

REPRESENTING THE POOR: LAW, POVERTY AND DEMOCRACY

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1 Introduction

The title of the article refers to the representation of the poor. “Representation” is used here to refer to different contexts and institutional settings. First, it denotes the ways in which the interests and viewpoints of the poor are voiced, championed, overlooked and/or effaced in and through representative legislative bodies.¹ Secondly, it refers to the ways in which courts, through constitutional interpretation and enforcement, affirm and reinforce the rights of the poor to democratic participation and citizenship, or fail to challenge their exclusion from effective democratic representation. The representation of the poor in and through representative institutions and through constitutional litigation and adjudication also touches upon a third meaning, which refers to the portrayal of “the poor” and the construction of their interests in legal and political discourse. This dimension is closely connected to the first two. The scope and meaning assigned to the rights of the poor to democratic representation and participation are, after all, inseparably linked to whether they are portrayed as active citizens or largely passive subjects of state authority.

The article considers different judicial constructions of democracy, and asks whether and to what extent these understandings can help reinforce the effective representation of the poor and affirm their rights to democratic citizenship and participation. Conversely, to what extent do these interpretations insulate relations of inequality and subordination from democratic debate and contestation and contribute to the silencing of the poor? The emphasis on judicial understandings of democracy draws attention to the adjudicative setting, and raises questions about the capacity of courts to serve as open democratic spaces in which the meaning of constitutional norms and

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¹ Representation, in this sense, is intimately bound up with the claim of democratic states to rest on the consent of the governed or to institute the right of the people to self-government. At the same time, however, it raises questions about distortions in the democratic process, through which the right of the poor to participate in and influence the outcomes of political decisions is substantially diminished.

commitments can be contested.² At the same time, however, the topic points beyond the judiciary to legislatures as the primary institutions representing the people and to the people themselves. How is “the people” conceived in constitutional discourse? How is the relationship between the people and their representatives construed? And what are the conditions under which legislative bodies can be said to have made authoritative pronouncements in the name of the people they claim to represent?

Two conflicting conceptions of democracy are juxtaposed in this article, which are both derived from the Constitutional Court’s jurisprudence. The first can be labelled a dialogic, participatory and pluralistic model of democracy. This model underscores the agency and voice of those traditionally excluded from full citizenship; posits a dialogue between the people and their representatives; and requires the state to take positive steps to secure conditions under which citizens can exercise rights of democratic participation. It also embraces a vision of political equality which is suspicious of laws and practices which may have the effect of insulating social and political power from mechanisms designed to promote democratic accountability, or allowing the wealthy and powerful to pass off their particular interests as the common good. This understanding sets the bar quite high for legislative enactments to qualify as authoritative pronouncements made in the name of the people. It is suspicious of the idea of an identity of the people and their representatives, and assumes an active role for the courts in policing legislative and bureaucratic decisions to ensure that they emanate from inclusive participatory processes and do not impinge on basic norms of democratic accountability and responsiveness. The second conception, by contrast, conceives of democracy in more formal terms as the capacity of duly elected legislatures to enact law within their constitutional area of competence. Between elections, there is little that the people can do to hold their representatives accountable. Moreover, except in the case of a breach of clear, unambiguous constitutional provisions, courts should defer to the democratic legitimacy and institutional competence of the political branches.

The interplay between these two understandings calls for a far more extensive study of the Constitutional Court’s jurisprudence than can be undertaken here, as judicial understandings of democracy influence decisions on issues as diverse as access to court, the application of the Bill of Rights to private relations, limitation analysis, remedies, and the substantive meaning of a broad range of constitutional norms such as equality, freedom of expression

² These include questions about the extent to which the courts’ actual jurisprudence has secured a space in which the poor can challenge official interpretations of constitutional norms which entrench their continued social, economic and political marginalisation. See, generally, J Dugard & T Roux “The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor: 1995-2004” in R Gargarella, P Domingo & T Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006) 107. More theoretical questions relate to the spatial and aesthetic dimensions of adjudication (see W le Roux “From Acropolis to Metropolis: The New Constitutional Court Building and South African Street Democracy” (2001) 16 *SAPL* 139) and to whether the diverse needs and voices of the poor can be adequately represented in the language of the law. Much of the latter debate has centred on the tension between the Constitution’s transformative aspirations and the conservatism of South African legal culture. See K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146.

and socio-economic rights. The article focuses instead on two areas of the Constitutional Court's jurisprudence. The first deals with public participation in the legislative process, while the second relates to constitutional challenges to the hegemony of political elites who are in a position to use their power and influence to privilege their own, particular interests over the public interest. Throughout, the emphasis will be on the ways in which the two conceptions of democracy under consideration relate to the rights, needs and voices of the poor.³

2 Public participation in the legislative process

2.1 *Doctors for Life* and *Matatiele II*'s promise

In *Doctors for Life International v Speaker of the National Assembly*⁴ the Constitutional Court held that the Constitution of the Republic of South Africa, 1996 ("the Constitution") imposes an enforceable obligation on legislatures to facilitate public participation in the legislative process, and that non-compliance with this requirement must result in the constitutional invalidity of the legislation in question. Ngcobo J, writing for the majority, interpreted section 72(1)(a) of the Constitution⁵ in view of the right to political participation in international and foreign law and the importance of democratic participation in the struggle against apartheid and under the Constitution.⁶ On this construction, it is not enough simply to allow public participation. Parliament is under a positive obligation to ensure that citizens have an effective opportunity to participate in the legislative process. This is to be done through public education, the provision of information, and various other initiatives to bring democracy closer to the people.⁷ Although Parliament and the provincial legislatures must be allowed a broad discretion in deciding how best to fulfil this duty in a given case, the Constitutional Court has the power to test whether they afforded the public a reasonable opportunity to participate in the legislative process. What is reasonable will depend on a range of factors, including the nature and importance of the legislation, its impact on the public, its urgency, and Parliament's

³ These are of course not the only areas relating to the political participation of the poor. Other contexts of interest include the participation of the poor in administrative decision making, their exercise of democratic rights and freedoms (for example freedom of expression, association and assembly) and, indeed, contexts in which political participation occurs outside of the formal opportunities offered by state institutions (for example where alliances, communities or groups seize the political initiative through mass action, protests or petitions). My decision in this article to focus on channels of participation relating directly to the logic and mechanisms of representative government does not signal the privileging of "formal" or "state-centred" conceptions of democracy over "informal" or "decentred" understandings of democratic participation. In fact, the article's resistance to the reduction of "the people" to a particular institutionalisation (for example "the people" as represented in Parliament) is perfectly consistent with an account of democracy which emphasises the capacity of the people to challenge decisions of their representatives, whether through formal or informal mechanisms.

