

ANALYSING THE RESILIENCE OF THE EMERGENT POLITICAL CULTURE OF CONSTITUTIONALISM IN SOUTH AFRICA

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1. INTRODUCTION

The aims of this article are twofold: to identify the nature of South Africa's political culture or pattern of orientations towards participation in and respect for constitutional government that helps to sustain democracy in the country; and to assess the resilience of the spirit of constitutionalism in government circles, as well as among ordinary South African citizens. The article also has a subtext about the factors that can derail South Africa's fledgling democracy, but which, because of length constraints, were not systematically developed or fully explicated in the text itself. The term "emergent political culture" is used expressly to signify the embryonic and vulnerable nature of a common culture of constitutional compliance to the rule of law.

Culture, in its broadest sense, encompasses the beliefs, behaviour, language, and entire way of life of a particular group of people, passed on from one generation to another by learning rather than biological inheritance. Political scientists, however, use the term in a somewhat more restricted sense to "refer to a people's psychological orientation in relation to political objects such as parties, government and the constitution, expressed in their political attitudes, beliefs ... and values" (Heywood 2001:219).

The concept of political culture was developed in the 1950s and the 1960s in the United States to study the underlying layers of attitude that can support - or fail to support - the rest of the political system. In a pioneering work, **The civic culture: Political attitudes and democracy in five nations** (1963), Gabriel Almond and Sidney Verba designed a framework for studying political culture on a comparative basis in order to identify the features of political culture that are most conducive to democratic politics.

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Political culture then looks for the constitutional values that will underpin the legitimacy of government. According to these two authors, citizens living in modern participant democracies develop a civic responsibility and are in most cases willing to play an active role in political society. They see democratic stability as the outcome of a political culture in which citizen participation and passivity are combined with government performance and obligation (1963:15-21).

Heywood (2001:201-2) points out that the civic-culture approach to the study of political attitudes and values has, however, elicited considerable criticism. Almond and Verba's approach considers political culture as homogeneous and therefore tends to overlook the different political value systems that are present in politically and socially fragmented societies and as a result, pay too little attention to social conflict generated by class, race and ethnic cleavages found in the political subcultures of highly fragmented societies.

Given our history of segregation and apartheid over the past two centuries, the political culture of South Africa is not uniform and monolithic, nor do South Africans subscribe to the same sets of political and economic values. The different value systems are based on divergent past histories, certain assumptions, presuppositions and theories, which inevitably harbour a specific ideological content with attendant implications for the conclusions drawn from this study.

When South Africa adopted the Constitution of the Republic of South Africa in 1996 with the intent of building one nation based on single citizenship and common values such as human dignity, equality, non-racism and non-sexism, it was still very much divided by different value orientations, as well as class, racial and ethnic schisms.

The question is whether our constitution is flexible enough to carry South Africa forward to the realisation of a common political culture of democracy and a single nationhood. The approach that will be followed with regard to this question is to describe the key variables that determine the frailty/robustness of constitutionalism in South Africa. The obstacles that South Africa faces in this regard - class, race and ethnic divisions, the legacy of the political culture of the African National Congress (ANC) and the ideological divide - will be briefly argued before turning to look at the factors that favour the endurance of a civic culture of constitutionalism. It will be argued that the staying power of our present constitution rests, firstly, on the legitimacy of the constitution-making process, the pre-election pact and broad-based ownership for the final product that made the smooth transfer of power from one regime to another possible. The resilience of the constitution is further based on the enshrinement of the values of good governance and people's participation in public affairs, and the empowerment of civil society to articulate and to protect their social

and political rights, as well as the role of various institutions in buttressing the culture of constitutionalism, particularly the Constitutional Court. The political culture or the way in which both government and the different segments of civil society view and subscribe to the values enshrined in the constitution will largely determine the advance towards and the sustainability of a vibrant democratic dispensation in South Africa.

2. THE ENDURING CLEAVAGES IN THE SOUTH AFRICAN SOCIETY

There are a number of obstacles that vie against the growth and maturation of a common set of political values in South Africa.

2.1 Class divisions

The history of the South African political economy has created deep inequalities in terms of *the distribution of wealth*. As Karl Marx pointed out long ago, the way people earn their living has a lot to do with the type of government they have. The inequalities in the distribution of wealth were brought about by people's participation in the economy of the country: whites had open access to economic opportunities whereas black people were restricted. Businesses and industries, established in mainly 'white' areas, were introduced by the Hertzog government in 1924 and subsequently strengthened by successive National Party (NP) governments since 1948. These practices resulted in dualities in the South African economy, the first of which was that the country developed a political economy in which the distribution of wealth was (and still is) skewed in favour of the white minority (Schoeman 2001:323).

This means that South Africa's economy is divided along racial lines, with its wealth benefitting mainly the white population. Schoeman cites figures of 1997 which shows that the richest 10% of the country's population earns 50% of the income and the poorest 20% only 1,5%. Some 85% of the poor according to these figures are black (2001:323).

South Africa's *high rate of unemployment*, which, according to the 2001 census borders on 40%, is partially related to the problem of structural disparity between the white and black economic classes in South Africa. Of the formally unemployed, approximately 50% are engaged in the informal sector. These jobs are, however, marginal economic activities at best, like hawking fruit, or doing car watches, and do not necessarily eliminate material poverty. It is a well-established fact that workers in low-skilled occupations (for example labourers) have, on average, more

and longer spells of structural unemployment than workers in higher skilled occupations (for example professionals) (Venter 2001:5; Schoeman 2001:323-4).

The distorted ratios between black and white in highly skilled jobs during the apartheid era, the greater concentration of blacks in lower skilled occupations and the general discrimination in the labour market, inevitably influenced the way in which the new regime after the 1994 elections attempted to address the issue.

