"Has South Africa become a juristocracy? Or who runs the country?"

Dennis Davis
Judge of the Cape High Court

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Thank you for inviting me. It's a pleasure to be here, for two reasons. Firstly, I knew Harold for a long time, and respected him immensely. He and I were often on different sides of the theoretical framework of the Left, and our discussions taught me a great deal. Secondly, the objective of this forum has always been to promote debate and deliberation, which I think is vital.

That's partly what I want to speak about; it seems that since 1994 in South Africa, we are neglecting debate and deliberation more and more. Perhaps we deserve the public broadcaster we've got, because when we don't utilise the rights that people fought and died for, the implication is that we don't consider them all that important.

Listen to any talk radio programme and you will hear complaints about the constitution, ranging from the unconstitutionality of the death penalty to the recognition of gay marriage. The essence of the complaint is that majority opinion is against these constitutional provisions as interpreted by the Constitutional Court. Hence it is undemocratic to prevent majority opinion from being implemented. The gap between the majority opinion and the decision to declare the death penalty to be unconstitutional, for example, will cause the legal system to be illegitimate.

This form of protest against a constitutional democracy in which judges interpret a text called a written constitution turns on two interrelated issues: 1.why should majority public opinion on important matters of public policy be constrained in perpetuity by a legal text which, 2 is interpreted by unelected judges who follow their own values in giving content to this text?

The answers to these questions are not obvious – even judges hold differing opinions. Take for example a recent decision of the Constitutional Court which dealt with a challenge to an amendment to the abortion laws. It reveals differences between the judges as to the role of the court. The majority of the court decided that Parliament, in particular the National Council of Provinces, had not discharged its constitutional obligation of conducting sufficient public hearings before passing legislation of considerable public interest. Hence the court insisted upon a dialogical process between the democratically elected legislature and the public before the amendment became law. By contrast, Judge Zac Yacoob, in a minority judgement, held that the court should not impose obligations of consultation upon a democratically elected legislature. 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 take decisions on behalf of the public.

This minority judgement places great importance on the principle of representative democracy whereas the majority insists, with as considerable persuasion, that our 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: how far should the rule of the court extend over the country's public representatives including the will of the voters?

We should accept 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'?

In answering these questions the distinguished legal philosopher Ronald Dworkin says in a recent book Judges in Robes 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. In the South African case, the design we chose and on which we as 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 people' to ensure that certain foundational rights were enjoyed by all, regardless of access political power at a transient moment.

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 judgements when they decide these cases but they are value judgements which need to make sense of the scope and ambition of the constitution read as a whole. In addition, judges are constrained by the reading of previous judicial colleagues confronted with the same clauses. In other words, judges are not free to impose their own view on the constitution, regardless of the text. Some reading of the text as a whole and precedent is required. Dworkin readily accepts that even the application of precedent requires a value judgement. Judgements of relevant similarity are not made by mechanistic use of analogy; the judge has to determine whether the present dispute is of sufficient legal equivalence to the previously decided case so as to be followed. Thus the judge does not, on this argument, decide cases by relying on her own values but strives to quarry out some more objective approach by asking what is just in this situation, the concept of justice being sourced in the principles which underlie the legal system they are enjoined to protect. Dworkin thus argues that judges must take account of the consequences of their decisions "... but they may only do so as directed by principles embedded in the law as a whole, principles that adjudicate which consequences are relevant and how these should be weighed, rather the by their political or personal preferences."

No matter the sophistication of this theory, the meaning of the constitutional text is invariably and will remain contested. Claims about 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:

> "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."

These 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 Waldron and Mark Tushnet have argued that because disagreements about rights is not unreasonable and that legitimate differences are inevitable, it is important that such disagreements are resolved by means of responsible deliberative mechanisms. 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 employ Waldron "... a rather insulting form of disenfranchisement … and a legalistic obfuscation of the moral issues at stake in our disagreements about rights."

In my response to this argument, I want to make two points: 1. The design of our constitution was intended so that neither judges, the executive or legislature ran the country exclusively. But how they do it together, and more particularly the role the judiciary play in this democratic model, should always be the subject of rigorous public debate. 2. The very purpose of a constitution of the model embraced by South Africa is to secure for each permanent resident (I employ this term rather then citizen so as to embrace the wording of many of the rights in the constitution) the conditions under which each person can enjoy the value of autonomy and can participate in the formulation and development of public reason.

Waldron contends that we overestimate the purchase of judicial review as a means to protect rights. Deliberative processes by way of the legislature is the more democratic route. Yet Waldron concedes that his model only works where four assumptions operate (i) democratic institutions are in reasonably good working order; (ii) a set of judicial institutions in reasonably good working order settle disputes and uphold the rule of law; (iii) there is a general commitment on the part of most members of a society to the idea of individual and minority rights iv) there is persisting and good faith disagreement about rights; that is, there is good faith disagreement about what a commitment to rights entails and the implications thereof.

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 conception of review by unelected judges converts a rights enterprise into something undemocratic Outside of Waldron's New Zealand, it is difficult to conceive of any countries where recourse alone to legislative deliberation is going to promote and protect a rights culture Take for example the case of gay marriages. In Minister of Home Affairs v Fourie, Sachs J 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." He then goes on to say:

> "In an open and democratic society contemplated by the Constitution 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. … the 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."

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 our society. In this, the court protected the autonomy of all who make up our society, thereby promoting the conditions in which all may participate fairly in the political process. On its own that does not undermine democracy; to the contrary it promotes a form of democracy which recognises the role of democratically elected institutions, both in the deference 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 beheld to trump a constitutionally entrenched right. In addition, the protection and promotion of self autonomy allows for individuals to coalesce into civic movements which in turn can enjoy a dialogic relationship with both the courts and the legislature.

The provision in our 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 thus:

> "A claim (to socio economic rights) 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 … People may claim protection against the external circumstances of their own lives that are unfavourable to self authorship."

This second response to Waldron type majoritarianism does come with a caution - where the courts do not respect the legislature's reasonable judgement as to whether the legislative programme promotes and protects 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 then it is implemented in practice. For the question that we must address concerns the problem of the elected bodies developing policies that run counter to the vision of the constitution. The best that courts can then 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.

Perhaps it is necessary to end with a caution : constitutions are not all the same; constitutionalism is not about one size fits all. As Yash Ghai warns in a conclusion to an analysis of comparative constitutions in which he suggests that similar language and seemingly common concepts are deceptive, "... comparative constitutional law has become mired in formalism and pseudo – universalism and the wonderful multiplicity of the constitution has become lost." We should begin our analysis not in the pseudo – democratic claim about majority opinion at appoint in history but about the possibility of embracing three coordinating strands for the South African democracy- a deliberative legislature, a judiciary which promotes the procedural and substantive conditions for political participation and civil, society where those conditions are exploited by autonomous citizens getting together in a common political purpose.