⁴ 2006 6 SA 416 (CC); 2006 12 BCLR 1399 (CC) ("*Doctors for Life*")

⁵ S 72(1)(a) of the Constitution states that

"[t]he National Council of Provinces must facilitate public involvement in the legislative and other processes of the Council and its committees"

⁶ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC); 2006 12 BCLR 1399 (CC) paras 90-117

⁷ Paras 130-134

own views on what would be appropriate.⁸ Ngcobo J held that the failure of the National Council of Provinces (NCOP) to hold public hearings was unreasonable in relation to two of the four Acts that were being challenged. These two Acts – one of which dealt with the termination of pregnancies and the other with traditional health practitioners – related to controversial matters and were the subject of great public interest. He also emphasised the special role assigned to the NCOP in the legislative process. Since the NCOP is charged with the representation of the provinces in the national sphere of government, the facilitation of public involvement by the National Assembly is no substitute for public participation at the level of the NCOP and/or of the provincial legislatures.⁹

It is instructive to compare this judgment with the dissenting judgment of Yacoob J. Yacoob J's disagreement with the majority turns in part on his use of grammatical and structural modes of interpretation. In his view, the majority judgment conflates "public involvement" with the stronger notion of "public participation",¹⁰ overlooks the fact that section 72(1)(a) requires the NCOP merely to "facilitate" public involvement (which, he insists, is a less exacting requirement than to "promote" involvement),¹¹ and misses the significance of the fact that section 72(1)(a) does not form part of the constitutional provisions relating to the legislative process.¹² His insistence that it is the Court's task to determine what the Constitution requires, and not to engage in theoretical speculation about the meaning of "democracy" or the ideal balance between its representative and participatory dimensions, is consistent with the textualist leaning of his judgment.¹³ However, the disagreement between the majority and minority judgments ultimately turns on more than differences in interpretive methodology. Yacoob J's interpretation of the constitutional text is informed by a particular understanding of democracy, in which the decisions of elected representatives are seen as identical with the will of the people. In the absence of a clear and unambiguous constitutional requirement of public participation in the legislative process, judicial enforcement of a "right" to political participation would "undermine the political will of the people" and "negate their choice at free and fair elections".¹⁴ Such "failure to accord due weight to the actions and decisions of the representatives of the people of South Africa would demean the very struggle for democracy"¹⁵ and impact fundamentally on "the value of the right to vote acquired through bitter struggle".¹⁶

In this vision, there is a perfect identity of the people and their representatives, which is secured through the expression of the will of the people during free and fair elections. This unity or identity is bolstered through

⁸ Paras 118-129, 145-146

⁹ Paras 79-88

¹⁰ Paras 308-312

¹¹ Paras 303-307

¹² Paras 315-318

¹³ Para 269

¹⁴ Para 292

¹⁵ Para 294

¹⁶ Para 319

a variety of mechanisms designed to give effect to the constitutional values of accountability, responsiveness and openness. However, such mechanisms must either be rooted directly and unambiguously in the Constitution or in the decisions of the people's representatives, and must not be judicially imposed on legislative majorities. Judicial imposition of a requirement of public participation would disturb the direct and "uninterrupted chain of legitimacy" running from the people to their representatives,¹⁷ and would thus demean the value of the right to vote.

Where Yacoob J sees unity and identity, Ngcobo J in his majority judgment perceives a certain distance between the people and their representatives. The people, in his view, did not confer absolute authority on their representatives, but "reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created".¹⁸ This residue of the people's originary power precludes representative bodies from making totalising claims in the name of the people. Far from having an absolute claim to represent the people, based on the latter's participation in elections every five years, the legitimacy of representative institutions needs to be strengthened through an on-going dialogue with the people who elected them. On this view, the right to vote is an important, but by no means the only institutionalisation of the right to political participation.¹⁹ Other forms of democratic participation help provide vitality to representative institutions and enhance the civic dignity of participants. They also counter the disproportionate effects of private wealth and power in the legislative process. Ngcobo J states that public participation

"because of its open and public character acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."²⁰

For these reasons, participatory democracy has an important role to play in promoting political equality and integrating the marginalised and poor into the democratic community.²¹

¹⁷ The phrase is borrowed from E-W Böckenförde "Demokratische Willensbildung und Repräsentation" in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland Bd III* 3 ed (2004) 31 38

¹⁸ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC); 2006 12 BCLR 1399 (CC) para 110

¹⁹ Para 98

²⁰ Para 115

²¹ See paras 171, 174 on the importance of adequate consultation with traditional healers, particularly in view of their previously marginalised status. See also the concurring judgment of Sachs J para 234:

"Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections."

In *Matatiele Municipality v President of the Republic of South Africa (2)*²² the constitutionality of the Constitution Twelfth Amendment Act of 2005 and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005 was at issue. The effect of this legislative package was, *inter alia*, that the Matatiele Municipality was removed from the province of KwaZulu-Natal and incorporated into the Eastern Cape. This triggered section 74(8) of the Constitution, which requires a constitutional amendment which alters the provincial boundaries of a particular province or provinces to be approved by the legislature[s] of the province[s] concerned. While the Eastern Cape Legislature did hold public hearings, the KwaZulu-Natal Legislature approved the constitutional amendment without facilitating public involvement. Ngcobo J in his majority judgment rejected the contention that it was not necessary to facilitate public consultation as the legislature was speaking on behalf of the people of the province. The Constitution, in his view, does not unquestioningly assume the identity of the people and their representatives, but envisages “a dialogue between the elected representatives of the people and the people themselves”.²³

The majority advanced a number of reasons for holding that the provincial legislature’s conduct fell short of section 118(1)(a) of the Constitution, which requires a provincial legislature to facilitate public involvement in its legislative and other processes. Chief among these was the impact of the legislation on the community of Matatiele. Their emotional attachment to KwaZulu-Natal, their right to live in the province of their choice and the practical significance of the move for service delivery militated against the idea that their relocation to the Eastern Cape could be effected without proper consultation. The conclusion that they should have been afforded an opportunity to make submissions was also supported by other considerations. These include: the fact that they were “a discrete and identifiable section of the population”;²⁴ the unique nature of the provincial power to veto constitutional amendments and its centrality to the constitutional scheme;²⁵ and the fact that both the NCOP and the KwaZulu-Natal Legislature considered public hearings to be desirable.²⁶

The reasoning in *Doctors for Life* and *Matatiele II* seems particularly promising when viewed from the perspective of the representation of the poor and other vulnerable groups. This is so for at least four reasons. First, these judgments emphasise the agency and voice of those traditionally excluded from democratic citizenship. Far from being viewed as helpless victims, the poor are regarded as bearers of fundamental human dignity who are entitled

²² 2007 1 BCLR 47 (CC) (“*Matatiele II*”) The legislative package was originally challenged on the basis that Parliament had usurped the powers of the Municipal Demarcation Board to re-determine municipal boundaries. In *Matatiele Municipality v President of the Republic of South Africa (1)* 2006 5 SA 47 (CC); 2006 5 BCLR 622 (CC) (“*Matatiele I*”) this challenge was rejected. However, although the point was not relied on by the applicants, the Court directed the parties to make submissions on whether the KwaZulu-Natal Provincial Legislature was obliged to facilitate participation, and if so, whether it had complied with this obligation.