The particular measures employed - among others, black empowerment to increase the share of blacks in the high-end market sector and to put measures in place, such as affirmative action, to achieve a more balanced employment ratio between blacks and whites in the country - stem from a political value system that developed out of their historical experience of economic deprivation and its consequences.

The enormous economic disparity between the rich and the poor in South Africa means that there can be no single economic value system, no single ideological reference point and consequently, no single political culture. If these disparities are not adequately dealt with, they can put the political system under enough pressure to jeopardise the preservation of our constitution. The political dynamics of divergent economic value systems and their impact on constitutionalism will be discussed below.

2.2 Racial divisions in South African society

Beside economic factors that tend to thwart the establishment of a common political culture among the peoples of South Africa, there is also racial discord. Venter (2001:6) argues that South African society is marked by racial division, reinforced by the history of segregation and, later on, of apartheid in South Africa. The new political order since 1994, however, has not eradicated these divisions.

In an academic lecture on the role of opposition politics and parties, the leader of the Democratic Alliance (DA), Tony Leon, observed that South African history and political discourse under both apartheid and the new constitutional order is still fixated by pigmentation or the colour of one's skin. Whenever a legitimate issue arises, for example about the competence and credentials of an appointee or about the failure of a political policy, it is often met with angry racial retort. The governing party, he states, relies primarily on the symbolism accrued in the struggle against minority rule, and any criticism is perceived as an attempt to stigmatise and discredit the party in general as incompetent and corrupt, which brings him to the somewhat disillusioned conclusion:

So while the question is - or should be - about appropriateness, qualification, conduct in office and so forth, the real topic under scrutiny is race. And it is often difficult to distinguish the surface waves and spray from the deep tides and current underneath (Leon 2001:5, 7-8).

Racial and class divisions are clearly reflected in voter preferences and voter profiles. During the 2004 elections the ANC received a larger than two-thirds majority of the votes (70 per cent). But the big racial fault-line is still very much evident in South African politics. Few white, coloured and Indian voters could get themselves to vote for the ANC. According to Duvenhage (2004) nearly 90 per cent of the ANC's constituency in 2004 was black. A high proportion of them come from the impoverished lower social strata of society. Thus, more than 70 per cent of the supporters who form the ANC constituency were structurally unemployed in 2004.

The second largest political party during the 2004 elections, the DA, could garner only 12 per cent of the votes - 58% less than the governing party. Although the DA picked up a number of black and coloured votes, the voter support profile of the DA is predominantly white middle class (more than two-thirds). The majority are gainfully employed, fall in the middle to higher income brackets and usually have a tertiary education (Duvenhage, 2004).

My contention is that the continued class-based and racially skewed voter support for political parties does not bode well for establishing a common nationhood in South Africa. As Venter (2001:6) points out, the different race groups have *different conceptual frameworks* when dealing with the problem of racism. Whites tend to use a liberal framework of reference, focusing on the freedom of individuals to compete and to be judged solely on merit, without reference to race, colour or creed. Black South Africans tend to take the position that they have been historically disadvantaged by the segregationist policies of successive white political authorities. These disadvantages first have to be corrected by state intervention (affirmative action and black empowerment) before the liberal position of individual merit can be considered. These two frameworks are very much divergent, difficult to reconcile and often lead to misunderstanding and conflict.

2.3 Ethnic divisions

Contrary to expectations of many liberal theorists of nation-building, ethnicity and ethnic consciousness are reviving and rampant on a world-wide scale. The decolonised states of Africa practise politics on an ethnic basis rather than a party political basis. In decolonised ethnically divided African states a single ethnic group

often takes control of the state and uses its powers to exercise hegemony over other ethnic groups.

Africans in South Africa are historically divided along ethnic lines and the ANC government was therefore compelled to recognise tribal authorities, as was the NP during the previous political dispensation. But whereas the NP government tried to freeze ethnicity as a permanent feature in South African society under names like 'separate development' and 'political self-determination', the ANC chose to pursue an ethnic neutral policy (Van der Waldt 2001:146). Consequently, these divisions are at present neither salient nor politically exploited in South Africa, which augurs well for the development of a more tolerant political culture. The ANC is the most apparent transethnic party in South African politics. In the April 1994, the 1999 and 2004 general elections, black voters from all black ethnic groups overwhelmingly supported the ANC. As the New National Party began to crumble after its disastrous election results of 2004, the incumbent members of the party in Parliament, provincial and local government joined the ANC in droves, albeit in some cases merely to retain their seats.

It is noteworthy that parties with a predominantly ethnic basis - the Inkatha Freedom Party (IFP) (Zulus), the United Democratic Movement (UDM) (Xhosa) and the Freedom Front Plus (FFP) (Afrikaners) - could not make a breakthrough and took home far fewer votes than the official opposition party, the DA.

Although a transethnic political culture is slowly beginning to take root, South Africa still has a long way to go. There has been no open debate, brainstorming or genuine introspection on the part of the ANC, opposition parties and tribal authorities on the institution or the future of traditional leadership in a modern democracy functioning within a globalised economic environment. The question has never really been debated how customary law, indigenous ethnic institutions of traditional leadership and the exercise of power by traditional ethnic leaders that were not democratically elected but rely on hereditary succession, can be harmonised with an evolving system of modern democratic governance. That this political dichotomy has largely been evaded is evident from Chapter 12 of the constitution that consists of only two brief paragraphs on the recognition and role of traditional leaders.

2.4 The ANC's internal political culture

The parasitic existence of the South African Communist Party (SACP), deriving part or all of its political sustenance from its host, the ANC, is one of the biggest anomalies in the political make-up of the ANC. The SACP has mostly chosen to remain incognito in all three national elections and has not once run its own

election campaign or put forward its own independent candidates. The SACP's weight of influence on the Mandela cabinet and both the Mbeki cabinets through cabinet or parliamentary members with dual membership of the ANC and the SACP, is incommensurate with their actual numbers. The nature of these two parties' cohabitation helps to explain the current ideological schizophrenia of the ANC as a political party and the vicissitudes in its political policies that have at times varied from democratic liberalism to populist Leninism.

