

The people, the court and Langa constitutionalism

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The extra-curial writings of the late Chief Justice Langa contain several brief but suggestive references to the role of the People in South African constitutionalism – references that go beyond the standard court-centric picture in which the people, having underwritten the Constitution as popular sovereigns, are thereafter confined to supporting roles: bringing cases, complying with orders, supporting the courts to defend their independence. The writings of the late Chief Justice should encourage us to consider the more active and positive role that the people can play as constitutional agents, including as an ongoing source of interpretative activity. This constitutes an important qualifier to the dominant tendency in current writing on South African constitutionalism to see political forces as threats and public opinion as an obstacle. It is also more than an attractive but hypothetical possibility: I argue that it will assist us to see how much of the South African Constitutional Court's activity since 1994, including all of its most globally-celebrated bold cases, are constructed to a significant extent on pre-existing public foundations built by forces both inside and outside the ANC government – an important rebuttal to prevailing court-centric accounts.

I INTRODUCTION

Constitutionalism can sometimes struggle to know what to do with ‘the people’ once the constitutional text is written. They are sovereign, certainly, and thus must underwrite the constitutional drafting in some way, but what is their role thereafter except to be told what they have committed themselves to, and to obey?

In the extra-curial writings of the late Chief Justice Langa there are, across the years, a series of brief but highly suggestive references to the people whose full meaning is, I think, deeply significant but not immediately apparent. Their brevity is part of their suggestiveness: they are not just token references, and they are not the sort of thing one would say at all unless one had in mind something deeper, a resistance to the idea that the people’s role in constitutionalism is confined to being a collective sovereign with a capital letter whose power they embody but do not really exercise.

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However, the references take some working out. Some parts of a Langa constitutionalism are readily identified from his writings. We can be entirely confident, for example, that a Langa constitutionalism would show great concern for access to justice, would seek a representative bench, and would stress the importance of hearing from multiple voices and so would make careful space for dissent, from judges and from everyone else. But the role of the people is rather more elusive, and my attempt to articulate it here is more uncertain, and more presumptuous, accordingly – particularly since I will be doing so with reference to my own research in this area. However, I think the idea is of the first importance: I believe that it represents a deep and generous part of a Langa constitutionalism that can prompt us to an understanding of the relation between the people, the Constitution, and the court that is more accurate and more normatively appealing than the one that often prevails in South Africa today.

II THE EXTRA-CURIAL WRITINGS

‘Ultimately’, the late Chief Justice wrote in 1998, ‘it is the people who must make the Constitution meaningful.’ What does this mean, exactly? What does it mean to say, as he continued, that ‘[a]ll the structures and all the guidelines and safeguards become ineffective if there is no motivation in the people for a true transformation of society’?¹ What does it mean to say, as he did in 1999, that ‘the people must take responsibility for the Constitution which has been created by them’, or to say, as he did in 1993, that ‘[i]n the final analysis, it is the people themselves who will safeguard their special interests. The law will simply supply the instruments’?²

Part of it, certainly, is about ideas that are already quite widely accepted. It is partly a point about people acting to defend their rights, and about civil society acting to defend the rights of those whose are unable to do so themselves. ‘[A] determined effort from all sectors of society is required if everyone is to have the necessary awareness of their rights and the wherewithal to vindicate them.’³ It is also a point about the importance of public support for the Constitution and the court. ‘The biggest resource in South Africa and elsewhere is the vigilance of the people and their

¹ P Langa ‘Social justice and rights: The South African model’ (1998) 16 *Windsor Yearbook of Access to Justice* 149 at 154.

² P Langa ‘The protection of human rights by the judiciary and other structures in South Africa’ (1999) 52 *Southern Methodist University LR* 1531 at 1538; P Langa ‘Perspectives on constitutions, bills of rights, laws, and policy in South Africa’ in AM Micou & B Lindsnaes (eds) *The Role of Voluntary Organizations in Emerging Democracies: Experience and Strategies in Eastern and Central Europe and in South Africa* (1993) 117.