²³ *Matatiele Municipality v President of the Republic of South Africa (2)* 2007 1 BCLR 47 (CC) para 58
²⁴ Para 79

²⁵ Paras 46-48

²⁶ Paras 76-78

to participate in processes of collective decision making. Secondly, this jurisprudence does not content itself with a merely abstract understanding of the opportunity to participate in democratic processes, but requires the state to take positive steps to secure conditions under which citizens – including the poor and marginalised – can exercise rights of democratic participation. Thirdly, because the judgments in question resist assumptions about the unity of the citizenry or the identity of the electorate and their representatives, they are less prone to subsuming the needs and interests of the poor under vague notions of the “common interest”. One-size-fits-all solutions imposed from above do not sit well with the Court’s emphasis on the particularity of needs and the distinctness of the voices of those affected. Finally, these judgments rest upon a conception of political equality which is inconsistent with the capacity of the wealthy and powerful to pass off their private interests as the public interest or to insulate their power and influence from mechanisms designed to promote democratic accountability. The right to public participation vests in every person affected by a decision, regardless of her income or social status. It can therefore be expected to play an important role in countering private power and influence, and ensuring that a broader range of interests and viewpoints – including those of the marginalised and poor – are heard.

Subsequent to these two judgments, the theme of public participation has also made its influence felt in other contexts. The state has been required to engage meaningfully with individuals and communities affected by intrusive forms of government action such as evictions.²⁷ In these cases, too, the Court has emphasised the agency and voice of the poor and has treated them as equal participants in a constitutional dialogue involving the state, land owners and poverty-stricken communities.²⁸ The Court has also held that the President’s failure to afford victims an opportunity to participate in proceedings concerning the possible pardoning of individuals claiming to have been convicted of offences committed with a political motive was irrational and hence unconstitutional.²⁹

²⁷ See *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 5 BCLR 475 (CC) and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 9 BCLR 847 (CC) on the requirement of meaningful engagement in eviction cases. See also *Beja v Premier of the Western Cape* 2011 3 All SA 401 (WCC), where the City of Cape Town failed to adhere to the National Housing Code’s community participation requirements and the “agreement” between the City and the residents for the installation of unenclosed toilets was found to be neither valid nor enforceable.

²⁸ In an earlier case concerning an application for the eviction of occupiers from privately owned land, Sachs J declared that

“those seeking evictions should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. The tenacity and ingenuity they show in making homes out of discarded material, in finding work and sending their children to school, are a tribute to their capacity for survival and adaptation. Justice and equity oblige them to rely on the same resourcefulness in seeking a solution to their plight and to explore all reasonable possibilities of securing suitable alternative accommodation or land” (*Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) para 41).

²⁹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC); 2010 5 BCLR 391 (CC).

2 2 *Merafong and Poverty Alleviation Network's rider*

The duty of provincial legislatures to facilitate public involvement in relation to constitutional amendments which affect the boundaries of a specific province or provinces also came up in *Merafong Demarcation Forum v President of the Republic of South Africa*.³⁰ The legislation in question abolished cross-boundary municipalities and transferred the part of Merafong which had formerly formed part of Gauteng to North West. From the outset, the proposed amendment gave rise to vehement opposition. Against the background of mass protests and calls for a public hearing, the Gauteng Provincial Legislature held a joint public hearing with the North West Legislature. After the conclusion of the hearing, the relevant portfolio committee of the Gauteng Legislature adopted a written negotiating mandate which detailed the reasons for the community's opposition. The mandate mirrored the community's demands. It supported the phasing out of cross-border municipalities, and recommended the inclusion of the municipal area of Merafong in Gauteng. When this mandate was presented to the Select Committee of the NCOP, the latter's legal advisors pointed out that it was not competent for the Gauteng Provincial Legislature to propose amendments to the Bill in question. Three days later, the portfolio committee reversed its original decision and authorised its delegation to the NCOP to vote in favour of the Bill. The Bill was passed, and Merafong was incorporated into North West.

The majority of the Court rejected the applicants' contention that the Gauteng Provincial Legislature had failed to facilitate public involvement. Van der Westhuizen J pointed out that, while the legislature was constitutionally obliged to be open to the views expressed by the public, they were not bound by them.³¹ In his view, the fact that the provincial legislature changed its line after consulting with the NCOP does not suggest that the public meeting was a mere charade, or that the incorporation of Merafong into North West was always a done deal. The legislature was open to persuasion by the views of the community, as reflected in its negotiating mandate, and there is no evidence that the reversal of that position in the final voting mandate points to a lack of good faith. Moreover, the legislature's failure to inform the community that it was no longer possible to adhere to the position taken in the negotiating mandate was "possibly disrespectful",³² but not unreasonable. Another round of public consultation would have served little or no purpose, as it was unlikely that either the legislature or the community would be swayed by the other's arguments. The judge also rejected the argument that the legislature's decision was irrational, and found that it was not based on a mistaken understanding

³⁰ 2008 5 SA 171 (CC); 2008 10 BCLR 968 (CC) ("*Merafong*")

³¹ "Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the Legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them" (Para 50)

³² Para 55

of its powers or responsibilities under the Constitution or of the consequences of a legislative veto.³³

Only one of the judges held that the provincial legislature had acted in breach of its constitutional obligation to facilitate public consultation. Sachs J found that its failure to go back to the community and explain its about-turn was unreasonable in view of the nature of the legislation, its potentially drastic impact on the community and the expectations created by the recommendations of the Municipal Demarcation Board and the adoption of the negotiating mandate. It slighted the civic dignity of the people of Merafong and created the perception that the consultation process was a sham.³⁴ The Court was more evenly split on the question whether the legislature had acted irrationally. Moseneke DCJ, in a dissent concurred in by three other judges, held that the legislature had laboured under a fundamental misconception of its powers under section 74(8). It appeared to believe that its exercise of the veto power would result in the withdrawal of the entire amendment Bill and a consequent return to a system of cross-boundary municipalities. This, stated Moseneke DCJ, was clearly incorrect, as the province only had a veto over changes to its specific boundaries. Its exercise of the veto would therefore not prevent the abolition of cross-border municipalities, and would be perfectly consistent with its stated objectives of phasing out cross-border municipalities and preventing the incorporation of Merafong into North West. The legislature's about-turn was accordingly not in pursuance of a legitimate objective and was therefore irrational.³⁵