In order to understand the political culture of the ANC and the party's uncomfortable relationship with the SACP, one needs to go back in history to the ANC's three decades in exile (1960-1990). The political culture that took root in these years goes a long way to explain the party's political philosophies on economic organisation and its continuous alliance with the SACP.

Several authors contend that a typical Leninist spirit permeated the political culture of the ANC in the three decades of expatriation and joint activity with the SACP. Ellis and Sechaba (41-3, 45) explain that, where these two organisations had separate policies and structures before the banning of the ANC in 1960, their identity became somewhat blurred during the ANC's years in exile. The fairly small number of expatriates, mostly grouped in Tanzania, was in disarray and effectively leaderless.

It was under these circumstances that the Communist Party, at least initially, took over a dominant role in central policy decision-making of the triple alliance of the ANC, its military wing Umkhonto we Sizwe (MK) and the SACP and established direct links between the ANC and the Kremlin. As the oldest communist party in Africa, and prior to World War II, also the largest on the continent, the SACP had forged links with Moscow over the years that paved the way for more direct material and military support of the ANC in exile.

Johnson (2003:328) concurs:

With the turn to armed struggle, its reorganisation as an exiled liberation movement aimed at seizing state power and because of its links with the South African Communist Party (SACP), the ANC was increasingly influenced by communist-style bureaucratic methods of work and a vanguard Leninist strategy with democratic centralism as its organising principle.

Oliver Tambo, who was instrumental in the transformation of the ANC from a liberal-constitutionalist organisation into a radical national liberation movement in

these years, followed a strategic policy of fusing the ANC and the SACP into one organisation with collective decision-making powers, to prevent the ANC organisation from falling apart. He underlined the fact that the leading members of the party were also the leading members of the ANC: the two organisations "to all intents and purposes" were "running a common struggle together" (Shubin 1999:116). Tambo realised only too well how dependent, financially and militarily, the ANC structures were on the Soviet Union, in order to keep its machinery running.

A large number of cabinet ministers, parliamentarians and the majority of the new SANDF generals and officers received training in the USSR. It is interesting to note in this regard how many of the members of Nelson Mandela's first cabinet, who came from an exile background, were members of both the Central Committee of the SACP and the National Executive Committee of the ANC at the time of their appointment.² According to Shubin (1999:400; 411) the Russian press calculated that approximately 1500 ANC activists were trained at Soviet military institutions (Kiev and Odessa) and about two hundred ANC/SACP members completed training at Soviet tertiary institutions, notably the Patrice Lumumba University and the Lenin International School of Politics in Moscow, where they were taught Marxism-Leninism. Foremost among these, was Thabo Mbeki, National Executive Committee member of the ANC since 1975 and member of the SACP Politburo since 1984, ANC Director of Information and Oliver Tambo's speech-writer and right-hand man. In 1969, three years after he had received his MA from Sussex, Mbeki was selected by the SA Communist Party for ideological training at the Lenin International School in Moscow. The next year he underwent his military training for MK also in the former Soviet Union, as did so many of his compatriots at the time.

Johnson furthermore examined the ANC's political culture since 1994. Although the transfer of power came about through negotiation instead of insurrection, and led to the establishment of a constitutional democracy in line with the Western liberal model, elements of Leninist 'democratic centralism' linger on in ANC party ranks. Largely because of its continued link with the SACP, the ANC leadership still uses the language of insurrectionism while pursuing an agenda of reform. It still has militaristic, top-down concepts of organisation, even though the political landscape is no longer that of warfare. As Johnson spotlighted, the acceptance of a negotiated settlement simply does not mean that the ANC suddenly became a liberal party, even though it acts within the confines of the constitutional framework. Despite the fact that the ANC disavowed Marxist-Leninism as a strategy, the persistence of radical rhetoric and Marxist discourse within ANC circles shows that

² See the biographies of ANC dignitaries on the ANC web page at <http://www.anc.org.za/people/>

the ANC is as far as its internal political culture is concerned, still a Leninist vanguard party functioning within the framework of liberal democracy. It would therefore be unwise to overlook the areas where the ANC's philosophy diverges with liberalism, which has been particularly intense on the issue of socio-economic rights and which could still derail democracy and the culture of constitutionalism in South Africa (Johnson 2003:322 et passim).

2.5 The ideological divide

Capitalism or socialism nowhere exists in a pure form today; it is a philosophical distinction or reference point against which to compare actual systems. For the sake of our argument, however, we can define capitalism as an economic system based on the private ownership of capital and land and on free enterprise or market allocation of resources. Conversely, socialism is an economic system based on state ownership of capital and land and on a centrally planned allocation of resources. It involves plans being made and monitored by a central planning authority and then communicated to the various production and distribution organisations in the country by a large team of state bureaucrats (Balaam and Veseth 2001: 48-50; 71-4).

The economic systems of capitalism and socialism vary primarily on two counts - who owns capital and land, and who allocates scarce resources. A major criticism levelled against capitalism in South Africa arises from the fact that the historical distribution of resources and land was arbitrarily tilted in favour of whites and indeed, in some cases, the result of illegitimate transfers. Because there have in the past been illegitimate transfers of private property rights, the current distribution of wealth has no legitimacy in the eyes of a sizeable section of black voters and political leaders. It is the historical origins of this large inequality in the distribution of wealth that has led the ANC government to the conclusion that there is a role for state intervention to bring about a more equitable distribution of income and wealth.

