

THE CONSTITUTIONAL COURT, COURT
WATCHERS AND THE COMMONS:
A REPLY TO PROFESSOR MICHELMAN ON
CONSTITUTIONAL DIALOGUE, 'INTERPRETIVE
CHARITY' AND THE CITIZENRY AS SANGOMAS

*Tshepo Madlingozi**

1 Background

When I think back on the Constitutional Court's 2007 term, one event stands out for me. On 20 August 2007, the Court was hearing *Merafong Demarcation Forum v President of the Republic of South Africa*.¹ After a long period of struggle in which they had employed both institutional and extra-institutional mechanisms of democracy, the people of Khutsong decided to take their case to the Constitutional Court. Why? 'The government does not want to listen.'² On that day more than a 1 000 protesters gathered outside the court room *toyi toying* and singing liberation songs. During the course of the day, things turned nasty when protesters started burning tyres, brandishing dangerous weapons and allegedly pelting the police with stones.³ For me, this episode vividly demonstrates the fragile state of South Africa's constitutional culture.

* I would like to thank the editors for inviting me to write this reply. In particular I would like to thank Professor Stu Woolman for regular conversation and extensive comments on the form and the substance of this reply. The paper also benefited from comments made by the participants at the *Constitutional Court Review Conference* (6-7 August 2008 Somerset West). Needless to say all errors are mine.

¹ *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC).

² I Lekota 'Flames in Khutsong' *Sowetan* 25 May 2007 <http://www.sowetan.co.za/Columnists/IdoLekota/Article.aspx?id=473030>.

³ See 'Khutsong battle reaches Constitutional Court' *Mail & Guardian On-line* 20 August 2007 <http://www.mg.co.za/article/2007-09-20-khutsong-battle-reaches-constitutional-court> (accessed 23 October 2008). For dramatic photos capturing these events, visit http://photos.mg.co.za/view_photo.php?pid=2036&gid=124 (accessed 23 October 2008).

In their opposition to the incorporation of Merafong municipality into the North West province, the people of Khutsong had done everything conceivably possible within the law: They had participated in public consultation forums where they voiced their opposition against the proposal; they sent memoranda to state organs at all three levels of government; they had lobbied political parties and other stakeholders; they had engaged in peaceful marches and protests. Indeed before resorting to the litigation, the people of Khutsong had exhausted all institutional mechanisms available to them in a direct, participatory and representative democracy. In a phrase, they had done all that could be expected of an active citizenry in a constitutional democracy. Khutsong – ‘the place of peace’ – will long be remembered for the violence and mayhem that have gripped the township since December 2005. In scenes very much reminiscent of the 1980s township revolts against the apartheid regime, television cameras captured daily images of young people blockading the streets with burning tyres and stones, preparing ‘molotov cocktails’, torching shops, libraries, schools, government buildings and local councillors’ homes. Between December 2005 and April 2006, violent protests caused damage to private and public property estimated at R70 million.⁴ The community’s deep level of discontent is further reflected by the successful boycott of the municipal elections in March 2006. Of almost 30 000 registered voters, only 232 cast their ballots.⁵ From December 2005 until the end of 2007, the township was rendered ‘ungovernable’.

It took a very long time before the people of Khutsong decided to take their struggle to Court. It was not an easy decision. The leaders of the Khutsong struggle were convinced that their struggle could ‘be won in the street’:⁶

⁴ Centre for Development and Enterprise ‘Voices of Anger’ 10 *CDE Focus* (April 2007) 10.

⁵ As above.

⁶ N Kolisile ‘The crying of Khutsong’ *Amandla Publishers* 1 October 2008 <http://www.amandlapublishers.co.za/content/view/71/32/> (accessed 2 November 2008). Similarly, after the Court delivered its judgment, the Young Communist League noted in a press statement that even though it had not yet studied the Court’s decision, it was their ‘contention that matters related to forceful and illegitimate demarcations cannot be mitigated or resolved through the organs of class rule – the courts.’ See ‘YCL Statement on Khutsong’s ruling by the ConCourt’ 13 June 2008 http://groups.google.com/group/yclsa-press/browse_thread/thread/67c0616a73a6f791 (accessed 20 June 2008). It is also important to note that – with the 2009 election firmly in their sight – the ruling party has recently decided that the Merafong Municipality will be incorporated back into Gauteng province. See ‘Khutsong to be returned to Gauteng’ *The Mercury* 22 October 2008 http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20081022054258319C323057 (accessed 2 November 2008).