A fourth case arose from the legislative response to the *Matatiele II* judgment. Legislation (including a constitutional amendment) providing for the incorporation of Matatiele in the Eastern Cape was adopted anew, this time after a fairly extensive process of public consultation at the national and provincial levels. In *Poverty Alleviation Network v President of the Republic of South Africa*,³⁶ the Constitutional Court held unanimously that the relevant legislative bodies had complied with their constitutional obligation to facilitate public consultation. The Court rejected the contention that the consultation facilitated by Parliament and the KwaZulu-Natal Legislature was a sham, and pointed out that the applicants' submissions had been discussed during the deliberations of the portfolio committees and that a report on issues relating to service delivery had been compiled. A challenge based on the alleged irrationality of the decision was also dismissed.

2.3 Re-assessment

The judgments in *Merafong* and *Poverty Alleviation Network* raise several questions. Do these judgments stand for the proposition that legislative majorities are free to push through their party-political agendas, provided that they first go through the motions of public consultation? Do they signal a return

³³ Paras 62-115

³⁴ Paras 292-298

³⁵ See paras 166-192

³⁶ 2010 6 BCLR 520 (CC) ("*Poverty Alleviation Network*")

to the more deferential approach that characterised the Court's political rights jurisprudence prior to *Doctors for Life* and *Matatiele II*?³⁷ Do they renege on the promise of those two cases, and revert back to a thinner conception of democracy that has relatively little to say to the struggles of the poor and destitute to overcome their economic, social and political marginalisation?

These questions may appear rather too harsh. After all, there is nothing in *Doctors for Life* or *Matatiele II* that suggests that legislatures are bound by the views expressed during rounds of public consultation. The reasoning in *Merafong* and *Poverty Alleviation Network* seems consistent with the insistence in those two cases that legislatures must be allowed a broad margin of discretion in deciding how best to facilitate public consultation. It also seems consistent with the idea, reiterated in numerous cases, that judges inquiring into the rationality of exercises of public power are not to substitute their own views on policy issues for those of the relevant authorities. Once meaningful public consultation has taken place, a court must respect the legislature's power to make a final, binding decision, as long as that decision is rational.

Indeed, one should not be too quick to conclude, simply on the basis of the outcomes of these cases, that the Court has reverted back to a shallow conception of democracy and an overly deferential posture which has little to offer the poor. The value of public participation cannot and should not be reduced to the question whether participants were able to convince the legislature of their views. Even when measured in purely instrumental terms, public participation may be of value in cases in which the participants' views ultimately did not carry the day. Neither in *Merafong* nor in *Poverty Alleviation Network* can it be said that the communities' concerns over service delivery fell on deaf ears. In *Merafong* the portfolio committee proposed, in their report to the Gauteng Provincial Legislature, a service delivery audit on the basis of which recommendations would be made to North West Province. And in *Poverty Alleviation Network*, a report on service delivery issues was compiled on the basis of the community's inputs. Therefore, even in cases where the legislature is not swayed by the inputs of communities and groups, the latter's participation in public processes of engagement may help raise public and legislative awareness of their needs and concerns, and may provide occasion for further democratic engagement and mobilisation.

And yet, it is hard to shake the feeling that, in these cases, the vision of democracy articulated in *Doctors for Life* and *Matatiele II* has either been diluted or has stumbled upon its own limits. In the first place, the majority judgment of Van der Westhuizen J (who was one of the dissenters in the two earlier cases) in *Merafong* rests on assumptions that are hard to square

³⁷ See the discussion of *United Democratic Movement v President of the RSA* 2002 11 BCLR 1179 (CC) in part 3 below. It must, however, be pointed out that not all the earlier decisions were informed by a shallow conception of democracy. Important precursors to the deeper understanding of democracy articulated in *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC); 2006 12 BCLR 1399 (CC) and *Matatiele Municipality v President of the Republic of South Africa (2)* 2007 1 BCLR 47 (CC) include the minority judgments of O'Regan J and Sachs J in *Democratic Alliance v Masondo* 2003 2 SA 413 (CC); 2003 2 BCLR 128 (CC); and *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC); 2006 1 BCLR 1 (CC) (see particularly paras 111-113 and the judgment of Sachs J)

with the depth of the vision of democracy embraced in *Doctors for Life and Matatiele II*. Consider, for instance, his argument that a further round of public consultation would serve little purpose – beside showing courtesy to the inhabitants of Merafong – as it was unlikely that the parties would be able to reach a common understanding. This argument is surprising in view of his conclusion that it could not be proved that the provincial legislature’s reversal of its original decision was “directly or indirectly influenced by previously formulated policies of the ruling party”.³⁸ Seeing that the legislature offered no cogent explanation for its sudden about-turn and since the judge rejected the contention that the change was dictated by political superiors, it is not clear how he could be so certain that the legislature would not be open to ideas that might result from a new round of consultation. One possible explanation is proffered: the effect of an exercise of the legislative veto would be that the municipality of Merafong would be split into two, one falling in Gauteng and the other in North West. This was apparently not what either the community or the legislature had envisaged. In view of this reality, the judge seems to suggest, there was not much to discuss – the legislature simply had to choose between two options, one of which would result in the bigger part of Merafong remaining in Gauteng, while the other would bring about the relocation of the entire municipality to North West.

The judgment assumes that participation primarily has instrumental value as a means to the coordination of conflicting interests or as a mechanism to bolster the legitimacy of laws in the eyes of the people. Where participation in the legislative process cannot reasonably be expected to forge consensus among legislative majorities and members of the public, the legislature is not obliged to report back to the community or to initiate a further round of public consultation in cases in which it has reversed its original decision. Where, as here, the positions of the legislature and general public appear irreconcilable, a further round of consultation would serve little or no purpose. This reasoning makes sense if we accept the judgment’s assumption that democratic deliberation consists in arms-length transactions between rational actors each seeking to maximise their own interests. There are, however, good reasons to be wary of this understanding of democracy. For one, this vision of democracy is far from uncontested. There is a tradition in democratic theory that is critical of the reduction of the political process to the coordination of conflicting interests and insists that democratic participation has an expressive and constitutive value that cannot be captured in purely instrumental terms.³⁹ In this view, it is through political participation that citizens become aware of their mutual dependence, learn to respect each other’s viewpoints and, through their deliberations about the common good, engage on a path of moral self-discovery which may give rise to a reconsideration of their private beliefs and perceptions of their own interests. For another, this second vision

