INTRODUCTION

Pierre de Vos[*]

The introduction in 1994 of a democratic constitution containing a justiciable Bill of Rights seemed to present South African lawyers, legal academics and judges with a unique opportunity to take stock of the entrenched legal culture and practices developed and sustained during the apartheid era. The post-amble to the 1994 South African Constitution[1] explicitly stated that the introduction of the new Constitution had to be seen as a decisive break with the past, declaring that:

> The Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race class, belief or sex.

When the late legal academic Etienne Mureinik seized on this post-amble of South Africa's 1993 Constitution to proclaim that the interim Constitution was a bridge from a culture of authority to a culture of justification, little could he have known how influential this idea would become in South Africa's subsequent constitutional jurisprudence.[2] This metaphor of the Constitution as bridge has found wide acceptance amongst legal scholars and judges, and is now firmly established as one of the founding myths of the new legal order in South Africa.

That a change of some sort was required was not seriously disputed by any of the important role players in the legal game. Although the major role players did not share the same understanding of what these changes should entail, there was a profound understanding that the new Constitution required some form of change in legal practices or the discursive habits of lawyers. Few lawyers and judges argued in favour of a radical rethink of the legal culture, despite the extreme formalism and reverence for the legal texts which dominated legal discourse in apartheid South Africa. As late as 1998, South Africa's legal culture — the professional sensibilities, habits of mind and intellectual reflexes — was described by a visiting US legal academic as being 'conservative', by which he meant that lawyers of almost all political outlooks had a cautious tradition of legal interpretation and analysis. 'US lawyers are often struck by their South African colleagues' relative strong faith in the precision, determinacy and self-revealingness of words and texts', while legal interpretation was thought to be 'highly structured, technicist, literal and rule-bound'.[3]

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* Professor, Law Faculty, University of Western Cape.

1 *Constitution of the Republic of South Africa*, Act 200 of 1993.

2 Mureinik (1994), pp 31–32.

3 Klare (1998), p 168.

Despite this prevailing conservatism — in the broad sense — most lawyers, legal academics and judges (even some of the most traditional ones) realised that the language of the Constitution in general and the Bill of Rights in particular (often) has no single 'objective' meaning, and that judges who interpret and apply the various provisions of the constitution cannot (at least not always) do so with reference to the language of the constitutional text only.[4] Although South African legal culture thus remains deeply conservative, I contend that the first stirrings of a new way of looking at legal texts can be observed. This is not to say that all — or even a majority of — judges, lawyers and legal academics in South Africa embrace the insights of legal realism, critical legal studies or post-structuralism. However, I do contend that an ever-increasing number of the participants in the debate on constitutional interpretation agree (sometimes rather reluctantly) that the language of the Constitution cannot (always) produce one absolute or fixed meaning.[5] This is, at the very least, because the language of a modern constitutional text — and especially a Bill of Rights contained in such a text — is viewed as broad in scope, and as setting out general principles exhorting judges to interpret and apply them. This, so the argument goes, makes it very difficult — if not impossible — for judges called upon to interpret the provisions of the Constitution in general and the Bill of Rights in particular to claim that their decisions are always made in an objective and mechanical fashion, merely comparing the clear and unambiguous provision of the Constitution being invoked against the statute or action being challenged and deciding in an objective fashion whether the latter squares up with the former. Because the text of the South African Constitution is ambiguous and shot through with gaps and conflicts, it does not self-generate its meanings, and must be interpreted. To do this, it seems necessary to invoke sources of understanding and value external to the text and other legal materials.[6]

However, most judges, lawyers and legal academics in South Africa seem profoundly uncomfortable with the notion that judicial decision-making in the constitutional sphere is not (always) aimed merely at discovering a 'true', 'objective' or 'original' meaning of the text, and is hence not based solely on predictable and neutral principle.[7] For, if this is so, the interpreter of the constitutional text will often have to rely on other, subjective and extra-textual

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4 See for example De Waal, Currie and Erasmus (2000), p 117 ('As with ordinary language, the meaning of a constitutional provision depends on the context in which it is used.')