³ P Langa ‘The vision of the constitution’ (2003) 120 *SALJ* 670 at 674.

commitment to make the democracy work.⁴ Both these points relate to theme of access to justice. There is a reason that in 2006 the late Chief Justice emphasised the importance of *Bernstein v Bester* in affirming that ‘the right of access to courts in the Bill of Rights was also important for the independence of the judiciary and therefore also was an aspect of the separation of powers principle.’⁵

But there is more to it than this. It is quite true that litigation and public support for judicial independence are very important, but these arguments keep the court as the focus of interpretative attention. The people, on this view, are merely there to serve the court, bringing it cases, supporting its orders, and opposing threats to its independence. The late Chief Justice’s ideas extend beyond this court-centric picture.

One way in which they do this concerns implementation. A good deal of the change envisaged by the 1996 Constitution is change in how people relate to one another. A right to be free from discrimination, for example, is to a very large extent about living in a society where ordinary people in everyday settings do not relate to one another in certain ways. In a society with plenty of entrenched discrimination, realising this right depends on getting people to relate to one another differently.

There are certainly ways for a court to try and promote this result. The late Chief Justice argued in a 2010 piece co-authored with Justice Edwin Cameron that the court has acted to promote a rights-based culture, and that ‘[t]he result has been a growing public awareness of constitutional rights and the creation of a sense among citizens that they themselves are individual constitutional agents, rather than merely ‘subjects’ of the law.’⁶ (In the idea of the people as constitutional ‘agents’ we see an explicit affirmation of their more active role). He and Justice Cameron also argued that the court has an educative role to play, not from a ‘misguided sense of paternalism or condescension’, but as part of the necessity of establishing a constitutional value system, to soften harsh majoritarian opinions where necessary.⁷ This echoes a standard line in counter-majoritarian scholarship in South Africa, which is that the court could do more in the way of judicial speeches and media relations to explain its judgments and inform the public about its role.⁸

⁴ Langa (n 2) 1538.

⁵ P Langa ‘The separation of powers in the South African constitution’ (2006) 22 *SAJHR* 2 at 6, referring to *Bernstein v Bester* NO 1996 (2) SA 751 (CC).

⁶ P Langa & E Cameron ‘The Constitutional Court and the Supreme Court of Appeal after 1994’ (2010) 23 *Advocate* 25 at 32.

⁷ Langa & Cameron (n 6) 33.

⁸ See eg M du Plessis ‘Between apology and utopia – The Constitutional Court and public opinion’ (2002) 18 *SAJHR* 1; RN Daniels & J Brickhill ‘The counter-majoritarian difficulty and the South African Constitutional Court’ (2006–2007) 25 *Pennsylvania State International LR* 371.

But while the court is not powerless in this context, it is also not very powerful. Bringing an end to racism in everyday relationships is much harder than, say, invalidating racist legislation, because ultimately much of the change must happen inside people's heads. As the late Chief Justice put this point in a different but closely related context in 2006, '[r]econciliation and forgiveness are beyond the power of the law. We cannot legislate reconciliation and we cannot order forgiveness.'⁹ In contexts like these, members of the public can be more important and effective agents of constitutional change than the court.

The point can be taken further still, however, moving from the realm of implementation to interpretation itself. 'It is for the people of South Africa', the late Chief Justice wrote in 2001, 'to flesh out the concepts contained in the Constitution.'¹⁰ This is very interesting, particularly since this is the very task he also assigned to the court, in another piece, in almost identical terms: the court 'has the task of making more than cosmetic reference to values; it is engaged in the actual fleshing out of the concepts and their implementation.'¹¹

It is not, therefore, the case that the people commit themselves to certain values, and then step back, and the court is then in charge of giving content to those values. The people's responsibility is an ongoing one, and the results of their exercise of it are an ongoing source of constitutional content. The link between their activity and the court's is not just a matter of members of the public bringing cases and supporting orders. There is a further link at the level of constitutional politics:

[J]udges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values. This approach to adjudication requires an acceptance of the politics of law. There is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked. . . . [Some conceptions of law present] the law as neutral and objective when in reality it expresses a particular politics and enforces a singular conception of society. . . . [T]ransformation is not something that occurs only in court-rooms, parliaments and governmental departments.¹²

Note that these extracts say more than the old point that law is political – they say that there is a necessary link between public, political activity and the generation of constitutional meaning. That is why both people and court (and Parliament and other parts of the government) are involved in

⁹ P Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351 at 358.

