted by my judicial role. There are no obviously correct answers. For that reason I do not intend to furnish close-ended answers, but rather I recognise that there is a voluble public conversation around these difficult matters. I have chosen a few questions and I will seek to answer each in that sequence.

The core question is whether our constitutional arrangement permits an equitable balance between democratic will and constitutional supremacy? That enquiry, in turn, gives rise to a number of sub-questions:

- (a) *What is the constitutional value of democracy? In other words, why and how best must the will of the majority, acting through their representatives, be given effect?*
- (b) *Why has our constitutional architecture opted for constitutional supremacy and what is its purpose?*
- (c) *Can a balance be struck between popular will and the supremacy of the Constitution?*
- (d) *Has our jurisprudence found that equitable equilibrium between majoritarianism and constitutional supremacy?*

**What is the constitutional value of parliamentary democracy? In other words, why and how best must the will of the majority, acting through their representatives, be given effect?**

When I was a young activist, bent on destroying the monster of apartheid, we shouted many demands. However, I can't recall a demand of the struggle that resonated with my revolutionary zeal more than "one person one vote". It was and remains a primal demand for that essential element of democracy that effect must be given to the will of the majority. The right of each of us to participate in the democratic process is in effect a cluster of vital entitlements. These entitlements are emblematic of our equal worth and equal citizenship. They include the right to form a political party, to participate in its activities, including to campaign for it or its causes. Each citizen has a right to free, fair and regular elections for any legislative body established which includes the right to stand for public office and, if elected, to hold office. An exercise of these rights would result in representation in Parliament in provincial legislatures and in local authorities. Thus to give content to these rights, the Constitution envisages a multi-party system of democratic government premised on universal adult suffrage and a national common voter's role.

A complaint that the democratic will of the people is undermined merits serious attention because if true, it strikes at the very heart of the constitutional arrangement of our democratic state. Before one probes whether this complaint is justified, let us look at what the Constitutional Court has said in dealing with the principle of the “will of the majority” required by the Constitution.

Concurring with Langa DCJ’s decision in *Democratic Alliance and Another v Masondo NO and Another*, Sachs J observed:

“The requirement of fair representation emphasises that the Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition. It was through dialogue and sensible accommodation on an inclusive and principled basis that the Constitution itself emerged. It would accordingly be perverse to construe its terms in a way that belied or minimised the importance of the very inclusive process that led to its adoption, and sustains its legitimacy”.<sup>1</sup>

Sachs J went on to write:

“The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority,

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<sup>1</sup> *Democratic Alliance and Another v Masondo NO and Another* [2002] ZACC 28; 2003 (2) SA 413 (CC) (Sachs J, concurring) at para 42 .

but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not to exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, 'South Africa belongs to all who live in it . . .'. At the same time, the Constitution does not envisage endless debate with a view to satisfying the needs and interests of all. Majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding. Accordingly, an appropriate balance has to be established between deliberation and decision."<sup>2</sup>

In a multi-party system of democratic government a one-party state is excluded, as is a system of government in which a limited number of parties are entitled to compete for office.<sup>3</sup> "A multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid."<sup>4</sup>

There can be no doubt that the Constitution envisages that the will of the majority shall prevail because our state is a democratic one. That said, the Constitution poses a particular notion of democracy. Universal adult franchise is the primary building block in constituting legislative and executive powers. But this majoritarian primacy is subjected to the provisions of a supreme Constitution. The Constitution makes plain that the Bill of Rights is the cornerstone of democracy in South Africa and that it enshrines the rights of all people in our country and affirms the democratic values of human dignity,

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<sup>2</sup> Id at para 43.

<sup>3</sup> *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC) at para 24.

<sup>4</sup> Id at para 26.

equality and freedom. In a firm injunction, the Constitution requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights, which in turn may be limited when it is justifiable to do so.

So, the democratic ethos and practice are indispensable and constitutive of our constitutional state. The will of the majority when expressed in some formal act through its duly appointed and elected representatives must be given effect and courts are bound to do so, provided that the democratic will, if translated into a law, policy or conduct, bears a rational and legitimate purpose and has been passed by a procedure authorised by the Constitution. Simply put, valid laws bind everyone but one cannot by-pass the supremacy of the Constitution by merely asserting the parliamentary or executive will of the people. It must be a will expressed within the constraints of the Constitution.