It is against this background that the ideologies of capitalism and the remnants of socialism in the rival political cultures of South Africa should be viewed. Given the fact of existing social and economic inequalities of the South African society, and of a new ruling élite coming from the disadvantaged sectors of society, it is not surprising that the ideological hegemony of capitalism is being challenged in the intellectual and cultural circles of the ANC's tripartite alliance. Since 1994, the 'ruling ideas' of the capitalist system no longer monopolise the economic policies of government and strains of socialism crop up in their thinking from time to time.

One of the best examples is found in Mr Mbeki's response at the XXII Congress of the Socialist International (SI), which met in São Paulo, Brazil, and which he, as part of an ANC delegation, attended during the last week of October 2003. Mr Mbeki's 'Letter of the President' that appeared in the ANC's weekly Internet newsletter, 'ANC Today', shortly after the congress reaffirmed ANC thinking along socialist lines:

We have a duty to respond to the decisions taken by the XXII Congress of the SI, in the interests of both our people and the creation of what the SI has described as "a new world order based on a new multilateralism for peace, security, sustainable development, social justice, democracy, respect for human rights and gender equality" (Mbeki 2003: Internet).

Mr Mbeki once again harped on an old theme of his, namely that South Africa is defined by having two economies, one belonging to the developed world, and the other to the underdeveloped world. This second economy includes millions of poor people whose problems cannot be solved by reliance on 'the market'. What all of this signifies, is that the conditions of life and the imperative to ensure the socio-economic transformation of South Africa, means "that we cannot allow ourselves to be prisoners" to what the SI called "the neo-liberal market ideology". He continues:

If we were to follow the prescriptions of neo-liberal market ideology, we would abandon the masses of our people to permanent poverty and underdevelopment. This would be a betrayal of everything for which the masses of our people have engaged in struggle for nine decades, under the leadership of the ANC.

Thus the call of the SI to all progressive forces to oppose neo-liberal market ideology is, for us in South Africa and Africa, not a matter merely of ideology. It is a practical and rational response to what we have to do to achieve the goals of the national democratic revolution.... (Mbeki 2003: Internet).

This line of thought is very much a continuation of the ANC's socio-economic policy framework, the Reconstruction and Development Plan (RDP), developed in 1993, the year before the ANC came into power. The policy was drawn up in conjunction with key mass organisations, like COSATU, organised labour and a wide range of non-governmental organisations. The RDP displayed distinct socialist strands and favoured the black labour class above the business and investor classes. (Vid. The RDP 1994: Internet.)

However, globalisation of markets and the need for multinational corporations to invest in South Africa, forced the ANC government to liberalise its economic and trade policies. The ANC soon realised that investor confidence of the business sector was crucial for economic growth, job creation and the issue of poverty reduction. It was therefore compelled to downplay the RDP in favour of a new policy, the Growth, Employment and Redistribution (GEAR) programme, in which the need of a compact with the private sector and appropriate growth policies and strategies were stressed as critical determinants of job creation and poverty reduction (GEAR 1996: Internet).

The adoption of the GEAR policy puts South Africa squarely in the framework of social democracy and qualified welfare state capitalism. What this signifies is that South Africa basically retains a capitalist market economy in the sense that most of the productive resources are owned by private individuals and most resources are allocated by individuals trading freely in markets for both goods and services and factors of production. However, the scale of government, and the degree and direction of government intervention in the economy is much larger than in a liberal democracy.

Social democracy then stands for a balance between the market and the state, and a balance between the individual and the community. According to Heywood, what lies at the heart of social democracy, is on the one hand, an acceptance of free enterprise capitalism as the only reliable mechanism for generating wealth, and on the other, a desire to distribute wealth in accordance with moral, rather than market principles (Heywood 1997:55). In what has been dubbed the 'Keynesian compromise' by political economists, social democracy which was widely accepted in the early period after the Second World War, became associated with a clear desire to 'humanise' capitalism through state intervention (Balaam and Veseth 2001:56-7).

Against this background, social democracy, as enunciated particularly in the GEAR policies, is in principle a compromise between the socialist and capitalist traditions within our society. It draws on both socialist beliefs that the government must use state machinery to transform the state 'to serve the interests of the people', as well as a liberal commitment to the free market and individual property rights.

The implementation of the GEAR programme led to serious disagreement between COSATU and the SACP on the one hand, and the ANC leadership on the other. COSATU consistently tried to protect its membership against possible job losses because of the privatisation of state enterprises, while the ANC government felt that it needed the resources that could be unlocked by this programme. By restructuring state enterprises, R24 billion was raised to reduce public debts and to

fund broadened access to services, such as housing, electricity and water. The privatisation of state assets, prudent fiscal policies, the removal of barriers to foreign direct investment and financial liberation, came at a price to the labour market. Between 1994, when the ANC came to power, until 2002, more than a million jobs in the formal sector were lost (ANC 2004: Internet). Many of those retrenched were blacks without the necessary skills to compete in the modern economy, but many were whites who lost their jobs because of the policy of affirmative action.

Elements within the ANC have never really been willing to give GEAR a chance. In less than a year after the introduction of GEAR, the ANC tabled their **Draft Strategy and Tactics** (1997). According to this document, the transformation of state machinery - doctrines, composition and the management style of the civil service, judiciary, army, police and intelligence structures - have to serve "as a beach-head to *fundamentally transform*"³ the economy, in order to effect "the redistribution of wealth and income in favour of those previously excluded from the economic mainstream" (ANC 1997: Internet).

Houston and Muthien also observe that the ANC, under duress from the criticism of its partners, was forced to concede that GEAR did not deliver in respect of economic growth, employment and redistribution as had been expected, and therefore it quietly reintroduced the RDP as the government's primary development agenda (2001:55). It is highly significant that the ANC sees fit to extol the virtues of the RDP in its 10 Years of Democracy review, but maintains a resounding silence about the merits of GEAR, which incredibly, is not even mentioned once in the document (ANC 2004: Internet).