³⁸ *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC); 2008 10 BCLR 968 (CC) para 50

³⁹ See J Habermas *Between Facts and Norms* (1996) 18-19 on the distinction between communicative and strategic action; and D Held *Models of Democracy* 3 ed (2006) on the distinction between theories viewing democracy as an end in itself and those seeing it as a means to the end of securing private freedom

of democratic deliberation resonates with the deliberative and participatory stands in the South African Constitution⁴⁰ and with the reasoning in *Doctors for Life* and *Matatiele II*, which posits a dialogue between citizens and their representatives. That this dialogue does not simply have instrumental value and is not premised solely on the idea of arms-length negotiations between self-interested actors is clear from the judgment of Ngcobo J in *Doctors for Life*, which emphasises that public participation enhances the civic dignity of participants and “promotes a spirit of democratic and pluralistic accommodation”.⁴¹

The majority judgment of Van der Westhuizen J in *Merafong* vividly illustrates the limits of an instrumental vision of democracy. His judgment apparently views public consultation as a one-off event and is unconcerned with building more lasting forms of civic engagement and trust.⁴² It is blind to the possibility that democratic deliberation could persuade political actors to reconsider their perceptions of their own interests or open up novel ways of seeing and thinking about the problem.⁴³ It is fixated on established institutions, and finds it hard to conceive of the possibility that political contestation and struggles outside these institutions could have a significant bearing on the democratic character of the law. Ultimately, this construction of the legislature’s duty to facilitate participation does little to challenge or interrupt a merely formal conception of democracy as the capacity of duly elected legislatures to enact law within their constitutional area of competence. In fact, it is perfectly congruent with it.

Secondly, the facts in *Merafong* and *Poverty Alleviation Network* draw attention to the power of the ruling party to instruct its members how to vote. In both these cases, the Court dismissed claims that ANC legislators were under instructions from the party and were therefore not open to be persuaded by the public’s views. In *Merafong*, it was held that it was “not possible to determine whether and to what extent the final voting mandate and the debate in the NCOP Select Committee were directly or indirectly influenced by previously

⁴⁰ A number of authors have argued that the South African Constitution envisages a heterogeneous public sphere in which democratic participation is an end in itself and the public interest cannot and should not be reduced to the sum of private interests. See, for example, AJ van der Walt “Un-Doing Things with Words: The Colonisation of the Public Sphere by Private-Property Discourse” in G Bradfield & D van der Merwe (eds) *Meaning in Legal Interpretation* (1998) 235; H Botha “Civic Republicanism and Legal Education” (2000) 41 *Codicillus* 23; Le Roux (2001) *SAPL* 139; K van Marle “Lives of Action, Thinking and Revolt – A Feminist Call for Politics and Becoming in Post-Apartheid South Africa” (2004) 19 *SAPL* 605; J van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005)

⁴¹ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC); 2006 12 BCLR 1399 (CC) para 115

⁴² Sachs J implicitly levels this critique against the majority when he states, in relation to the legislature’s failure to explain its decision to the community:

“Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve” (*Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC); 2008 10 BCLR 968 (CC) para 300)

⁴³ One would have expected a new round of consultation not only to create a better understanding on the part of residents of the reasons for the legislature’s change of mind, but also to provide some insight into the community’s views on the possible division of Merafong into two municipalities falling in two separate provinces. It is even conceivable that a clearer understanding of the options available to the legislature under the Constitution might crystallise in the course of such consultation, or that new political alliances might be forged or alternative strategies be devised

formulated policies of the ruling party”.⁴⁴ And in *Poverty Alleviation Network*, the rationality challenge was brushed off with reference to the distinction between the purpose of the legislation and Parliament’s motives in enacting it. It was held that while the court can test for rationality, it is not in a position to inquire into the motives of legislators.⁴⁵ These judgments raise questions about the capacity of the Court’s jurisprudence to respond to situations in which an open-minded consideration of inputs is precluded by the hegemony of particular interests masquerading as the ruling party’s understanding of the public interest. It is to these issues that I now turn.

3 Keeping private interests at bay

Allegations that a political party or parties have used their numerical majority to introduce legislation to cement their own position or to shield politicians or officials from oversight by the legislature or independent institutions, have featured in a number of cases. In *United Democratic Movement v President of the RSA*,⁴⁶ the Constitutional Court considered the constitutionality of legislation (including a constitutional amendment) which allowed members of legislatures at the national, provincial and local government levels to cross the floor to another party without losing their seats. The Court rejected the contention that the legislation, which was triggered by a split in the Democratic Alliance, undermined the basic structure of the Constitution, was inconsistent with the idea of multiparty democracy as entrenched in section 1 of the Constitution, or violated the constitutional right to vote. The Court’s restrictive understanding of democracy and failure to give content to “multiparty democracy” have been widely criticised. Its rejection of the argument that a system of proportional representation requires an anti-defection clause⁴⁷ and its finding that the 10% threshold, which made it considerably easier to defect from smaller parties than from larger ones did not result in the unconstitutionality of the legislation,⁴⁸ appear to rest on the premise that the courts will generally defer to the electoral scheme devised by Parliament, and will intervene only in cases where it is in clear and direct conflict with the Constitution. This, together with its insistence that between elections, “voters have no control over the conduct of their representatives”,⁴⁹ raises questions over the depth of the Court’s understanding of democracy and over the capacity of its jurisprudence to help secure conditions in which representatives can be held accountable by the electorate.

Subsequent judgments have shown a somewhat richer and more nuanced understanding of “multiparty democracy”. The concurring judgment of Sachs J in *Democratic Alliance v Masondo*⁵⁰ – a case concerning the

⁴⁴ *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC); 2008 10 BCLR 968 (CC) para 50

⁴⁵ *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC) para 73

⁴⁶ 2002 11 BCLR 1179 (CC) (“UDM”)

⁴⁷ Paras 28-35

⁴⁸ Paras 46-47

⁴⁹ Para 49

⁵⁰ 2003 2 SA 413 (CC); 2003 2 BCLR 128 (CC)

question whether opposition parties are entitled to representation on mayoral committees – evinces a strong commitment to a pluralistic and deliberative democracy, and shows sensitivity to the intersections and tensions between deliberation and majority rule and between inclusivity and effective service delivery. And in *African Christian Democratic Party v The Electoral Commission*,⁵¹ the Court preferred an interpretation of a legislative provision which promoted multiparty democracy and citizens’ political rights over a more restrictive interpretation. Whether the Court’s sensitivity in these cases to democratic participation, inclusivity and citizenship signals a greater willingness to subject measures to rigorous scrutiny which are purportedly aimed at upholding the hegemony of a particular party or parties, or insulating party bosses from accountability is, however, uncertain.⁵²