That leads us to the next question. We must then ask why our constitutional architecture has opted for constitutional supremacy. Before traversing that question, I set out a brief excursion on the history of parliamentary sovereignty and constitutionalism in Europe, Africa and our own country.

### **Why has our constitutional architecture opted for constitutional supremacy and what is its purpose?**

The balance between – and premium placed by most modern democracies on – parliamentary democracy and the supremacy of the Constitution bears the stamp of historical experiences. In Europe, this balance was struck in the wake of the Second World War. On that continent, there has been a historically deep political hostility toward judges and it was long assumed that constitutional supremacy and, as a concomitant, constitutional review by courts, was incompatible with parliamentary governance lest it lead to a “government of judges”.

However, in the wake of the Second World War, constitutional drafters recognised how unchecked legislative power and, in particular, unchecked delegation in Nazi Germany, Fascist Italy and Vichy France had undermined “both the democratic-deliberative function of legislatures and emergent conceptions of constitutionally protected rights of individuals.”<sup>5</sup> Drafters of, for instance, the West German Basic Law (1949) and the French Constitutions (1946 and 1958) thus sought to define—

“the fundamental rights of individuals and the core normative responsibilities that the legislative branch could not lawfully delegate to the executive or administrative sphere. Each country also eventually established a body *external* to the legislature—the Federal Constitutional Court in West Germany and the Constitutional Council in France—to enforce delegation constraints *against the legislature itself*, thereby concretely signifying the abandonment of the unchecked parliamentary supremacy that had been a cornerstone of republican orthodoxy in the interwar period.”<sup>6</sup>

The democratisation of post-war Europe has “transformed the judicial basis of the European state.”<sup>7</sup> Modern constitutions typically proclaim a long list of human rights and establish mechanisms for defending the normative supremacy of the constitution, stipulating procedures for how the constitution may be amended.<sup>8</sup> At the same time, however, U.S.-style judicial review was rejected by post-war constitutional drafters as political elites remained hostile to sharing legislative functions with the judiciary. In contrast with U.S. judicial review, many European countries have limited review to specialised constitutional courts – an approach largely following Kelsen’s model of constitutional review.

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<sup>5</sup> Peter L. Lindseth, “The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s” (2004) 113 *Yale Law Journal* 1341 at 1348.

<sup>6</sup> *Id.* at 1348-9.

<sup>7</sup> Alec Stone Sweet, “Constitutional Courts and Parliamentary Democracy” (2002) 25 *West European Politics* 77 at 79.

<sup>8</sup> *Id.*

Kelsen recognised that the exercise of constitutional review would embroil the constitutional court in the legislative function, but nonetheless sought to distinguish between parliamentary legislative acts and what the constitutional courts do.<sup>9</sup> The former, he suggested, are “positive legislators” – they make law “freely, subject only to the constraints of the constitution.”<sup>10</sup> By way of contrast, constitutional judges are “negative legislators” – their legislative authority is “limited to the annulment of statute when it conflicts with the law of the constitution.”<sup>11</sup>

Although still influential today, Kelsen’s distinction between positive and negative legislator is complicated by the inclusion of human rights in many modern constitutions and the awarding of constitutional status to such rights. A rights’ jurisprudence, Kelsen warned, would undermine the distinction between negative and positive legislator: as judges sought to define the content and scope of such rights – which Kelsen maintained were located in the realm of natural law – they would become “super-legislators”.<sup>12</sup>

In sub-Saharan Africa, not unlike in South Africa from 1910, the constitutional arrangements were a product of the history of colonisation of those countries. As the winds of change blew across Africa from 1958 onwards, triggered by the independence of Ghana, their newly adopted constitutions mirrored those of the departing colonial powers.<sup>13</sup> That explains why Francophone countries were characterised by constitutional councils along the French model and Anglophone countries had parliamentary sovereignty as the preferred model. But virtually all sub-Saharan post colonial jurisdictions were characterised by absence of a vibrant electorate, of an exacting civil society and organised

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<sup>9</sup> See Hans Kelsen, “Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution” (1942) 4 *Journal of Politics* 183; Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1945) at 267-9, 272.

<sup>10</sup> Stone Sweet, above n 7, at 81.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 81-2.