The Employment Equity Act of 1999 became the cornerstone of the ANC's vigorous new affirmative action drive in the private sector. Beside measures to eliminate discrimination in employment the Act also calls on companies to introduce 'equity plans' that include numerical goals for proportional representation of blacks, women and disabled workers in the workforce, a time-table for implementing these equity plans, as well as mechanisms to institute union assisted consultation procedures for implementing government legislation in this regard (Houston and Muthien 2001:55).

Finding the golden mean between state intervention through public assistance (welfare) programmes and free market enterprise in highly developed countries is difficult enough; it becomes even more so in economically highly segmented

³ My emphasis. See my criticism under the heading "Economic pragmatism" in which I question the wisdom of this line of approach.

countries such as South Africa. If the government in a top-down political process and by means of legislation attempts to imprint a socialist value system on society at the expense of other value systems, it becomes a destabilising factor putting the constitution at risk. The question is then, how resilient is the civic culture of constitutionalism in preventing this?

3. FACTORS FAVOURING THE SUCCESS OF A NEW CULTURE OF CONSTITUTIONALISM

There are a number of positive political indicators that point in the direction of the growth of a new political culture of constitutionalism in South Africa. A constitution can be defined as a set of political principles, organised through and by law to establish permanent governing institutions with recognised functions and definite rights. Its objects are, in short, to define the nature of the government's power and to limit arbitrary actions by the government, while it simultaneously spells out the rights of the governed. Supporters of constitutionalism therefore argue that some issues should not depend on the outcome of elections. While the majority must govern, it must do so within rules which prevent it from restricting the rights of the opposition. Both to protect and restrain the rights of the majority are not contradictory; on the contrary, it ensures democratic government (Roskin et al. 2003:55).

3.1 The pre-election pact between the leading political parties

John Harbeson, who studied a number of democratic transitions in African states during the so-called 'third wave of democracy' of the post Cold War era, found that many African states that ostensibly held successful multiparty elections without establishing constitutional ground rules prior to the elections, tended to become unhinged even before the turn of the century. Evidence with regard to successful democratic transitions suggested that democracies are more likely to be sustained when the formation of broadly defined pacts precedes, rather than follows, initial multiparty elections (Harbeson 1999:45, 53).

For South Africa's negotiators, these rules were particularly important: decades of apartheid had ensured that the majority's desire to rule - and the minority's concern for protection - was unusually strong. At issue was not only a search for a system of government, but for the terms on which the minority would concede power to the majority over which it had ruled. The chief aim of the two parties was to negotiate a compromise that reflected the balance of power between the majority and minority. Detailed negotiations on an interim constitution preceded the first postapartheid multiparty elections, reinforcing the stability of the transition through the first years of ANC governance.

During the negotiations for an interim constitution the NP government, as a future minority party, strongly argued for a system of constitutional sovereignty that contrasted sharply with a past in which parliament reigned supreme as a guarantee against possible excesses by an ANC majority in the constituent assembly. They won this only in exchange for abandoning much of the group rights they had demanded in the early stages of the negotiating process. Constitutionalism was born out of the ANC's willingness to constrain majority rule, as long as the NP abandoned its demand for veiled racial privilege through the entrenchment of group rights (Atkinson 1999:93-4).

By the end of the CODESA negotiations, there was growing agreement on two issues. The first was that the constituent assembly would be constrained by constitutional principles agreed to beforehand. This agreement to limit the constituent assembly majority was an early ANC concession to constitutionalism.

The second was that there would be some kind of constitutional continuity during the transition. The NP government also insisted that while the new rules were being written, a constitutional authority had to govern. Either the existing Parliament would continue to rule, or an interim constitution was needed.

The ANC conceded a 'two-stage' transition. In the first phase, a negotiating body would draft an interim constitution upon which basis elections would be held to bring the ANC, who was still a struggle movement, on board as the likely new majority party in Parliament. The newly elected Parliament would then make the laws according to the agreed upon rules until it could draft the permanent constitution (Atkinson 1999:94).

Agreement was reached on constitutional principles, the particulars of an interim constitution, the establishment of a Transitional Executive Council to oversee the implementation of the Interim Constitution, as well as the arrangements necessary to ensure free and fair elections. Not only did the Interim Constitution enshrine the principle of free, fair, and transparent elections, but it also made the smooth transfer of power from one regime to another possible.

The broad pre-election agreements on the fundamental rules of the political game appear to have succeeded, in a large part as a result of reaching agreements prior to multiparty elections. As Tom Lodge (2002:153) points out, a prerequisite for reaching such an agreement is that a strong civil society and an authoritative state should have existed before the institution of universal suffrage.

That democracy in South Africa has been consolidated over the past ten years is primarily attributable to the supremacy of an entrenched constitution that put an end to the sovereignty of Parliament and has given the new government its stamp of legitimacy. In the past, the South African political system was dominated by parliamentary sovereignty inherited from the Westminster system. The adoption of the principle of constitutional supremacy in the 1993-constitution, and later confirmed in the 1996-constitution, meant that the constitution became the supreme law of the Republic, and that all government bodies and their laws were forthwith subordinate to the constitution (Rautenbach and Malherbe 1999:4).

A significant consequence of constitutional supremacy is that the positivist outlook of the past, when courts were called upon to apply the law as laid down by Parliament, has now been replaced by a normative approach in which the courts have to consider how to give effect to the norms and values protected in the constitution when passing judgement (Malherbe 2001:90). By accepting the supremacy of the constitution, the ability of a dominant majority party to inhibit, or even manipulate, Parliament, constitutional law or administrative law, has effectively been nullified.