It would be very dangerous to put our faith in legal processes. Courts are seldom neutral and often tend to serve the interests of the ruling class. That is the reason we have delayed taking this matter to the Constitutional Court. For more than a year we have relied on our own mass strength and we still do. In the coming period we will utilise the so-called democratic space provided by the new constitution as well as working class resistance. Key strategies include intensifying mobilisation, building consciousness and continuing with mass struggle in the form of marches and rallies. This struggle will be won in the street!

Khutsong – during this period of struggle – is both a reminder of the fragility of South Africa’s new political order and an indictment of its ability to respond effectively to those persons and communities in the greatest need. As one of the leaders of the Khutsong anti-demarcation movement wrote: ‘The struggle of the people of Greater Merafong is not just about forceful incorporation into North West, but about fighting for truth from government, people’s rights and democracy.’⁷

Khutsong is not a singular, if continuous, event in a long but peaceful transition from a fascist apartheid state to a democratic constitutional order. Every week some poor community engages in illegal and often violent actions to back up demands for a more responsive government. Patrick Bond reports that ‘the pace of social protest intensified dramatically during the mid-2000s, soaring from 5,813 recorded protests in 2004-05 to more than 10,000/year’.⁸ Dale McKinley, one of the leaders of the Anti-Privatisation Forum, has argued that the increased violence employed by these community movements reflects the absence of ‘more inclusive and meaningful forms of direct and participatory democracy, that have little to do with the institutional forms of representation within bourgeois ‘democratic’ society.’⁹ McKinley claims convincingly that ‘these movements have arisen out of the very failures and betrayals of the “main currents” and the institutional framework that gives them contemporary legitimacy.’¹⁰

The biggest threat to the consolidation of South Africa’s constitutional culture is not the unprincipled and crass accusations

⁷ Kolisile (note 6 above).

⁸ P Bond ‘Rejoinder: Collaborations, co-optation & contestation in praxis-based knowledge production’ (2008) 35 *Review of African Political Economy* 271-272.

⁹ D McKinley ‘Democracy and social movements in SA’ (2004) 28 *Labour Bulletin* 39-40.

¹⁰ McKinley (note 9 above) 40. For more in-depth analyses and case studies of these post-apartheid social movements and community organisations, see R Ballard *et al* (eds) *Voices of protest: Social Movements in Post-Apartheid South Africa* (2006); N Gibson (ed) *Challenging hegemony: Social movements and the quest for a new humanism in South Africa* (2006); D McKinley & P Naidoo (eds) *Development Update* 5 (2004); and T Madlingozi ‘Post-Apartheid social movements and the quest for the elusive “new” South Africa’ (2007) 34 *Journal of Law and Society* 77.

lodged by political elites within the African National Congress against South Africa's 'independent' judiciary. The time bomb ticking away inside our polity is the disillusionment of the overwhelming majority of South Africans with the politics and the policies of our post-apartheid democracy. Constitutional culture thrives when mobilised groups feel that they can appeal to constitutional norms and procedures in order to have their dispute resolved. It withers when such appeals go unheard. To be sure, the state's response to these community movements has been at best to marginalise and vilify these movements by labelling them as 'ultra-leftists', 'counter-revolutionaries' organised by white 'racists', 'enemies of the new democracy',¹¹ and at worst to criminalise and to suppress their struggles.¹²

If one of the objectives of the judiciary in a constitutional democracy is to facilitate 'constitutional dialogue', has the Court done enough to facilitate a dialogue between itself and the citizenry? The answer is no. More pointedly, I would caution against the judiciary's and the academy's acceptance of Professor Michelman's proposal that 'the principle of interpretive charity' will have a meaningful effect on closing the gap between the Constitutional Court and the people.

Professor Michelman is indeed a giant.¹³ His breadth of scholarship and his ongoing commitment to South Africa have made him one

¹¹ See, as an example, the response by ANC strategist Michael Sachs to the rise of these movements: M Sachs "We don't want the fucking vote": Social movements and demagogues in South Africa's young democracy' (2004) 28 *Labour Bulletin* 23-27.