5 There still seems to exist a very strong view among most lawyers, judges and legal academics that because of the broad and general language employed in it, the Constitutional text is unique in this regard and that 'ordinary' statutes usually do not present the same interpretive problems, as they usually contain clear and unambiguous language. Although I strongly disagree with this traditional view of how language works, the point I am making here is not dependent on a rejection of this traditional view.

6 Klare (1998), p 157.

7 See, for example, the various writings by the Fagan brothers: A Fagan (1995); E Fagan (1996); and E Fagan (1997).

factors — perhaps even the interpreter's own personal, political and philosophical views — to give meaning to that text. The discomfort flows from the fact that most judges, lawyers and legal academics in South Africa broadly adhere to the traditional liberal school of adjudication, a tradition that jealously guards the boundary between law on the one hand and politics on the other. As Karl Klare has recently pointed out, this traditional view of adjudication maintains a view of law as 'describing rational decision-procedures … with which to arrive at determinate legal outcomes from neutral, consensus-based general principles expressed or immanent within a legal order'[8]. The dilemma of constitutional adjudication within this traditional liberal paradigm is that it threatens to blur this purported boundary between the subjective, and partisan politics on the one hand, and 'neutral' and 'objective' legal interpretation on the other.

In order to deal with this dilemma without jettisoning the whole liberal project, most judges, lawyers and legal academics in South Africa have been spending considerable time and energy seeking ways of upholding the distinction between 'law' and 'politics' through the identification of objective criteria for judicial decision-making. For the participants within the traditional legal discourse, the failure to provide credible answers to this troublesome question may lead to a questioning of the legitimacy of the process of constitutional adjudication and even of the courts themselves. For, it is argued, if it is accepted that the text of the Constitution does not have one objectively determinable meaning, a failure to identify objective or objectively determinable criteria that will constrain judges in their interpretation of the open-ended or at least ambiguous text, will open up the judicial process to criticism of arbitrariness, politicisation, and even bias.[9] In other words, such a failure will be seen as tantamount to admitting that judges decide on the exact content and scope of fundamental rights with reference to their own personal, political and philosophical views and not with reference to an objectively determinable text or at least with objective or objectively determinable criteria. This will force an acknowledgement of the inherent 'political' nature of constitutional adjudication and within the traditional liberal paradigm of constitutional adjudication this will potentially detract from the legitimacy of the Constitutional Court itself.

Not all South African lawyers, judges and legal academics share this anxiety. On the contrary, the advent of the new Constitution has brought with it an explosion of legal writing challenging many of the traditional notions of law and legal interpretation and the interrelationship between law and politics. There has been a dramatic opening up of the legal discourse and a blossoming of discursive practices in the legal arena in a spirit of more critical engagement with law and power. Although those who engage with the law from this perspective do not necessarily share exactly the same philosophical or political views, they do share a common understanding that the advent of the new Constitution requires some sort of critical engagement with more than the text

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8 Mureinik (1994), p 158, referring to the work of Singer (1987), p 624, n 39.

9 See for example Meyerson (1997), pp xxvi–ii.

of the Constitution or the Bill of Rights. What is required, according to this group, is a complete rethink of the way in which we do and speak and practise law. The Research Unit for Constitutional and Legal Interpretation (RULCI) has been at the forefront of facilitating discussions amongst such critical scholars, most notably at its annual colloquium which was first held in 1999 and where the papers presented in this volume were first presented in 2004. The colloquium has grown into an important forum for debate and engagement amongst legal scholars who generally favour a progressive political, social and economic agenda and argue for a different way of engaging with legal discourse. In 2004, RULCI teamed up with the LatCrit movement to present a slightly larger conference and to extend the debate across borders. Although the connections and similarities between the concerns of those who come from the only superpower and those with more of a South African focus was not always apparent, the conference did highlight the need for a critical engagement with the law, not only from the perspective of legal doctrine, but also from the perspective of legal discourse.

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