If that is indeed the case, the message was apparently lost on the Cape High Court in *IDASA v African National Congress*.⁵³ In that case it was held that political parties are private bodies in relation to their fundraising activities. Applications for access to their fundraising records in terms of the Promotion of Access to Information Act 2 of 2000 can, as a result, only succeed if the applicants can show that they reasonably require the information in order to exercise their rights. In the view of the Court, section 19 of the Constitution does not confer a right to the disclosure of political parties’ sources of funding. The applicants were accordingly not entitled to access these records. The judge noted, however, that the applicants had made out a “compelling case” in favour of the need for specific legislation to regulate the disclosure of private donations to political parties.⁵⁴ Although he is right that the legislature would be better equipped than the courts to deal with the complexity of these issues, one cannot help but feel that an important opportunity was lost for establishing the principle that political parties, which occupy such a central role and wield so much public power in a list system of proportional representation, are constitutionally required to conduct themselves in an open, responsive and transparent manner. The finding that parties do not act as public bodies when receiving private funding is particularly ironic. It is precisely the “fluidity” and “permeability” of the distinction between their “public” and “private” functions⁵⁵ which makes it imperative to require political parties to disclose their sources of funding, as corruption, nepotism and secret lobbying thrive in that grey area between public power and private influence. To hold that they act in a private capacity when

⁵¹ 2006 5 BCLR 579 (CC) The Court held that the ACDP had complied with a requirement in the Local Government: Municipal Electoral Act 27 of 2000 that a party contesting an election must submit a deposit to the IEC’s local representative in circumstances where the party, not having submitted a deposit to the local office in Cape Town, requested the IEC to allocate a surplus payment made by it as a deposit for the Cape Town Metro. But see also *Electoral Commission v Inkatha Freedom Party* 2011 9 BCLR 943 (CC) The Court distinguished the facts from those in *ACDP*, and held that the requirement that election documentation be submitted at the local office of the IEC served a central and significant legislative purpose and helped maintain the integrity of the electoral process

⁵² See G Quinot “Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right” (2009) 25 *SAJHR* 392 for a critique of the courts’ fixation on the act of voting and neglect of the democratic processes leading up to and underpinning elections

⁵³ 2005 10 BCLR 995 (C)

⁵⁴ Para 58

⁵⁵ Para 29

receiving funding is to submit rather meekly to the power of private interests to determine, twist and distort the public interest.

A recent judgment of the Constitutional Court has been hailed by some as an important victory for the rights of the poor. In *Glenister v President of the Republic of South Africa*,⁵⁶ the Court held that the independence of the Directorate for Priority Crime Investigation (DPCI) was not adequately safeguarded. To that extent, the impugned legislation was in violation of the state's constitutional obligation to establish and maintain an independent anti-corruption entity. In their majority judgment Moseneke DCJ and Cameron J relied on section 7(2) of the Constitution, which obliges the state to "respect, protect, promote and fulfil" the rights in the Bill of Rights, to construe a positive state duty to create an effective and integrated anti-corruption strategy. Viewing this duty through the prism of section 39(1)(b), which states that a court interpreting the Bill of Rights "must consider international law", they concluded on the basis of a range of international conventions and agreements acceded to by South Africa that it includes the obligation to establish an anti-corruption unit that is sufficiently independent. The legislation in question fell short of this requirement in several respects. Members of the DPCI enjoyed no special security of tenure, and a ministerial committee was given the power to issue policy guidelines and to oversee the DPCI's functioning. In the judges' view, these features created a real risk of political influence on investigations, which compromised the capacity of the DPCI to act fearlessly and independently, particularly in high profile cases involving senior politicians and government officials.

The judgment has drawn sharp criticism. Ziyad Motala has lashed out at the majority: in his view, their judgment takes leave of the constitutional text and accepted canons of interpretation, makes questionable use of international law, and usurps Parliament's policymaking function. In the absence of clear constitutional guidelines on the institutional home of and lines of command within the anti-corruption unit, the Court ought to have respected the legislature's decision to locate it within the Department of Police.⁵⁷ These sentiments are echoed in statements by President Zuma⁵⁸ and Gwede Mantashe. Mantashe warned that judgments like *Glenister* "cast aspersions on the work of Parliament", involve the Court in the "political weighting of views", and

⁵⁶ 2011 3 SA 347 (CC); 2011 7 BCLR 651 (CC) ("*Glenister*") There was a narrow five/four split between the majority and minority. In his dissenting judgment, Ngcobo J held *inter alia* that international law cannot be used to create constitutional obligations (paras 88-103), that the state's obligation to protect the rights in the Bill of Rights can be fulfilled in a number of ways (paras 105-113), that the legislature enjoys considerable leeway in deciding how best to ensure the DPCI's independence (paras 107, 111, 114) and that the Act contains adequate safeguards to ensure the DPCI's independence (paras 132-156).

⁵⁷ Z Motala "Divination through a Strange Lens" *Sunday Times* (27-03-2011)

⁵⁸ Zuma's recent admonition to judges not to usurp the executive's policy making function has been understood as a reference to the *Glenister* ruling. Zuma's address, which was delivered at the Third Access to Justice Conference in Pretoria, is available at *PoliticsWeb* <<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=244907&sn=Detail&pid=71616>> (accessed 29-08-2011)

represent a “slippery road” which may lead to the judiciary “seeking to arrest the functioning of Parliament”.⁵⁹

The decision to locate a crime investigating unit within a particular government department and the setting up of mechanisms to provide lines of accountability and oversight are issues over which Parliament typically enjoys a wide margin of discretion. The conventional wisdom that a court, in deciding the constitutionality of laws, should not concern itself with the wisdom of particular policy choices would, ordinarily, preclude courts from interfering with decisions that are intimately bound up with the policy choices informing the design of law-enforcement agencies. In the absence of a clear constitutional preference for one model over another, a decision which overturns the legislative scheme designed by Parliament risks being seen as an unauthorised judicial transgression on the powers and functions of legislative bodies. Because they believe that the constitutional rights and values and the international legal materials relied upon by the majority are inconclusive as to the specific institutional framework within which an anti-corruption entity must operate, the critics aver that the majority judgment ultimately rests on ideological rather than legal premises and usurps legislative power.