¹² For extensive reports on the criminalisation of poor people's struggle as well as its violent repression, see D McKinley & A Veriava *Arresting dissent: State repression and post-Apartheid social movements* (2005) and M Memeza 'A critical review of the implementation of the Regulation of Gatherings Act 205 of 1993 – A local government and civil society perspective' (2006) available at www.fx1.org.za (accessed 14 June 2007).

¹³ It is a singular honour for me to be afforded this opportunity to engage with Professor Frank Michelman's excellent foreword to this first issue of the *Constitutional Court Review* (FI Michelman 'On the uses of interpretive 'charity': Some notes on application, avoidance, equality, and objective unconstitutionality from the 2007 term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1 (Michelman 'Charity')). Of those non-South African scholars who engage with the work of the South African Constitutional Court and South African Constitutional law theory in general, Professor Michelman is undoubtedly one of the most dedicated and influential. Indeed, as Professors Botha, Andre Van der Walt and Johan Van Der Walt have noted in a preface to a South African book dedicated to the scholarship of Prof Michelman, 'Frank's ideas have been – and continue to be – a source of inspiration for many of us who are interested in the possibility – and limits – of 'transformative constitutionalism'. His writings on the judicial function and the capacity of rights discourse to facilitate and deepen democratic dialogue are among the most original and thoughtful on the topic – as are his reflections on constitutionalism as a tool for protecting a plurality of cultures, thoughtways and lifestyles; redressing inequality; and promoting social justice. It is therefore hardly surprising that South African legal academics and judges would have turned to his ideas in an

of our most important allies in re-thinking the meaning of a truly post-apartheid constitutional democracy. It is therefore most fitting that he should write one of the forewords to the first issue of the *Constitutional Court Review*. My mandate here, however, is not to pay homage to Professor Michelman. It is, rather, to somehow engage with his response to the equally impressive commentary on the Court's jurisprudence by Professor Woolman.¹⁴ The two interlocutors need to be read together.

Professor Michelman's piece is a rejoinder to Professor Woolman's critical analysis of what he describes as the Constitutional Court's 'penchant for outcome-based decision-making and a concomitant lack of analytical rigour'.¹⁵ This absence of analytical rigour – and its deleterious consequences – are exemplified by, though not limited to, the Court's tendency, as Woolman sees it, to 'refuse' to engage in the direct application of the Bill of Rights: 'The persistent refusal to give rights identifiable content, by avoiding direct application results in a Bill of Rights increasingly denuded of meaning.'¹⁶ Woolman further contends that this refusal amounts to a 'paradigmatic violation of the rule of law'. This reticence makes it difficult, if not impossible

for lower court judges, lawyers, government officials and citizens to discern, with some degree of certainty, how basic law is going to be applied, and to know, with some degree of certainty, that the basic law is going to be applied equally ...¹⁷

Michelman disagrees with Woolman's conclusion that the thinly reasoned judgments in *NM*¹⁸ and *Masiya*¹⁹ show that the Court is in 'full flight from any meaningful engagement with Chapter 2 of the Constitution'²⁰ and thus an abdication of the Court's institutional

attempt to break with the formalism and authoritarianism characterising our legal past, and to make sense of the democratic and egalitarian aspirations of the Constitution.' H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003) vii. In a paper presented in 2003 at a symposium dedicated to the scholarship of Professor Frank Michelman – Professor Levinson had this to say: 'There are many reasons to honour Frank Michelman, not least because there are so many different topics – central to the enterprise of thinking about law – about which he has been remarkably illuminating. He is truly a giant on whose shoulders many of us are proud to stand as we try to think our way through the dilemmas presented by trying to take the enterprise of American constitutionalism seriously'. S Levinson 'Perpetual union, "free love", and secession: On the limits to the "consent of the governed"' (2003) 39 *Tulsa Law Review* 457 457.

¹⁴ S Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762 (Woolman 'Amazing'); S Woolman 'Application' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2005) ch 31.

¹⁵ Woolman 'Amazing' (n 14 above) 762.

¹⁶ Woolman 'Amazing' (n 14 above) 763.

¹⁷ As above.

¹⁸ *NM v Smith* 2007 5 SA 250 (CC) (*NM*).

¹⁹ *Masiya v Director of Public Prosecutions* 2007 5 SA 30 (CC) (*Masiya*).