¹⁰ P Langa 'A new constitution and a bill of rights' in J Sarkin, Y Haeck & JV Lanotte (eds) *Resolving the Tension between Crime and Human Rights: An Evaluation of European and South African Issues* (2001) 19.

¹¹ Langa (n 1) 152.

¹² Langa (n 9) 353 and 356–7.

'fleshing out' the Constitution. In practice, the people's role in implementation and interpretation will blur: in speech and action, for better or worse, they flesh out the Constitution by embodying it; in embodying it, they represent a source of constitutional content that the history of constitutionalism tells us has a significant bearing on official interpretation.¹³

III IMPLICATIONS FOR SOME DEBATES IN SOUTH AFRICAN CONSTITUTIONALISM

We should not miss the scope and significance of these ideas. South African constitutional law, we are being told, is not autonomous. The impartial, counter-majoritarian court is and should be in a relationship with the majority and with the prevailing political shifts of society that is not just about the former checking and controlling the latter. Political activity is relevant to interpretation – and not merely in the sense of informing strategic decisions about when and when not to say or do something. It is relevant to decisions about actual constitutional content.

These ideas clash with a standard view of constitutionalism in South Africa. On that view, the people have committed themselves to principles like dignity and equality. The court's job is now to offer us an account of these principles, in quite an abstract exercise in moral principle and comparative law. On this view, as the guardian of the text, perceived as the (only) check against a looming ANC and a majority that is far less progressive than the constitutional text, the court should resist political influences and decide only on the basis of these principled articulations.

This is a sketch, but not, I think, a caricature. Drucilla Cornell and Nick Friedman, for example, have argued that Ronald Dworkin's penultimate book, *Justice for Hedgehogs*, offers a compelling jurisprudential account of interpretation for the South African context. They argue that Dworkin has moved from an account of interpretation 'working with the actual praxis of the community' – represented above all by *Law's Empire* – towards an account that reduces the role of social fact and increases the role of abstract principle, 'openly advocat[ing] a necessary connection between law and dignity, and between law and political morality'.¹⁴ No doubt Dworkin always insisted on legal ideas having some link to social commitments – judges are not just doing abstract moral philosophy. But

¹³ A co-author and I have discussed some of the important sources in J Fowkes & M Hailbronner 'Courts as the nation's conscience: Empirically testing the intuitions behind ethicalization' in S Vöneky et al (eds) *Ethics and Law: The Ethicalization of Law/Ethik und Recht: Ethisierung des Rechts* (2013). I do not take the theoretical point further here, but see J Fowkes *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016, forthcoming).

¹⁴ R Dworkin *Justice for Hedgehogs* (2011); D Cornell & N Friedman 'The significance of Dworkin's non-positivist jurisprudence for law in the post-colony' (2010) 4 *Malawi LJ* at 3–4.

that link became less important in his writings over time and the role of the philosophical work to justify law's authority grew. Thus, we should understand that the people of South Africa had committed themselves to principles like dignity (which Cornell and Friedman plausibly place at the heart of South Africa's revolution).¹⁵ That is the sum of the social commitment part of the account. Thereafter, it is up to the judges to articulate an account of dignity and apply it. Indeed, it is partly because Cornell and Friedman think South African society at large is too fractured to be a source of more detailed commitments that they see the later Dworkin, who places less reliance on the presence of such commitments, as a better theorist for the post-apartheid state than the earlier one.¹⁶