<sup>13</sup> Isaak I. Dore, “Constitutionalism and the Post-Colonial State in Africa: A Rawlsian Approach” (1997) 41 *Saint Louis University Law Journal* 1301 at 1304.

labour movement, of a free and independent press, of a supreme and justiciable constitution and of an effective model of judicial review.<sup>14</sup>

Sadly, those ineffectual post-colonial polities displayed undemocratic tendencies that readily provided fertile ground for open-ended abuse of executive, fiscal and legislative power – that indeed resulted in the wholesale denigration of democratic practice, pervasive pillaging of the fiscus and state corruption. The violation of fundamental human rights became endemic, matched only by over-dependence on the auctioning of raw materials and elite self-enrichment at the expense of grassroots economic development.

I say this not unmindful of the deleterious role of neo-colonialism that sponsored civil wars in order to mask the plunder of natural resources and expand foreign markets. There are indeed glimmers of hope for our continent as we see the steady but slow emergence of democratic constitutionalism and improved economic activity and rural development in a number of countries on the African continent.<sup>15</sup> The continent is well on its way to banishing Afro-pessimism of yesteryears.

Turning inward, it has to be said that our adoption of constitutional supremacy was similarly influenced by our history. Under apartheid, parliament enjoyed supremacy and no Constitution or bill of rights provided any fetter on its legislative powers. Oppressive laws passed by parliament could, for the most part, not be challenged in the courts. The apartheid regime was sustained by lack of accountability and the construct of parliamentary sovereignty.

Take, for instance, parliament's efforts, in pursuit of apartheid policy, to disenfranchise any voter not classified as white. With a view to disenfranchising black and coloured voters, Parliament passed in 1951 the

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<sup>14</sup> Id at 1307. See also contributions in Robert Dibia (ed), *The Politics and Policies of Sub-Saharan Africa* (University Press of America, 2001) and John A Wiseman (ed), *Democracy and Political Change in Sub-Saharan Africa* (Routledge 1995).

<sup>15</sup> Angola (2010), Egypt (2011; provisional), Guinea (2010), Kenya (2010), Madagascar (2010), Niger (2010), and South Sudan (2011; transitional) all adopted new constitutions in the last five years, although not all can be called democracies.

Separate Representation of Voter's Act.<sup>16</sup> The Act was passed with a simple majority, rather than the required two-thirds of both houses of Parliament required to change the imperial legislation defining the franchise. In *Harris and Others v Minister of the Interior and Another*,<sup>17</sup> The Appellate Division declared the new legislation invalid, only for Parliament, in turn, to pass the High Court of Parliament Act (HCPA),<sup>18</sup> which allowed Parliament itself to set aside decisions in which the Appellate Division declared legislation to be invalid. The Appellate Division subsequently found this legislation too invalid, although following an expansion of the Senate and Appellate Division with National Party sympathisers, the HCPA was ultimately passed and a challenge to invalidate failed in *Collins v Minister of the Interior and Another*.<sup>19</sup>

The example serves to show that, at this time when the South African parliament enjoyed parliamentary sovereignty, the Appellate Division – and judiciary more generally – was a weak check on parliament's powers. Parliament was able to make laws without substantive constraints; it essentially enjoyed a monopoly on power.

It is so that if we were to recall the past, parliamentary sovereignty would re-install parliament as the sole arbiter of the rationality and reasonableness of the measures they pass. The will of the majority in parliament would be unrestrained. Socio-economic rights which are now justiciable and are a significant bulwark in favour of the vulnerable, worker rights which are now constitutionally entrenched and other fundamental rights would be enjoyed at the pleasure of parliament. But as we have seen, that is the constitutional option through which apartheid, Nazism, Fascism and post-colonial Africa blossomed.

As Karun Chetty observes, under apartheid “the judiciary was subordinate and subservient to parliamentary sovereignty; the law courts were undermined by successive governments that used them 'as instruments of

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<sup>16</sup> No. 46 of 1951.

<sup>17</sup> 1952 (2) SA 428 (A).

<sup>18</sup> No. 35 of 1952.