²⁰ Woolman 'Amazing' (n 14 above) 783.

responsibility. Michelman agrees entirely with Woolman's contention that the majority opinions in *NM* and *Masiya* are 'thinly reasoned'. He demurs from the thesis that these cases 'have been wrongly or irresponsibly managed, as measured by reasonably discoverable, valid considerations of law and legal administration.'²¹

The move Michelman then makes may be one of the most powerful rhetorical ploys in analytic philosophy: the use of the Donald Davidson's principle of interpretive charity. That principle in short requires that if we are genuinely interested in understanding another person or culture, then we must count them 'right' in most of what they say and do. To refuse to do so would consign them to the madhouse. Michelman describes the principle of interpretive charity as 'an approach to understanding a speaker's statements by interpreting the ... statements to be rational and, in the case of any argument rendering the best, strongest possible interpretation of an argument.'²² The aim of this principle, Professor Michelman tells us²³

is to learn. It is aggressively to learn what there is to learn from puzzles the interlocutors pose to us, by assuming there is method in their madness and doing our best to ferret that out, using everything else we know or can guess ... about where they are coming from.

Michelman deploys the technique of 'interpretive charity' in order to fill in the gaps in the majority's opinions in *NM* and *Masiya*. After an extensive and careful examination of the majority opinions in *NM* and *Masiya*, through a charitable lens, Professor Michelman concludes that the fact that the Constitutional Court seems to be gravitating towards its inherent power to develop common law in terms of section 173 and 39(2) of the Constitution – as opposed to its judicial review power in terms of section 8 and 172(1) when undertaking a modification of common law rules under pressure from the Bill of Rights – does not mean that the court is uncomfortable with engaging with the substance of the Bill of Rights.

Woolman sees the refusal to undertake the direct application of specific substantive provisions of the Bill of Rights as evidence of a court that does not respect its own precedents; as evidence of a court unaccountable to the community of constitutional interpreters and incapable of telling its citizens how to conform their behaviour to the dictates of the basic law; and as evidence that the Court – at the end of it all – is responsible for 'the amazing, vanishing of the Bill of

²¹ Michelman 'Charity' (n 13 above) 2.

²² Wikipedia http://en.wikipedia.org/wiki/Principle_of_charity as cited by Michelman 'Charity' (note 13 above) 4.

²³ Michelman 'Charity' (n 13 above) 4.

Rights'.²⁴ Michelman sees the choice to go the route of indirect application made possible by section 39(2) – rather than direct application under section 8 – as no more than a matter of ‘doctrinal housekeeping’;²⁵ a ‘filing system’-question²⁶ over which nothing of substance turns. Woolman maintains that form is substance: Direct application ultimately leads to a proper elucidation of South African constitutional law. Michelman remains unmoved. Woolman’s construction – magisterial as it is – proceeds, as Michelman notes, from an ‘unrealistic high expectation of formal tidiness and tightness in constitutional drafting.’²⁷ In Michelman’s opinion, the application conundrum – as brilliantly set out by Woolman – can not be resolved. Both authors agree that some surplusage is inevitable.

2 Engendering ‘constitutional dialogue’ with the Commons

I am not a constitutional lawyer. The main direction of my arguments can, without apology, be said to be political. However, what I will focus on still remains a bone of contention between Woolman and Michelman: the Court’s accountability and responsibility to ensure principled constitutional dialogue and its alleged failure to do so. I am interested in seeing who, beyond Woolman’s ‘chattering classes’,²⁸ influences the Constitutional Court. I am interested in asking whether the Court truly engages in a dialogue with ordinary persons. I would argue – consistent with the positions staked out by Woolman – that one of the ways that the Court can make itself accountable to the public, and thus facilitate constitutional dialogue, is when its judgments are sufficiently reasoned, fully justified and widely published. ‘Thinly reasoned’ judgments that require the reader to enter into a highly sophisticated and technical reconstruction of a judgment – some would say a *sangoma*-like exercise – do not advance the cause of ensuring that ordinary people are part of the ‘principled’ – or at least transparent – constitutional dialogue to which the Court is ostensibly committed. I must therefore conclude that the principle of ‘interpretive charity’ has limited value in bridging the gap between the Court and the vast majority of its constituents.

²⁴ Woolman argues that the Court’s failure to get application jurisprudence right and that it ‘continues to err in such quite obvious ways reflects, at a minimum three possibilities: (1) the court simply ignores academic interventions; (2) the court believes the academic criticism to be incorrect; and (3) the court ignores obvious doctrinal errors because it holds itself largely unaccountable to the existing community of academic and professional interpreters’ (Woolman ‘Amazing’ (n 14 above) 783).