David Bilchitz pushes in a similar direction in his work on animal rights. Perhaps, as a matter of abstract principle, the 1996 Constitution is best understood to protect the rights of animals. But it is not plausible to think of this as the reflection of a social commitment (yet), as Bilchitz acknowledges. In this context, he argues that judges should enforce animal rights to the limits of practicability – in other words, as much as is possible given the difficulties presented by prevailing public attitudes to the question.¹⁷ The people, in this picture, are above all an obstacle to the constitutional vision, which principled judges must pragmatically work around as much as possible. This, too, treats constitutional principle as a heavily abstract matter – arguably even more so than Cornell and Friedman, given that there is no sign the drafters of the Constitution or the leaders of the South African revolution were thinking about animal rights the way they evidently were thinking about human dignity – and so it too hews much closer to the jurisprudential line of the later Dworkin than the earlier one. Indeed, Thaddeus Metz has replied to Bilchitz's argument precisely by invoking the early Dworkin of *Law's Empire*, arguing that something important is lost if constitutional principle is detached from fidelity to its 'fit' with actual community aspirations – and not just because there is greater practical difficulty in enforcing ideas the public opposes.¹⁸

Such explicit engagement with these issues remains rare in South Africa, but the basic attitude on display finds echoes in much writing on South African constitutionalism. This scholarship is suspicious of politics, and very suspicious of judicial deference to it. As noted, the accepted view on the counter-majoritarian dilemma is that judges should simply apply

¹⁵ Cornell & Friedman (n 14) 91–2.

¹⁶ Cornell & Friedman (n 14) eg 59–60.

¹⁷ D Bilchitz 'Does transformative constitutionalism require the recognition of animal rights?' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012).

¹⁸ T Metz 'Animal rights and the interpretation of the South African Constitution' in Woolman & Bilchitz (n 17) 211–14.

the law, paying no heed to the state of public opinion – a denial of the relevance of politics to interpretation.¹⁹ The standard line is that the court should be a bold, and boldly independent, forum of principle, with the public (and, indeed, other public institutions) largely relegated to the sorts of supporting roles – defence, obedient compliance – that we saw earlier.²⁰

It would not, of course, be plausible to offer an account of law that did not in some significant way mark its distance to politics. And unsurprisingly one could not ascribe views to the late Chief Justice that are wholly at odds with this standard scholarly line either. He and Cameron cite Joseph Raz on the ways that courts can resist politics in arguing that the court must ‘be capable of resisting pressures to depart from our Constitution’s founding values’.²¹ He believed, conventionally, that ‘[i]n many instances, the issue before the Court is about how far the state can go in limiting rights as it goes about the legitimate business of governing’.²² As one would expect of a veteran anti-apartheid lawyer, he considered law secondary to seeking justice, and affirmed that we ‘must always strive to make the law just; and to tell the truth about the emperor’s robes, no matter the consequences’.²³ He spoke about *S v Makwanyane* in conventional terms as a counter-majoritarian decision by the court acting as guardian, understanding its question to be ‘not whether the public supported the death penalty but whether the Constitution allowed it’.²⁴

The late Chief Justice’s extra-curtial writings, therefore, hardly tell us to reject the standard account. They merely prod us to revise or supplement it. The court *should* decide *Makwanyane*, despite its being counter-majoritarian in relation to public opinion, but it *also* should take public opinion and its associated politics seriously as a source of constitutional content, as the product of ‘constitutional agents’ properly so called. That there are undoubtedly some tensions between these ideas is the reality that his ideas should prompt us to confront: we need some way to reconcile them, or some basis on which to decide when to follow which imperative.

The most prevalent argument in this context currently – linked to the standard line on the counter-majoritarian dilemma about judicial responsibilities to engage more with the public – is that we need more public debate and dialogue about constitutional content. Dennis Davis, like

¹⁹ Du Plessis (n 8); Daniels & Brickhill (n 8).

²⁰ I discuss a variety of such arguments in Fowkes *Building the Constitution* (n 13).

²¹ Langa & Cameron (n 6) 29.

²² P Langa ‘The role of the constitutional court in the enforcement and protection of human rights in South Africa’ (1996–1997) 41 *St Louis University LJ* 1259 at 1269.

²³ P Langa ‘The fifth Bram Fischer memorial lecture: The emperor’s new clothes: Bram Fischer and the need for dissent’ (2007) 23 *SAJHR* 362 at 372.

²⁴ Langa (n 1) 152–3.