<sup>19</sup> 1957 (1) SA 552 (A).

domination to work injustice, thus creating a crisis of legitimacy in the legal system as a whole'.<sup>20</sup> Chetty further observes:

“When recourse is had to the legal tradition of this country, it is generally accepted that parliamentary sovereignty as applied by the apartheid government had a deleterious and stifling effect on the judiciary and judicial activism. Judicial independence and the growth of judicial activism were compromised by the ‘inarticulate premises’ of judges who either consciously or unconsciously articulated these premises in support of a minority government predicated on parliamentary supremacy and sovereignty as well as legal positivism that was ‘invoked as a jurisprudential creed supportive of this approach’. Parliamentary sovereignty and its cognate, legal positivism, did not nurture a culture of judicial activism and legal realism but rather one that typified a sterile and impotent judiciary.”<sup>21</sup>

It must be emphatically added that the people on the ground and not the elite were the foremost victims of apartheid. They bore the full burden of unjust laws. Barring its minority electorate, parliament was accountable to itself and nobody else. Its legislative deeds were totally immune to judicial review. And its executive and administrative acts were subject to only benign judicial scrutiny. Under that system crimes against humanity were committed under the noses of judges and they could do nothing about them even if they were made aware of them.

Our founding mothers and fathers were well aware of this deleterious impact of parliamentary sovereignty and made a different choice. They sought to bring to life a democratic state under the sway of a supreme constitution that entrenches fundamental protections and a binding normative scheme.

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<sup>20</sup> Karun D Chetty, “Politics and Constitutional Adjudication: A Response to Prof. F Venter (PU vir CHO)” (2003) 6 *PER/PELJ* 11 at 11-2 (quoting L. du Plessis & H. Corder, *Understanding South Africa’s Transitional Bill of Rights* (1994) at 191).

<sup>21</sup> *Id* at 12.

Of course there are inherent tensions in our constitutional architecture. I turn now to look at how best to balance what appears to be two antithetical constructs within the one constitutional state.

### Striking the balance

There can be no question that our founding mothers and fathers made an unambiguous election to bring into being a constitutional state in which the constitution is supreme law. It proclaims in simple language that all “law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”<sup>22</sup>

Emerging constitutional skeptics call to question the wisdom of such an all-pervading and imperious supreme law. As we have seen they decry potential constitutional review of “all law or conduct” of the legislature or the executive by the judiciary and in that way subvert the will of the majority they represent. These critics should be reminded that as a reaction to our hellish apartheid past, the concept and values of the constitutional state and of an egalitarian society are deeply foundational to the creation of the “new order” desired by the preamble. The “detailed enumeration and description” in section 36(1) of the Constitution of the criteria that must be met before the legislature can limit a right entrenched in the Bill of Rights stresses the “importance, in our new constitutional state, of reason and justification when rights are sought to be curtailed.”<sup>23</sup>

We have moved from “a past noted by much which was arbitrary and unequal in the operation of the law to a present and a future” where state action and indeed private action must be capable of being justified rationally.<sup>24</sup> The idea of the constitutional state presupposes an exercise of public and private

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<sup>22</sup> Section 2 of the Constitution.

<sup>23</sup> *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC) at para 156. (Ackermann J, concurring)

<sup>24</sup> *Id.*

power that can be rationally tested against or in terms of the law.<sup>25</sup> It also presupposes a right to effective recourse and remedy when constitutional guarantees are desecrated.

Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Law or conduct that is arbitrary, or unjustifiably limits entrenched rights or in some other manner is inconsistent with the Constitution is invalid at the behest of the doctrine of constitutional supremacy.<sup>26</sup>

As though the supremacy clause is not enough, the Constitution asserts its supremacy in other cardinal provisions. It requires that in the exercise of its legislative authority, Parliament “must act in accordance with, and within the limits of, the Constitution.”<sup>27</sup> Members of Cabinet are “accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.”<sup>28</sup> They are required to act in accordance with the Constitution.<sup>29</sup> Courts too are independent but subject only to the Constitution and the law and must apply the law. What is more, the Constitution commands courts to declare any law or conduct inconsistent with the Constitution invalid to the extent of the inconsistency.<sup>30</sup> It better be understood that it is not open to courts to look away when confronted with unconstitutionality. They are enjoined to say so and to fashion redress.

Having said all that, it must be conceded that, if there is a danger in parliamentary sovereignty, there is also a danger in constitutional supremacy. Contemporary attacks on the Constitutional Court as undermining the popular will have traction precisely because they are rooted in a legitimate fear.<sup>31</sup> A

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<sup>25</sup> Id.

<sup>26</sup> Section 2 of the Constitution.

<sup>27</sup> Section 44(4) of the Constitution.

<sup>28</sup> Section 92(2) of the Constitution.

<sup>29</sup> Section 92(3)(a) of the Constitution.

<sup>30</sup> Section 172(1)(a) of the Constitution.