²⁵ Michelman ‘Charity’ (n 13 above) 3.

²⁶ As above.

²⁷ Michelman ‘Charity’ (n 13 above) 39.

²⁸ Woolman ‘Amazing’ (n 14 above) 762.

How did I arrive at this conclusion regarding the limits of the principle of interpretive charity in contemporary South Africa? Again, not on the basis of a nuanced assessment of the highly technical debate between Michelman and Woolman. I have read the exchange between Woolman and Michelman to ultimately be about how the Constitutional Court should conduct itself in relation to various stakeholders. Woolman argues, convincingly, that ‘a principled judicial dialogue’ that the Court claims to stimulate,²⁹ is not possible if the Court, in his opinion, ‘refuses to say more than is necessary to decide a case on its facts.’³⁰ Michelman demands that we try harder, and that if we take the principle of ‘interpretive charity’ seriously then we might just be able also to enter into a ‘principled dialogue’ with the Court.

Woolman does not deny the gravitational pull of Michelman’s charitable approach. Instead, he contends ‘that a court that cannot be held accountable to its own precedent, to the text of the Constitution, or to the community of constitutional interpreters, and that grounds its decisions by mere genuflection in the direction of s 39(2), more closely approximates a “kryptocracy” than a “logocracy”.’³¹ Whether we agree with this characterisation or not, all of us should be in agreement that trenchant and sustained critique of the Court’s jurisprudence from academics should be encouraged. What should we read into the Court’s sense of imperviousness to being influenced or at least being accountable to a community of ‘constitutional interpreters’? If we agree that the court fails to create the conditions for a ‘principled dialogue’ between itself and what Professor Woolman refers to as ‘a cohort of educated Constitutional Court watchers’;³² through its ‘murky, if not tendentious, lines of reasoning’ then what hope is there for the Commons, the masses of the people that are directly affected by its decisions?³³

Writing in 1992, Donald Nicolson noted that although the notion of judicial independence is important in a democratic society, ‘democracy is also threatened by an unaccountable judiciary.’³⁴ I do not wish to enter into debates about the nature and the form that

²⁹ As called for by the Court in *S v Mhlungu* 1995 3 SA 867 (CC) para 129.

³⁰ Woolman ‘Amazing’ (n 14 above) 785.

³¹ Woolman ‘Amazing’ (n 14 above) 784.

³² Woolman ‘Amazing’ (n 14 above) 762.

³³ Woolman is at pains to point out, however, that he is not simply – or even primarily – interested in what he rather glibly calls the chattering classes. Indeed, he argues in ‘Amazing’ (n 14 above) and elsewhere that a constitutional democracy cannot function as a constitutional democracy when no more than a few hundred people can read and decipher the meaning of the Court’s decisions. See also S Woolman & M Bishop ‘Law’s Autonomy’ in S Woolman & M Bishop (eds) *Constitutional conversations* (2008) 1.

³⁴ D Nicolson ‘Ideology and the South African judicial process – Lessons from the past’ (1992) 8 *South African Journal on Human Rights* 50 70.

judicial accountability should take. Nor do I desire to revisit the arguments around how various techniques of judicial accountability can ensure a way out of the 'counter-majoritarian' dilemma. I am solely interested in how 'public accountability' can contribute to the process of constitutional dialogue between the Court and the Commons. It is also important to note that I use 'accountability' in the very narrow sense proposed by Louis Seidman:³⁵

Sometimes we say that persons are accountable when they are required to give an account of themselves – that is, to give reasons or justifications for conduct and to demonstrate that such conduct is not the product of mere whim or caprice.

Seidman argues that opinion writing exposes the judge's thought process to those who read it, permits criticism of the justifications that the court offers and thereby allows judges to be held accountable.

To state that the 'culture of justification'³⁶ that flows from the doctrine of the rule of law is just as applicable to the judiciary as it is to the executive and to the legislature, is to state the obvious. In cases where the Court's decisions run counter to public opinion – assuming that such opinion can be accurately determined – it is vitally important that the Court fully justifies its decisions if it is not to lose public legitimacy.³⁷ Chief Justice Pius Langa has rightly observed that

[T]he relationship which [the judiciary] has with rest of the community is ... important. It should be regarded as an integral part of the community it serves, and it can only function properly if it enjoys the complete trust and confidence of that community.³⁸

Judging from various public statements and op-ed pieces written by members of the judiciary, it would seem that recent public criticism of the judiciary has caught members of the bench by surprise. The judges appear to have assumed that their public legitimacy was secure. However, one simply needs to look at the results of various empirical surveys to see that, for the majority of this country, the

³⁵ LM Seidman 'Ambivalence and accountability' (1988) 61 *Southern California Law Review* 1571 1574.