Cornell and Friedman, argued in 1999 that South Africa lacks the sort of social commitments needed for a Dworkinian account grounded on social fact. But he saw this as a reason for preferring Habermas instead and for encouraging debate and conversation, rather than as necessitating the exercise of judicial power to try and fill in the gaps with abstract principle.²⁵ Several other authors have made arguments of this sort. Stu Woolman's important recent book advances a general theory of constitutional experimentalism and participatory bubbles in which content is often formed by complex interactions between members of society, the court, and organs of state. These arguments are associated with familiar debates about whether the best way to promote public discussion is judicial maximalism, sparking debate and offering content, or judicial minimalism, avoiding settling issues and thus leaving something to discuss – and about whether the duty to protect rights may supersede these considerations in any event.²⁶

The other prominent discussion of the court's relationship with politics is more suspicious. It worries about judicial timidity on some unpopular issues and about judicial deference to the powerful ANC. Theunis Roux's recent book offers much the most sophisticated version of this argument in the South African context.²⁷ He argues that a court has good reason not to take on political forces where this would threaten to produce a destructive clash, and he believes that the South African Court has sometimes retreated in just this way, compromising on principle to avoid provoking the ANC into reprisal. However, he argues that the court has done this without losing its reputation as a body that decides cases according to law because it has only done it in a few cases. Roux thinks this could conceivably be defended as legitimate (not merely prudent) if we adopt a fairly weak Raz-style legitimacy condition and treat political threats to institutional security as one of the non-legal considerations that the court is legally permitted to consider (although he does not think it could satisfy a more rigorous Dworkin-style legitimacy condition).²⁸ But compromises on principle remain legally suspicious things for Roux: one

²⁵ D Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999).

²⁶ S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013); see also eg J van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) and D Bilchitz 'Does Sandra Liebenberg's new book provide a viable approach to adjudicating socio-economic rights?' (2011) 27 SAJHR 546, reviewing S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010).

²⁷ T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013).

²⁸ Roux (n 27) 98–100; see further Fowkes (n 13) chap 2.

does not lose the sense that this is 100 per cent commitment to principle, 97 per cent of the time.²⁹

The late Chief Justice would, of course, accept that politics and mass public opinion can be sources of difficulty for courts and for constitutionalism, but his writing should encourage us to see that more positive relationships are also possible. This is very important, because (I believe) the single greatest defect of current scholarship on South African constitutionalism is its failure to recognise the extent to which the relationship between constitutional law and constitutional politics in the country has been of this positive variety. This is also the source of my largest disagreement with Roux: I believe that his account is a plausible and useful way to understand a court responding to serious political threats, but I do not think that account is the best fit for what has actually happened in South Africa since 1994.

These arguments need lengthy defending and I do so elsewhere;³⁰ here, I want to make some briefer claims about how this should help us to understand what I think the late Chief Justice was seeking to bring to our attention, and its importance.

To begin with, constitutional law and politics can have a more virtuous relationship when the court acts to receive into constitutional law ideas with what I call a pre-existing public status: ideas that are to some degree already entrenched in society, in public talk, in public institutions and actions. Courts get to draw on that public status when articulating and promoting those ideas. In this scenario, court activity thus happens after or alongside public activity and builds upon it: the sort of relationship of mutual agency I believe the late Chief Justice contemplated.

Furthermore, this is not merely a virtuous but hypothetical possibility. I contend that something like this has in fact been the case in South African constitutionalism much more often than is recognised, and in fact is true of the court's most celebrated bold decisions. *S v Makwanyane* was counter-majoritarian in relation to the public, but not in relation to the stance of the majority party. The vindication of a new rights-based vision for the South African state in the judgment reflects and was built on an idea of much broader public status, including strong support from ANC leaders. It was an exercise in enforcing ideas, rather than the deliberately inconclusive text of the right to life, and the court did not invent those ideas or arrive at them simply as a matter of abstract principled judgment.³¹ The LGBT equality cases reflect the same pattern. The court

²⁹ To appropriate Gerald Gunther's famous description of Alexander Bickel's theory of the passive virtues: G Gunther 'The subtle vices of the 'passive virtues' – A comment on principle and expediency in judicial review' (1964) 64 *Columbia LR* 1 at 3.