How far-reaching and penetrating the measures are to keep the constitution intact can be assessed from the stricter entrenchment clauses that apply to the founding provisions of the constitution and the values that are endorsed therein. The founding provisions require a special 75 per cent majority of the members of the National Assembly to effect an amendment to them. These provisions include, among others, the concept and practice of human dignity, the achievement of equality and the advancement of human rights, the supremacy of the constitution and the rule of law, universal adult suffrage, regular elections and a multiparty system of democratic government (Devenish 1999:9-10).

3.2 The balancing of values in the constitution

Constitutions state the fundamental laws of society and serve as the yardstick by which any activities of the government and the people are measured. Constitutions lay down the relationship between the state and the individual, marking out the respective spheres of government authority and personal freedom. They do this largely by defining civil rights and liberties, often through the means of a bill of rights (Heywood 1997:180).

Constitutions, though, are never neutral. They invariably embody a broader set of political values, ideals and goals, and are always intertwined, more or less explicitly, with ideological priorities. The authors of a constitution therefore seek to empower their regime with a set of unifying values and a sense of ideological purpose.

In many cases, these aims are accomplished explicitly in preambles to constitutional documents, which often function as statements of national ideals.

The 1996-constitution bears the same stamp. Swanepoel (1966-Grondwet, Internet: 2) points out that it is in fact the product of political and ideological compromise and an attempt to foster a common value system among South Africans with a heterogenic population make-up, diverse cultures, and a history of conflict and separation.

The authors of the South African constitution set themselves to the task of constitution-making with two different sets of ideological purpose. The NP approached the issue from the point of view of entrenching 'classic' or fundamental civil liberties, such as freedom of expression, freedom of religious worship, freedom of assembly, freedom of movement and the protection of property rights. These so-called first generation rights have a liberal character in that the state is thus prevented from encroaching upon the constitutional rights of the individual.

The ANC, in addition, wanted to entrench a range of so-called second generation or economic and social rights such as the right to health care, education, equity and distributive justice.

Thus, instead of merely describing the purely negative *freedom from* rights, that prevent government from infringing on the rights of individuals, the positive *freedom to* rights are also described, which require of government to step in to guarantee these freedoms (Roskin et al. 2003:98). This classification is at once also a description of the difference between liberal and social democracy. In the latter, the state does not only have the function of creating a political culture in which fundamental rights can be safeguarded, but it must also actively participate to bring about the affirmation of these rights.

Under the heading "Social engineering for social justice", Swanepoel (1966-Grondwet, Internet: 29-37) discusses a number of articles that indicate that the constitution has the objective of changing society in the direction of greater justice. The preamble to the constitution, beginning with the statement that the people "recognise the injustices of our past" and "honour those who have suffered for justice and freedom in our land," sets the tone for the introduction of measures addressing past inequities and injustices.

Whereas section 9(1) states that everyone is equal before the law, and has the right to equal protection and benefit of the law, section 9(2) states the following:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.

Section 9(2) by implication authorises affirmative action in relation to historically disadvantaged persons (because of apartheid) or on the basis of gender. These measures are presented as protection or advancement mechanisms that can be legally imposed in order to bring about social change. Constitutionalism involves, inter alia, a commitment to proportionality and limited government (Devenish 1999:17). The activist role that government assigns to itself as a change agent to drive and steer the transformation process in every sector of business, smacks of social engineering and shows just how easily affirmative social rights can be misused by the state.

Swanepoel draws attention to the benefit that can be derived from the fact that the two distinct approaches of liberal and social democracy have both been written into the constitution. People from different political and societal cultures relate to the new dispensation because they can identify with certain important values that have been incorporated into the constitution (Swanepoel 1966-Grondwet, Internet:40). This viewpoint is reiterated by Du Plessis (1997:34) who argues that dynamic interaction of conflicting perspectives in the constitutions of countries with deep-seated ideological differences can contribute towards practical problem-solving. The South African constitution has been written with the South African political, economic and cultural realities in mind and is therefore sufficiently flexible to accommodate the ideals and beliefs of the different sectors of our society within a broad, durable and relevant constitutional framework.

3.3 The relative strength of civic culture in South Africa

Several authors maintain that the ANC leaders accepted a negotiated constitutional solution because they basically had no alternative. In the post-Cold War era, democracy has been unchallenged as the dominant political philosophy, and the ANC was obliged to fall in with the prevalent philosophy. Legassick (2003:298) is of the opinion that the legacy of democracy by 1990 still survived in the working class and civil society in South Africa, and that it was one of the main factors underpinning the democratic nature of the settlement and of the South African constitution, despite the rhetoric of repatriated ANC cadres for a socialist state.

Johnson makes very much the same point. By 1994, she argues, the ANC found itself in the unfamiliar environment of reform, having come to power through a

negotiated settlement that severely limited the possibility of bringing about radical social transformation. The militaristic, top-down command that proved successful during the struggle was hardly favourable for the durable strengthening of democratic values or norms, and has created new challenges on the difficult path to establishing robust, open and egalitarian structures and practices (Johnson 2003:322).

Pillay (1996:325) reiterates the view that a black culture of democracy was maintained in South Africa during the struggle years, arguing that South African society is characterised by the simultaneity of two democratic traditions, namely that of traditional parliamentary or representative democracy, and that of grassroots participatory democracy:

Parliamentary (representative) democracy, on the one hand, had until 1994 been the domain of the white political élite (with limited participation by black élites in the tricameral system, and in the bantustans). On the other hand, participatory democracy has (in varying degrees) been articulated and practised by a vast range of black and non-racial social movements that emerged since the early 1970s.

South Africa has, in line with the prevalent trend of post Cold War democratisation, founded a multiparty democracy based on the rule of law and the supremacy of the constitution. The task of political parties in advancing democracy cannot be over-accentuated. Leaders of the major parties (the ANC, DA and IFP) are in favour of an inclusive South African nationalism and a new political culture of common statehood. The exclusivists from the right and the left (the Afrikaner Weerstandsbeweging (AWB), the PAC and Azapo) are relatively insignificant minorities.