I find some of these criticisms problematic. A constitution does not always wear its meaning on its sleeve and interpretations arrived at through rigorous and sometimes arduous engagement with the constitutional text, structure and values and the social and historical context are not for that reason less compelling than interpretations that immediately strike us as right or even inevitable. I am also uncomfortable with the binary opposition between “legal” and “ideological” decision making. The right question to ask is not whether this is a legal or political judgment, but whether it is based on a plausible interpretation of the Constitution – a legal document that structures public power through an intricate network of institutions, procedures, rights and values that is political at its core. If the judgment places too much strain on the constitutional text or fails to integrate the various reasons advanced for it into a coherent and defensible reading of the Constitution, that is cause for criticising the Court’s reasoning, not for concluding that it has forsaken its judicial mandate in favour of an overtly political role.

Despite the progressive tone of the majority judgment, there is nevertheless something odd about the way it jumps from the state’s obligation to respect, protect, promote and fulfil the rights in the Bill of Rights to an analysis of the extent to which the DPCI’s independence is secured. For a start there is no rights analysis. It is simply stated, without arguing, that the rights infringed by the state’s failure to establish a sufficiently independent anti-corruption unit include “the rights to equality, human dignity, freedom, security of the

⁵⁹ See Anonymous “Mantashe’s ConCourt Remarks Scandalous: DA” (18-08-2011) *News 24* <<http://www.news24.com/SouthAfrica/Politics/Mantashes-ConCourt-remarks-scandalous-DA-20110818>> (accessed 29-08-2011)

person, administrative justice and socio-economic rights, including the rights to education, housing, and health care”.⁶⁰

The foray into international law, which is expressly undertaken in terms of section 39(1)(b) of the Constitution’s injunction to consider international law in the interpretation of the Bill of Rights, does not shed any light on the content of these rights either. The inquiry centres on institutional issues of independence, and no attempt is made to explain how a failure to adhere to international standards impacts on the rights in question.⁶¹ Given the paucity of rights analysis, it does not come as a surprise that there is no limitation analysis either. Noting that the respondents offered no justification of the limitation, the Court concludes the limitation inquiry simply by stating that a justification would in any event be “hard to advance”.⁶²

The only clue to the link between the rights in the Bill of Rights and institutional issues of independence comes in the form of statements, references and quotations which refer, in the most general terms, to the effects of corruption on democracy, the rule of law, societal safety and security, and the socio-economic upliftment of the poor. For instance, we are told that corruption

“blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.”⁶³

The judges also quote from a statement by Kofi Annan, which emphasises corruption’s detrimental effects on the rights of the poor:

“[I]t is in the developing world that [the effects of corruption] are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government’s basic ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.”⁶⁴

The first statement notes the negative impact of corruption on the “democratic ethos” and the “institutions of democracy”, but does not explain how this negative impact occurs. The second statement does not

⁶⁰ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC); 2011 7 BCLR 651 (CC) para 198. No attempt is made to relate these findings to the Court’s earlier jurisprudence or to explain how they fit in with the standards (for example: the reasonableness standard in relation to socio-economic rights) enunciated in earlier cases. The specific subsections that are infringed are not even mentioned.

⁶¹ See paras 179-202.

⁶² Para 203. Perhaps it does not really matter that the judges’ recourse to a two-stage inquiry is more apparent than real. As an anonymous referee helpfully points out, the judgment does not hinge on a finding of a direct infringement of the Bill of Rights, but relies instead on the state’s more general failure to respect, protect, promote and fulfil the rights in the Bill of Rights. Given corruption’s threat to a number of rights it may have been sufficient for the majority to find, as it did with reference to international law, that the failure to establish an independent anti-corruption unit was at odds with the state’s obligations in terms of s 7(2) of the Constitution. This may be so, but it would nevertheless have contributed significantly to the judgment’s persuasive value if the Court engaged in a more rigorous analysis of corruption’s impact on constitutional rights and values.

⁶³ Para 166.

⁶⁴ Para 167.

refer to democracy, but can be read to imply that one of the ways in which corruption impacts on basic service delivery and perpetuates inequality is by undermining a government's democratic legitimacy and by obstructing the mechanisms of democratic accountability. Democracy, it seems, is viewed mainly in instrumental terms. Norms of democratic accountability are valued to the extent that they boost the state's capacity to alleviate poverty, redress inequality and ensure a dignified life for all. The possibility that democracy may be constitutive of – at least some of – the rights in question⁶⁵ or that the rights of citizens to political participation may be at stake here is apparently not considered.

These lines of inquiry might have provided a sounder basis for the Court's attempt to establish a link between the Bill of Rights and institutional issues of independence. Representatives and officials whose primary allegiance is to those who fund their lavish lifestyles or whose donations oil the party's machinery make a mockery of the ideals of democratic accountability, openness and responsiveness. In the first place, their willingness to place private interests above the public interest dilutes the importance of the right to vote and diminishes the impact of democratic participation. Corruption and political patronage thus strike at the heart of democratic citizenship and rights of political participation. They deny basic political equality and re-introduce gradations and hierarchies based on wealth and influence into the very notion of citizenship.⁶⁶ Secondly, as Choudry points out, corruption and patronage flourish in dominant party democracies in which there has been a shift of power from the ruling party's parliamentary to its non-parliamentary wing. In such societies the separation between state and party gets increasingly blurred, legislators and officials come to depend on the goodwill of party leaders whose mandate derives not from the electorate but from the party, and public resources (for example state contracts and government positions) become an indispensable tool in struggles for political power and influence. Democratic accountability becomes a sham, and attempts to curb the independence of institutions that are able to expose corruption become common.⁶⁷ Thirdly, the political manipulation of public resources enables ruling parties to stifle political competition and prevent the formation of a strong and credible opposition. Corruption and political patronage are therefore fundamentally

⁶⁵ See H Botha "Equality, Plurality and Structural Power" (2009) 25 *SAJHR* 1 on the links between democracy and equality. See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 28-34, 36-42 and 63-66 on the relation between democracy and socio-economic rights

⁶⁶ Classical-republican thinkers already theorised the relationship between corruption and inequality in the sixteenth and seventeenth centuries. For them, civic virtue signified the capacity of citizens to place the common good above their own particular interests. Corruption, by contrast, referred to the propensity of rulers and citizens to elevate their private interests above the public interest. For thinkers like Machiavelli and Harrington, inequality was the root cause of corruption, as material dependence gave rise to "a state of affairs in which some individuals look to others – when they should be looking to the public good and public authority" (JGA Pocock *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975) 209). In the absence of a material basis for independence, individuals lack the positive freedom to pursue the common good in concert with others. Inequality is thus irreconcilable with citizenship and threatens the very life of the republic.

⁶⁷ S Choudry "'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" (2009) 2 *CCR* 1 22-32

at odds with the idea of a multiparty democracy and with the right of every citizen to make political choices which, according to section 19(1) of the Constitution, includes the right to form a political party and to participate in its activities and recruit members.