<sup>31</sup> For instance, ANC secretary-general Gwede Mantashe recently opined that the Constitutional Court was thwarting the will of “the people” by finding legislation passed by Parliament to be unconstitutional. See, for example, Ampofo-Anti “Mantashe’s warped logic”

tension clearly exists between democratic theory and constitutional supremacy. This is not a dilemma peculiar to our shores. It is perhaps as endemic as there are constitutional democracies.

Constitutional law scholars have called this conundrum the *countermajoritarian dilemma*. When the courts, through the exercise of judicial review, strike down legislation – declaring it, for instance, constitutionally invalid – they override the will of the prevailing majority as expressed by parliament. In short, the supremacy of the Constitution, and its policing by the courts through judicial review, places unelected public officials – namely judges – with the power to nullify acts of elected public officials and thus seems to undermine a fundamental principle of democracy.

Constitutional supremacy and democracy are not, however, necessarily at irreconcilable loggerheads. A synthesis of the two, indeed, undergirds all modern constitutional democracies. Without devaluing the institutions constituent of representative democracy, constitutionalism holds that certain essential features of the polity – most importantly certain fundamental rights and the institutional guarantees protecting them – may not be amended or destroyed by a majority government. The Constitution sets out normative constraints on majoritarian politics, and their preservation are entrusted to the judiciary. Judicial review, then, is a necessary mechanism for preserving the Constitution, for guaranteeing fundamental rights and for enforcing limits that the Constitution itself imposes on governmental power.

On the one hand, constitutional democracy recognises the principle that government is based on and legitimated by the will and consent of the governed or at least the majority of the governed.<sup>32</sup> On the other hand, constitutional democracy places a limit on this principle “by making the democratically elected government and the will of the majority subject to a . . .

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*Sunday Independent* 31 August 2011 at <[www.iol.co.za/sundayindependent/mantashe-s-warped-logic-1.1128708](http://www.iol.co.za/sundayindependent/mantashe-s-warped-logic-1.1128708)>.

<sup>32</sup> LWH Ackermann, “The obligations on Government and Society in our Constitutional State to Respect and Support Independent Constitutional Structures” (2000) 3 *PER/PELJ* i at 1.

constitution and the norms embodied in it.”<sup>33</sup> As former Justice Ackermann wrote, “[i]n a constitutional state, the politics of governance can never again be a merely pragmatic enterprise aimed exclusively at achieving the various goals comprising the government’s electoral mandate. Governance is now subject to the Constitution and its values.”<sup>34</sup>

The premium placed by many jurisdictions on both democracy and constitutional supremacy derives from the prioritisation of human rights in the wake of the Second World War and in our case in the wake of apartheid and colonial repression. Constitutionalism, on this view, reflects contemporary democracies’ commitment to “entrenched, self-binding protection of basic rights and liberties” in an “attempt to secure vulnerable groups, individuals, beliefs, and ideas vis-à-vis the potential tyranny of political majorities, especially in times of war, economic crisis, and other incidents of political mass hysteria.”<sup>35</sup>

On this view, democracy should not be simply equated with majority rule. Democracy should no longer be understood as a political community governed by the principle of parliamentary sovereignty, but rather one governed by the principle of constitutional supremacy.<sup>36</sup> Individuals should enjoy legal protections in the form of a written constitution robust enough to withstand even change by an elected parliament or, in some jurisdictions, by a simple majority in such a parliament. Moreover, on this view, an entrenched and effectively enforced (through judicial review) constitution is not undemocratic, but rather should be understood as reconcilable with majority rule.<sup>37</sup>

This must be so for several reasons. First, it may be correctly posited that when we adopted the Constitution we entered into an original social contract. As Hirschl puts it, “members of the polity (or its constituent assembly) provide

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<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Ran Hirschl, “Preserving Hegemony? Assessing the Political Origins of the EU Constitution” (2005) 3 *International Journal of Constitutional Law* 269 at 272.

<sup>36</sup> Id.

<sup>37</sup> Id.

themselves with precautions or pre-commitments against their own imperfections or harmful future desires and bind themselves to their initial agreement on the basic rules and rights that specify their sovereignty.”<sup>38</sup>

In other words, for us, democracy is more than a mathematical game. It is a veritable vehicle for the realisation of a cluster of foundational values and social goals that ought to inform the kind of society that we seek to create. Even a democratic majority is not enough to rubbish these selected core values and objects that we have collectively chosen to immunise from populism.