Political parties are the very *raison d'être* of multiparty democracy and put into words the aspirations, fears and needs of their members and demand that these be translated into government action, such as legislation, policies and programmes. Thus, parties may also play a watchdog role in society.

A multiparty political system ensures that the people have an opportunity to choose between different sets of political leaders from a variety of political parties. It also ensures that a change of government takes places peacefully and predictably (Mulikita 2003:112). Although we will probably have a one-party dominated system for the foreseeable future, the role of opposition parties in South African politics is recognised. The major political parties are generally equipped with the physical, human and financial capacities to play a meaningful role in representing societal interests, holding the government accountable, and fostering the ideal of a common statehood.

An important barometer of the civic culture in a society is the existence of free and independent mass media. The role of the independent media in a democracy to act as a critic of government and to promote an enlightened civil society has long been recognised. South Africa has an array of healthy independent media that provides a forum for the spectrum of political opinion that can be debated and discussed, thus promoting democracy and curbing government power.

3.4 Economic pragmatism

Political and economic freedoms are mutually reinforcing. The new global environment within which South Africa has to operate has become decidedly capitalist-oriented after the collapse of the Soviet Union and the East Bloc countries at the beginning of the 1990s. Economic development is ever more determined by the dynamics of inexorable globalisation especially with regard to the increasingly mobile economic activities of multinational economic enterprises that serve as the main conduit for foreign direct investment. Since South Africa is heavily dependent on international trade - which accounts for about 60% of the gross domestic product - and foreign direct investment for job creation and economic expansion, it has followed a deliberate policy of reintegrating South Africa into the world economy.

Social democracy is quite compatible with many of the broad principles of the liberal democracy, such as equal opportunity for all, a mixed economy and a non-centralised view of the state. In the view of Wessels, a social democratic viewpoint, with its policy of qualified welfarism, is acceptable because it corresponds to the structural nature of South Africa's mixed economy. The biggest challenge, he says, "does not lie in the structural readjustment of the existing economic order, but in the democratisation of the economic order, i.e. making it accessible and putting it at everyone's disposal on the basis of equal opportunity for all" (1998:88).

Social democracy differs from democratic socialism in that the former acknowledges that the state could become too powerful. There should be a greater degree of political decentralisation, social organisation should follow a more pluralistic approach, and ownership and the management of economic resources should be in the hands of private owners and entrepreneurs, with less state control from above. Wessels (1998:89) aptly captures the nature of social democracy and its qualified distributive welfare programmes with a quotation from Mcnaughton:

Welfare should be an investment in productive and capable people, not a last resort for the incompetent.

3.5 State institutions supporting constitutional democracy

Chapter 9 of the South African constitution deals with a number of independent state institutions, which support constitutional democracy and therefore fulfil an important function in buttressing the culture of constitutionalism. These institutions include:

- 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; and
- the Electoral Commission.

These institutions are independent, subject only to the constitution itself and the law (Constitution 1996: sec. 181). The Public Protector must be accessible to all citizens or groups in the South African society and has the power to investigate conduct (except court decisions), report on it and to take appropriate steps to curb improper conduct in state affairs or in public administration (Constitution 1996: sec. 182).

The principal functions and responsibilities of the Auditor-General of South Africa are to audit and report on the accounts of government at all levels and thus to provide that essential, independent link in the whole process of legislative control over the financial activities of the executive arm of government. At the local government level these audit reports are submitted to the relevant council, at provincial level to the provincial legislature, and at national level to Parliament.

The Human Rights Commission is mandated to promote respect for human rights and monitor and assess the observance of human rights. The Commission seeks to highlight, in particular, the issue of racism through its various activities. It has committed itself to popularising the nature, meaning and content of the right to equality (Constitution 1996: sec. 184).

The task of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is to promote respect for the rights of the various cultural, religious and linguistic communities, as well as to promote tolerance on the basis of equality, non-discrimination and free association. The Commission for Gender Equality and the Electoral Commission, have similar functions in their respective fields and play an important role to ensure openness

and transparency in both government and society with regard to gender issues and free and fair elections respectively (Constitution 1996: sec. 185, 187, 190).

3.6 The Constitutional Court

In terms of Section 167 of the Constitution, the Constitutional Court is the highest court in disputes on constitutional matters and thus functions as one of the chief guardians of democracy. A constitutional matter includes any issue involving the interpretation, protection or enforcement of the constitution. Thus, whenever a dispute arises about the constitutionality of the status, powers or functions of organs of state, or the question arises whether a bill before Parliament complies with the constitution, or whether findings of the other courts of justice are consistent with the constitution, these matters may be referred to the Constitutional Court.

Based on a panel survey of 3258 South Africans conducted in 1996 and 1997, Gibson and Caldeira (2003) in a path-breaking article on the degree of popular acceptance of the rulings of the Constitutional Court, asked whether the court could function as a guardian of South Africa's nascent democracy. In particular, they investigated whether the Constitutional Court gets its decisions respected, accepted, implemented, and complied with even in cases when most people may disagree with their decisions.

Working with theories that have been established with regard to 'old and long-established democracies', they argued that theories of institutional legitimacy provide the most comprehensive account of the efficacy of legal institutions. Institutions perceived to be legitimate are those with an authoritative mandate to render judgements for a political community. This moral authority - or legitimacy - means that people accept judicial decisions, even those they bitterly oppose, because they view courts as appropriate institutions for making moral and legal decisions (Gibson and Caldeira 2003:2-3).

The argument is, therefore, that courts do possess a legitimacy-conferring capacity. By stamping their constitutional imprimatur on legislation, some argue that courts 'settle' political conflicts. Thus, when legitimacy is conferred, controversies tend to dissipate and subside (Gibson and Caldeira 2003:5).