Seen thus, the independence of anti-corruption agencies does not simply have a remote bearing on a range of constitutional rights, but goes to the heart of our constitutional system of representative democracy and fundamentally affects rights of democratic citizenship. The order made in *Glenister* is, accordingly, not a misguided attempt by an unelected court to substitute its views on policy issues and its preference for a particular institutional design for those of Parliament, but an important victory for a constitutional vision of democracy which precludes laws and conduct which effectively insulate political elites from democratic supervision and contestation.

4 Concluding remarks

The Constitutional Court's jurisprudence wavers uneasily between two rival conceptions of democracy and its relationship to the poor. On the first view, regular elections secure a direct link between the government and electorate. It is this chain of democratic accountability and legitimacy which ultimately provides the strongest guarantee that the voices of the poor will be heard and that their needs will be attended to. The power of judicial review should, accordingly, be used sparingly. In the absence of clear and unambiguous constitutional authorisation, judicial review of decisions of the political branches amounts to unwarranted interference with the chain of legitimacy running from the people to their representatives. Besides resting on shaky hermeneutical foundations, this understanding of democracy is based on dubious assumptions about the relationship between the people and their representatives in government. Effectively reducing the role of "the people" to participation in elections every five years, it grounds the state's legitimacy in the people's supreme democratic power and, in the very same move, removes power from the people by insisting that they relinquished it to elected representatives. Moreover, this view overlooks the link between economic and political power and fails to resist the capacity of private power and influence to shape political outcomes. In addition, it accepts the uninterrupted chain of democratic legitimacy as a given rather than as a critical ideal, and legitimates the political marginalisation of the poor and other vulnerable groups in the name of a formal conception of democracy and of political equality.

The second view resists a too glib identification of the people with their representatives and posits a dialogical, participatory and pluralistic understanding of democracy. Rejecting the first view's fixation on a single act through which voters delegate power to their elected representatives, it starts from the idea of an on-going dialogue between the people and representative institutions. Here the supposed unity and identity of "the people" keeps getting interrupted by a plurality of needs and viewpoints, as individuals and communities participate in decision-making processes affecting them. This

vision seems better able to uphold the civic dignity of the poor; to ensure open, accountable and responsive government; and to resist the capture of public decision-making processes by particular interests.

Despite the progressive tenor of the judgments in *Doctors for Life* and *Matatiele II*, the first, more restrictive view of democracy continues to re-assert itself in Constitutional Court judgments. A number of reasons have been mooted for its persistence. According to Roux, judgments like *UDM* in which the Court relies on a formal, rather shallow conception of democracy should not be seen as a renunciation of the deep principle of democracy articulated elsewhere. They rely, rather, on a countervailing principle in terms of which “the judiciary should defer to the legislature in politically sensitive cases concerning the design of the electoral system”,⁶⁸ or amount to a pragmatic concession to the Court’s vulnerable institutional position.⁶⁹ Choudry takes a somewhat different view. For him, judgments like *UDM* and *Merafong* result from the Court’s lack of a conceptual framework for understanding the dynamics of a dominant party democracy.⁷⁰ To these a third explanation can be added, which relates to the Court’s reliance on human dignity in cases concerning political rights. The Court has invalidated measures which, by denying the vote to prisoners⁷¹ or nationals residing abroad,⁷² could be construed as a denial of the equal dignity of those categories of citizens. However, the Court has struck a far more deferential pose in cases in which laws dilute the importance of the right to vote through structural changes to the electoral system,⁷³ or effectively prevent some citizens from casting their vote as a result of the interplay between electoral rules and material and other forms of disadvantage.⁷⁴ This raises fundamental questions over the relationship between dignity and democracy, and over the political marginalisation and silencing of the poor.⁷⁵

It is hard to square the current socio-political reality with the Constitutional Court’s vision of an inclusive, egalitarian and participatory democracy in which the poor are treated as active citizens rather than faceless subjects or passive beneficiaries of government largess. Recent protests over poor service delivery, police brutality in the face of these protests, and countless allegations of corruption, nepotism and political patronage have once again

⁶⁸ T Roux “Democracy” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 7 2006) 10-64

⁶⁹ 10-57

⁷⁰ Choudry (2009) *CCR* 5, 34

⁷¹ *August v Electoral Commission* 1999 3 SA 1 (CC); 1999 4 BCLR 363 (CC); *Minister of Home Affairs v NICRO* 2004 5 BCLR 445 (CC)

⁷² *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC); 2009 5 BCLR 448 (CC)

⁷³ *United Democratic Movement v President of the RSA* 2002 11 BCLR 1179 (CC)

⁷⁴ *New National Party of South Africa v Government of the RSA* 1999 5 BCLR 489 (CC)

⁷⁵ Danie Brand has argued that some of the Constitutional Court’s “meaningful engagement” orders in socio-economic rights cases over-emphasise the specific, individual interests at stake in a particular dispute, at the expense of the underlying structural causes of poverty and deprivation. JFD Brand *Courts, Socio-Economic Rights and Transformative Politics* LLD thesis University of Stellenbosch (2009) 162-176. The Court’s emphasis in political rights cases on the dignity of individual voters has arguably had a similar effect, in that it has shifted the attention away from the underlying structural causes of political inequality, the silencing of marginalised and poor communities and a lack of democratic accountability and responsiveness.

drawn attention to the staggering gap between rich and poor and the ways in which political elites appear to have extricated themselves from the logic of democratic accountability. The critical challenge is to articulate the Court's deeper vision of democracy, in which dialogue, participation and voice take centre stage, with an understanding of the ways in which electoral rules and the party system combine with inequality, corruption and patronage to entrench the exclusion and silencing of the poor. Only thus can we hope to resist the strange logic in terms of which the poor are effaced in the very act of their representation.

SUMMARY

The article juxtaposes two judicial understandings of democracy in relation to their implications for the poor. Some constitutional judgments conceive of democracy in formal terms as the capacity of duly elected legislatures to enact law within their constitutional area of competence. These judgments are loath to impose requirements that would guarantee the participatory nature of the lawmaking process, and reluctant to raise questions about the ruling party's use of their numerical majority to stifle political opposition or shield officials from legislative oversight. Other judgments conceive of democracy in dialogic, participatory and pluralistic terms. It is argued that this second judicial conception of democracy is better placed to challenge laws and practices which effectively insulate social and political power from mechanisms designed to promote democratic accountability, or allow the wealthy and powerful to pass off their particular interests as the common good. This vision of democracy needs to be supplemented with a better understanding of the ways in which electoral rules and the party system tend to intersect with inequality, corruption and patronage to entrench the exclusion and silencing of the poor.