It must be added that, like all contracts, provisions of the Constitution are not completely shielded from amendment provided the prescribed supporting majorities are observed. To discard supremacy of the Constitution and judicial review a supporting vote of 75% of members of the national assembly and of six of the nine provinces would be required.<sup>39</sup>

Second, some commentators suggest that constitutional supremacy and, specifically, judicial review by independent constitutional courts, may actually further democratic ends by facilitating political representation and participation by minorities that are otherwise excluded from policy-making processes in majoritarian parliamentary politics.<sup>40</sup> The obverse of this coin, as we have often heard from domestic discourse, is that political and other minorities unduly increase their influence which they otherwise cannot procure from the ballot box. However, for the judiciary it should matter not whether a minority or majority raises a constitutional grievance. The task at hand would remain the same and that is whether the claim is good.

Third, some theorists, influenced by institutional economics, proffer a functionalist explanation that constitutional supremacy and judicial review are an institutional answer to the efficiency problems of collective action,

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<sup>38</sup> *Id* at 273.

<sup>39</sup> Section 74(1)(a) and (b) of the Constitution.

<sup>40</sup> See Jon Elster, “Forces and Mechanisms in the Constitution-Making Process” (1995) 45 *Duke Law Journal* 364 at 378-80.

enforcement and imperfect or asymmetric information.<sup>41</sup> Economic development and investment, on this view, require as prerequisites predictable laws and a legal regime that ensures the protection of private property rights. The constitutionalisation of rights (and creation of an independent judiciary to conduct judicial review guided by the constitution), increases investor confidence and allows for a more consistent, predictable and efficient enforcement of contracts, thus further encouraging investment.

Fourth, most modern democracies employ a system of institutional arrangements that includes separation of powers, checks and balances and judicial independence. The South African Constitution, for instance, designates the judiciary – and in particular the Constitutional Court – as the prime upholder and enforcer of the Constitution.<sup>42</sup> However, the Constitution goes further and makes provision for a number of other independent state institutions, the purpose of which is to “strengthen constitutional democracy in the Republic”,<sup>43</sup> namely the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. Furthermore, the Constitution also makes provision for several other independent bodies that play a role in checking and balancing the exercise of power by the various arms of government. For instance, with respect to local government, the Constitution mandates the establishment of an independent authority for the determination of municipal boundaries,<sup>44</sup> and provides for a Financial and Fiscal Commission which is independent.<sup>45</sup>

As I conclude this section, it must be added that a claim that constitutionalism amounts only to limiting government is misleading and potentially

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<sup>41</sup> Hirschl, above n 35, at 277. See also Douglass C. North and Barry R. Weingast, “Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England” (1989) 49 *Journal of Economic History* 803.

<sup>42</sup> See section 167(3) of the Constitution.

<sup>43</sup> Section 181(1) of the Constitution.

<sup>44</sup> See section 155(3) of the Constitution.

<sup>45</sup> Section 220 of the Constitution. See, generally, Ackermann, above n 32, at 3.

dangerous.<sup>46</sup> A robust and supreme Constitution arguably can make government stronger and more stable. Institutional arrangements such as the separation of powers, checks and balances, individual civil, political, and justiciable socio-economic rights make the government more responsible, more consistent, more predictable, more just, more caring, more responsive and more legitimate in the eyes of the citizenry.

Ours is an avowedly transformative supreme law that is set to change our world. To that end we have fashioned the most efficient constitutional construct to eradicate the evil of the past and to usher in a new dawn and to anticipate and prevent future abuse of public or private power. We cannot now regress in order to make monetary political gains.

### **Has our jurisprudence struck an appropriate balance between majoritarianism and constitutional supremacy?**

I have come to the end. I must though briefly evaluate whether our jurisprudence has struck an appropriate balance between majoritarianism and constitutional supremacy. Let me at the outset say that I think that our courts have done a reasonable effort in striking the appropriate balance, elusive as it is. Few examples should suffice.