However, results from their survey showed that findings from long-established democratic polities could not readily be generalised to newly emerging democracies. Whereas a legitimate court in the South African case could persuade the tolerant to accept an intolerant outcome, it had little effect on those initially intole-

rant. Thus, among whites, the Court had the capacity to foster a greater degree of tolerance, but among the majority of the South African population, i.e. blacks, the Court could do little to convert those opposing the exercise of democratic freedom to a more tolerant and democratic position (Gibson and Caldeira 2003:20).

The authors found that the political culture of constitutionalism is not yet pervasive and that South Africans are not very tolerant of their political enemies.

Those who ascribe greater legitimacy to the Court are, generally, not much more likely to accept a Court decision with which they disagree. This is especially true of intolerant South Africans, and therefore the ability of the Court to constrain the intolerant majority is limited...From the point of view of protecting minority rights, these are ominous findings (Gibson and Caldeira 2003:23).

Although the central hypothesis of research on institutional support, that legitimacy contributes to acquiescence, probably sticks as far as the ANC government is concerned - they acquiesced in the ruling with regard to all the important cases in which the verdict had been brought out against them - this does not seem to be directly generalisable to many of their constituents and supporters. The authors conclude that political pluralism enshrined in the Bill of Rights and so essential to democratic governance, still has difficulty in emerging:

The country is badly divided by race and class, and politics currently provides little hope of bridging that gap. Moreover, a serious potential threat to the country's fledgling democracy is unchecked majoritarianism. The hegemony of the ANC - with its as yet unused ability to mobilise its supermajority to modify the constitution - frightens many, including those who support the substantive goals of the party. If the Constitutional Court is to become an effective defender of democracy, it must build a stronger and deeper reservoir of goodwill among ordinary South Africans (Gibson and Caldeira 2003:24).

Although Gibson and Caldeira painted a somewhat gloomy picture of the ability of the Constitutional Court to promote a culture of constitutionalism, one has to bear in mind that the research for the article was done shortly after the establishment of the Court (1986-1987). Given its authoritative framework of reference for interpretation and application of the law in mediating and settling of constitutional disputes, the Constitutional Court will, over time, gain much more legitimacy as an impartial referee and thus help to institutionalise constitutional values among the citizens of the state.

4. CONCLUSION

This article has touched on the deep divisions in South African society and some of the structural conditions that reinforce these divisions at the expense of the formation of a common political culture of constitutionality. While no national consensus has been reached on some of the core issues, there are a number of positive indicators for the sustainability of a political culture of constitutionalism:

- an inclusive political settlement (a pre-election pact, an interim grand coalition);
- constitutional compromises and the institution of the Constitutional Court to preserve individual and cultural rights;
- moderate leadership;
- institutionalisation of constitutional values (Venter 2001:19).

Not many democracies can immediately claim that their citizens have been equally empowered by the rights so recently written into their constitutions. To make these rights real, often means that the government has to extend its power to redress past inequalities while at the same time making itself more accountable to citizens.

The real test for democratic maturity and consolidation is often when a ruling party in power at the democracy's inception is subsequently defeated in an election and has to cede power to the winner. In the South African case an election defeat or an alternation of parties in government is rather remote. Thus, the resolve of a one-party dominated state such as ours, to uphold democracy and safeguard the constitutional rights of minorities, has therefore not yet been put to the test.

I concur with Venter, who cites Heribert Adam, an American sociologist, remarking that the fundamental cleavages in our country do not revolve around race or culture, but around social equality. Rather than ethnicity, it is class (jobs, income, property) - the material conditions of life - that matters most to all South Africans (Venter 2001:15).

Whether the new political culture of constitutionalism will thrive, will not necessarily be the result of overcoming the exceptional ideological, party political, racial and cultural differences in South Africa, but obtaining a more equitable distribution of material resources. If we accept the thesis that national unity and non-racism will depend on satisfactory material circumstances, the political leadership of this country should focus on restructuring the conditions of material distribution. What needs to be done is very simple; *how* to achieve it less so.

In South Africa with its dual economies, ethnic plurality and huge disparities between the rich and the poor, it is not sufficient to rely primarily on the self-regulating market mechanism of supply and demand, or to put our trust in the inherent ability of competition to distribute economic power and in so doing, to limit the potential abuse of such power. Modern economists admit that market incentives that encourage skills, hard work and innovation, translating into greater production, higher incomes and better standards of living in homogeneously advanced nations, do not apply in equal measure to heterogeneous, developing nations. States become social democracies precisely because their societies require a greater measure of assistance from public programmes managed by government agencies to reduce poverty, increase literacy and provide healthcare to the poor (McConnel and Brue 2002:680-1).

The problem, however, is to be able to know where to draw the right boundaries between the state and the market, and the government and the people. When the ANC government in its zeal to bring about social transformation, becomes overly intrusive and resorts to social engineering in laying down sports quotas or demands that the workforce and directorates of businesses should reflect the population composition, it breaches the true spirit of the Bill of Rights. It not only creates a spirit of entitlement instead of one of merit, but also, in the long run, erodes the faith in the constitution⁴. In these circumstances, democracy remains vulnerable. Conversely, democracy becomes socially entrenched or consolidated only when citizens trust and feel empathy for one another, and government becomes legitimate only when it redistributes the scarce resources of the state in a fair and equitable manner to the benefit of all its citizens.

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⁴ At the beginning of 1994, only 2% of the managers in Public Service were African, while African workers constituted 70% of the public sector labour force. By late 1997, blacks accounted for 79% in the Public Service, while 38% of managers at director level or above, were black (Houston and Muthien 2001: 49). Training, experience and efficiency were sacrificed for political correctness and legitimacy.

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