³⁰ Fowkes (n 13).

³¹ *S v Makwanyane* 1995 (3) SA 391 (CC); Fowkes (n 13) chap 1.

could build on a long history of growing recognition for LGBT rights among South African political parties and movements, prominently including the ANC, dating back to the late 1980s.³² It could also build on legislative activity. *National Coalition (2)* observes that ‘a notable and significant development in our statute law in recent years has been the extent of express and implied recognition the legislature has accorded same-sex partnerships’, and it can footnote a range of legal instruments in support of this proposition.³³ *Hoffman*, on equality for people living with HIV/AIDS, could offer a very similar long citation for the proposition that HIV-positive people ‘enjoy special protection in our law’.³⁴ *Doctors for Life* has many footnotes where these other cases have one, but it too is significantly built on extensive pre-existing recognition of the ideas concerned, in public talk and government action.³⁵ Nor are these cases only about legislative or executive activity. The LGBT equality decisions and *Hoffman* are also built on the work of activists, the AIDS Law Project, the National Coalition, the South African Law Reform Commission and its predecessor, and so on.³⁶ And *TAC (2)* is of course famously about the vital constitutional work that can be performed by civil society actors, not just judges enforcing abstract principles.³⁷

This hardly means that the court had no independent role in these cases or that it deserves no credit itself for them. Parts of these judgments did fly in the face of popular opinion, the ANC government or elements within it offered some opposition to some of them (though largely at the level of wrangling over the lines of jurisdiction rather than the substance of the ideas themselves, I would argue),³⁸ and the court did do principled work of its own in articulating what it took the relevant constitutional ideas to be. But it does mean that none of these celebrated cases is really an example of bold counter-majoritarianism by the court, nor are any of them really

³² Landmarks along the road can be found in N Hoad et al (eds) *Sex and Politics in South Africa* (2010); see further Fowkes (n 13) chap 6.

³³ *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 37 n 42.

³⁴ *Hoffman v South African Airways* 2001 (1) SA 1 (CC) para 28 n 25.

³⁵ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); see further S Rose-Ackerman, S Egyid & J Fowkes *Due Process of Lawmaking: The United States, South Africa, Germany and the European Union* (2015) 118–20; Fowkes (n 13) chap 7.

³⁶ For background on HIV/AIDS, see especially E Cameron ‘Legal and human rights responses to the HIV/AIDS epidemic’ 2006 *Stell LR* 47; see further Fowkes (n 13) chap 5.

³⁷ *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC); see eg M Heywood ‘Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the treatment action campaign case against the minister of health’ (2003) 19 *SAJHR* 278; SL Robins *From Revolution to Rights in South Africa: Social Movements, NGOs & Popular Politics After Apartheid* (2008) 100–26; G Marcus & S Budlender *A Strategic Evaluation of Public Interest Litigation in South Africa* (2008); see further Fowkes (n 13) chap 8.

³⁸ Fowkes (n 13), especially in relation to the LGBT equality and socio-economic rights cases, see chaps 6 and 8.

examples of the abstract articulation of constitutional principle, nor can a court-centric account remotely do justice to any of them. They represent a much more multi-institutional, public, political kind of constitutional activity – and one that looks a lot like what the late Chief Justice seemed to be talking about.

These cases all reflect a substantial alignment of constitutional principle and public forces. They do not tell us very much about the trickier situations – the ones Cornell and Friedman and Bilchitz and Roux are really engaging with – in which this alignment gives way to tension, and principle and politics pull in opposite directions. The late Chief Justice, understandably, did not engage explicitly in his extra-curial writings with these more controversial situations. But the famous cases do at least show us what sort of broader support has underpinned the court's globally celebrated constitutional landmarks to date. That does not, of course, necessarily mean that the court could not have been bold without this support or that it cannot be in the future. But that is a counterfactual that significantly remains to be seen. The more unilaterally the court acts, the greater the risk that this boldness will come at a cost: at an institutional cost of the sort that Roux is worried about (and which comparative examples like Hungary demonstrate can be perfectly real); at a cost in mistakes or in the stunting of democratic debate, as minimalists and dialogue theorists and others rightly worry about; or at the cost that we saw Metz concerned about in relation to animal rights, the cost of damaging the sense in which this is South Africa's Constitution, not the court's. If the people find too unfamiliar what they are told they have committed themselves to, we weaken the link between people and court that the late Chief Justice told us to value.