A good starting point would be *State v Makwanyane*.<sup>47</sup> The Constitutional Court was required to determine the constitutionality of the death penalty for murder. At the time, the Interim Constitution was applicable. Chaskalson P accepted that the majority of South Africans believed that the death penalty ought to be imposed in extreme cases of murder. He acknowledged that public opinion may hold some degree of relevance but stated that, in itself, it

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<sup>46</sup> The political philosopher Giovanni Sartori has written that constitutionalism is “the technique of retaining the advantages of [the rule of legislators] while lessening their respective shortcomings.” Constitutionalism “adopts rule by legislators” but with limitations concerning the method of lawmaking – constrained by strong procedural requirements – and the range of lawmaking – “restricted by a higher law and thereby prevented from tampering with the fundamental rights affecting the liberty of the citizen.” Giovanni Sartori, *The Theory of Democracy Revisited* (Chatham House, 1987) at 308.

<sup>47</sup> *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391; 1995 (6) BCLR 665.

is no replacement for the duty vested in the judiciary to interpret the Constitution and to uphold its provisions without fear or favour.<sup>48</sup> As he explained, “[i]f public opinion were to be decisive there would be no need for constitutional adjudication.”<sup>49</sup> Of course *Makwanyane* provoked an outcry. But the Court was faithful to its judicial obligations under the supreme law.

I have been a member of the Constitutional Court for nearly a decade now. I accept that I am less than dispassionate about the track record of that inimitable Court. It has fearlessly pronounced on vital public and private disputes and in so doing it has crafted a jurisprudence we should be proud of.

The Court has pronounced on the right of access to housing. It has repeatedly ordered government to find and furnish alternative accommodation as homeless people are evicted. It has intervened to ensure that vulnerable people have access to social grants. It has ordered government to provide anti-retroviral medication. The Court has not hesitated to pronounce on a whole range of procedural and substantive rule of the criminal justice system. The Court has often mediated between state organs drawing clear lines of authority amongst them. The equality jurisprudence of our Court is a matter of great pride and world renowned. It has unhesitatingly banished discrimination and exclusion on virtually every conceivable ground. On occasion and perhaps not as often as it should be, it has refashioned and adapted the common law in line with our constitutional ethos. When appropriate, the Court has invoked the humane values of Ubuntu and infused them into our law in ways most beneficial. And as required by the Constitution, it has tested many statutes and administrative conduct for constitutional compliance. The Court has not been slow in taking a cue from international law, in taking seriously our international obligations and where appropriate it has looked to foreign law for guidance.

It is so that not all court watchers think that we have done a good job all the time. In respect of socio-economic rights some have made out a compelling

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<sup>48</sup> *Id* at para 38.

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

case that the Court has been excessively deferential to the political branches. This deference, it is argued, is apparent from the Court's refusal to entertain the minimum core approach to enforcement of socio-economic rights as well as its refusal to exercise supervisory jurisdiction.

My personal take is that socio-economic rights jurisprudence is in many ways embryonic. It can hardly be said that the Court lacks commitment to protect the most vulnerable amongst us and whose interest in access to housing, shelter, education and medical care is vital. As evictions increase and other economic pressures befall the vulnerable in society, the Court has seen an increase in socio-economic rights claims. About that we are delighted. I have no doubt that opportunities will arise to help deepen its socio-economic rights jurisprudence in order to come to the rescue of the most vulnerable amongst us.

Lastly, I do think it is an error to characterise the relationship between the Court and other branches of government as oppositional. Let me start off by reminding all of us that the government and so too the ruling party has always made it publically known that it respects the rule of law, that it is committed to upholding the Constitution, that it would give effect to court orders and that it is a partner with courts to realise the high ambitions of our Constitution.

The government has by and large done so. In my experience, where court orders have not been implemented it has been as a result of some or other administrative ineptness and not as a result of outright recalcitrance.

The function of the Constitutional Court, albeit counter-majoritarian at times, is ultimately supportive of democracy. It upholds protections that ensure democratic process and protects both minority and majority rights under the beneficence of our constitutional arrangement.

Judicial officers who grace our courts are emphatically patriotic and loyal to the Constitution and the law. We must continue to ensure that the bench is not only representative of our demographics but also competent and well cut

to the task. That combination, in time will enhance the legitimacy and effectiveness of our judiciary.

That judges sometimes hold against or other times for government tells us nothing about their commitment (or the lack of it) to the democratic project of our country. That they get the law wrong sometimes only remind us that they are human and explains why we have appellate safeguards. There is simply no place for wanton attacks on them suggesting that they are fostering some arcane if not dishonest agenda. An average judge approaches her work with utmost industry and sincerity alive to the grave responsibility she bears and the national project to create a just and better life for all. They all know that they must find the rich equilibrium our constitution admirably imposes.

Thank you for listening and good night.