³⁶ E Mureinik's term. See E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' 1994 (10) *South African Journal on Human Rights* 31.

³⁷ See T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106. See also E van Huyssteen 'The South African Constitutional Court and the death penalty: Whose values' (1996) 24 *International Journal of Sociology of Law* 291.

³⁸ See T Mbeki *ANC Today* 5(23) <http://www.anc.org.za/ancdocs/anctoday/2005/text/at23.txt> (accessed 22 October 2008).

Constitutional Court does not enjoy high public support.³⁹ Indeed, recent comments by Anthony Butler are spot on: ‘The idea that the courts are suddenly under siege is a fantasy. Their legitimacy has long been fragile ...’.⁴⁰

Amongst community movements, activists and ordinary people – as opposed to educated Constitutional Court watchers and members of the chattering class – the judiciary has not been able to shake off the impression that it is an instrument of the elites.⁴¹ Take this exchange between the Treatment Action Campaign’s Mark Heywood and another activist. Mark Heywood – an unabashedly activist Constitutional Court watcher – wrote⁴²

The Constitution is at the heart of our democracy. It prescribes accountable and ethical government, openness and a culture of justification by politicians for their actions. But more than this, it should be the touchstone for all public policy, an instrument that can be used to insist on public policy that places equality and social improvement at the heart of all government action.

Now, to a ‘sober-minded’ and indeed ‘educated’ Constitutional Court watcher, this plea might seem quite reasonable. But that was not how it was read by one Commons activist:⁴³

This near spiritual, nay, pathological worship of the handwork of neo-liberals is how the masses and their struggle for full independence, self-reliance and liberation got substituted for ‘the constitution’! All political power and authority somehow got squeezed into the Constitution, and what all need do is learn it, and enforce its provisions, and instantly, all will be solved. What is concealed is that the real social and economic power in this marginal act of giving themselves a liberal constitution automatically moved, and conformed, into the capitalist class. And true, to the extent reasonably possible, the people’s real problems will be attended to!

What is also never frequently spoken about are ... the massive racial fears of the white supremacists, who, upon being born again as capitalist class rights fighters through a liberal constitution, abandoned their ‘minority racial rights’, and fought to have the constitution invested with ‘supreme power’ over all else.

³⁹ On such public opinion surveys, see Roux (n 37 above) 107 n 4. (Roux reports that 27.9 per cent ‘attentive’ public support for the CCSA in 1997, ie among citizens who had heard about the Court, and ‘34 per cent public support for the CCSA in 2004’).

⁴⁰ A Butler ‘Emotional responses overlook good points Mantashe makes’ *Business Day* 14 July 2008.

⁴¹ See T Madlingozi ‘The limits of transformative constitutionalism in the struggle against poverty and marginalisation’ (2009, forthcoming) copy on file with author.

⁴² M Heywood ‘Political climate dangerous for poor most of all’ *Business Day* 28 July 2008.

⁴³ A Banda *Debate Listserve* (28 July 2008) debate-bounces@debate.kabissa.org (accessed 28 July 2008).

The point here is that criticism of the judiciary does not only come from those who engage in scurrilous attacks on the judiciary in order to advance their narrow political agenda. Criticism of the judiciary also comes from those who are genuinely concerned about the gap between constitutional promises and the lived, impoverished, reality of the majority of South Africans.

The common reaction by judges and legal analysts to criticism of certain court judgments is to argue that the people do not understand the law or that they have not acquainted themselves sufficiently with the facts of the case. The former President of the Supreme Court of Appeal, Justice CT Howie has argued that not enough trouble has been taken ‘to *tell our public*, and our media, something of what judicial independence is all about’ and that public criticism is often made in the absence of getting to know the ‘vital facts’.⁴⁴ But as a member of the Commons, I must ask: Whose responsibility is it to make sure that the public not only knows the ‘vital facts’ but also understands the working of the courts? Further, and more significantly, what if the public tries to acquaint itself with the reasons for a particular decision, only to be confronted with a ‘thinly reasoned’ judgment? How reasonable is it to expect members of the public to adopt the principle of ‘interpretive charity’ and engage in the laborious exercise of filling in meanings and passages in the courts’ decisions as Professor Michelman urges us to do?