The moral is not necessarily that the court should retreat when faced with a situation in which bold action would also have to be unilateral action, although this is the possibility that a number of influential recent works focus on.³⁹ The late Chief Justice's writings hew to the conventional line, against retreat, in this situation; their special interest lies in another point. If constitutionalism works best when it is the sort of public activity that the late Chief Justice described, then the courts will have a reason to act with awareness of this, granted that conditions will vary. When public support exists, courts will have a (non-decisive) reason to appeal to that support; when it is absent, courts will have a (equally non-decisive) reason to shape their actions differently, whether this means

³⁹ See Roux (n 27) and also in more general contexts especially T Ginsburg *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003); A Trochev *Judging Russia: Constitutional Court in Russian Politics, 1990–2006* (2008); see also the helpful recent review essay by T Ginsburg 'Courts and new democracies: Recent works' (2012) 37 *Law & Social Inquiry* 720.

avoidance, or an attempt to provoke dialogue, or an effort to educate, or something else. There will be a reason to phrase judgments in ways that may resonate with the public rather than not. Dworkin famously included, but never expanded on, an elusive little sentence in *Law's Empire* that a judge 'must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law' in order 'to make [the] decision sufficiently acceptable to the community'.⁴⁰ Roux pursues a point of this sort in his nice description of the Constitutional Court's judgments as 'diplomatic missives', and his discussions of cases show he sees this diplomacy as directed to the public as well as to the ANC.⁴¹ There are many ways, from nervous retreat to phrasing to leadership, for courts to respond to the variations of constitutional politics.

A good deal of scholarship on South African constitutionalism seeks judicial boldness, more content, more remedies, more action. While the late Chief Justice spoke of resolute principle, he also spoke of other things, of judicial modesty, and prudence, and incrementalism, of how 'overly activist judges can be as dangerous for the fulfillment of the constitutional dream as unduly passive judges'.⁴² He chose to emphasise the fine line the judiciary must draw, not between preservative and transformative constitutionalism, on which much scholarly writing is focused, but 'between transformation and legislation'.⁴³ In saying this, the late Chief Justice was not revealing himself unable to think creatively about the judicial role or to break free of an incrementalist common-law mindset, or as holding a belief that judges cannot or should not ever be bold. Instead, his comments reflect an awareness that a court acting alone is seldom the best court to be; that the court is one institution among many; that –

the judiciary is an indispensable part of democratic government and can never disengage itself or have a separate life of its own. This is another way of saying that the judiciary is a structure of the community serving a specific function within it.⁴⁴

Langa constitutionalism is a public activity, which has the modesty to realise that courts are not the only ones with the aspiration to be just or the courage to be bold, and that slower or more collaborative movement

⁴⁰ R Dworkin *Law's Empire* (1987) 380–1. See also, at 12, his equally elusive comment along similar lines though not referring directly to public opinion.

⁴¹ Roux (n 27) 130 and 385, and for cases, see eg chap 6. As I read him, however, Roux does not go further to consider whether the *reason* that progressive judgments can sometimes be phrased in terms of ideas that resonate with the political community says something important about that community and its ideas – in other words, that the reason progressive judgments can be 'sold' to the public says at least as much about the public's progressive beliefs as it does about the diplomatic and rhetorical abilities of judges writing judgments.

⁴² Langa & Cameron (n 6) 28–9.

⁴³ Langa (n 9) 353.

⁴⁴ Langa (n 3) 671.

might not only be safer and surer, but also constitutionally better, more democratic, more respectful, richer. And if I am right, South African constitutionalism is significantly this sort of public activity, with a constitutional politics of under-appreciated quality. Langa constitutionalism is real, manifest in the proudest parts of the court's record, which stand as a due and living monument to the man and his beliefs.