3 Conclusion

During the Court’s 2007 term (and well into its 2008 docket), incidences referred to as ‘threats to the judiciary’ reached a fever pitch. In the weeks and months preceding the appearance of the then deputy president of the African National Congress (ANC) in court to face charges of corruption, robust criticism, emanating largely from members of the tripartite alliance – the ANC, the South African Communist Party and the Congress of South African Trade Unions – became common place. The slogan ‘We will kill for Zuma’ if the Court did not find in his favour became a disturbingly regular part of public discourse in some quarters.

More than ever, the Court needs to court public support in order to protect itself against escalating ‘attacks on the judiciary’ emanating from various political quarters. Theunis Roux has shown that in the past the Court has not needed public support in order to safeguard its institutional security because the ‘ANC political elite has shielded the Court from the political repercussions of its most

⁴⁴ Justice CT Howie ‘Judicial independence’ (2003) 120 *South African Law Journal* 679 679 & 682 (emphasis added).

unpopular decision ...'.⁴⁵ In light of recent events this protection can no longer be taken for granted. Indeed, these events dictate that the Court change its strategy and work to consolidate its public legitimacy. That is no small task. The Court has not yet engaged in any meaningful outreach programs.⁴⁶

The Constitutional Court might be based near Hillbrow. It might be located in a non-intimidating, inviting building and it might be geographically accessible. The judges might be very friendly and well meaning people. But the members of the Court continue to operate and to move within the circles of 'educated Constitutional Court watchers'. I have seen and enjoyed the presence of Constitutional Court judges at various academic conferences. But I am yet to see any of them at various workshops and rallies hosted by social movements. I have seen members of the Court give frank and engaging public lectures at various universities. But I am yet to see any of them address members of social movements.⁴⁷ I have heard members of the Constitutional Court give interviews on English radio stations. I have never heard any of them offer an interview on an African language radio station.

An 'educated Constitutional Court watcher' might tell me that the Court does not need to undertake such a public role. After all, their communications are a matter of public record. But where are the Sesotho or TshiVenda translations of the Court's judgments?⁴⁸ And even if they did appear on the Court's website, I fail to see how that would make any difference at all to the majority of South Africans who remain quaintly removed from the internet and other forms of new media.

As we launch this Review, we need to pause and think of ways that ordinary people, the Commons, can become part of the 'principled dialogue' to which the Court and academics such as Woolman and Michelman have committed themselves. Finally, as South Africa enters what has been aptly described as the 'second transition' – characterised by, amongst other things, robust engagement with

⁴⁵ Roux (note 37 above) 138.

⁴⁶ In its annual strategic/business plan, under a section entitled 'Outreach programs' the Director of the Constitutional Court only manages to mention initiatives such as the law researchers program and the setting up of the Court's choir and soccer team. See 'Annual Strategic/Business Plan 2008/2009' <http://www.constitutionalcourt.org.za/site/Admin/ANNUAL%20STRATEGIC%20BUSINESS%20PLAN%202008-2009.pdf> (accessed 21 October 2008).

⁴⁷ Justice Dennis Davis is a notable exception in this regard. Justice Davis regularly gives key note addresses to social movement conferences and other events.

⁴⁸ During his interview for position of the Deputy Justice, Justice Dikgang Moseneke noted the practical and cost implications in handing down judgments in other official languages. See <http://www.constitutionalcourt.org.za/site/judges/transcripts/dikgangmoseneke1.html> (accessed 1 November 2008).

institutions supporting democracy and the settling of major political disputes in courts⁴⁹ – the Court’s opinions will more than ever before play a significant role in public discourse and democratic politics. It is, therefore, vitally important that the Court holds itself accountable, not only to ‘educated constitutional court watchers’, but also to the Commons – some 46 million ordinary South Africans. Fully reasoned and sufficiently justified opinions that do not require the public to engage in highly complex exercises in ‘interpretive charity’ would be a first step in that direction. Maybe, just maybe, the events of 20 August 2007 might not be repeated in the future.

⁴⁹ See S Ndlangisa ‘Political ball is in our courts’ *City Press* 24 August 2008 24.

