

THE DEMOCRATIC TURN AND (THE LIMITS OF)  
CONSTITUTIONAL PATRIOTISM AFTER THE TRUTH  
AND RECONCILIATION COMMISSION:  
*ALBUTT v CSVR*

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## 1 Introduction

On 23 February 2010, the South African Constitutional Court unanimously dismissed an appeal against an interim interdict which prevented President Zuma from pardoning apartheid criminals, until such time as the victims of the crimes in question had been given an opportunity to make representations to the President.<sup>1</sup>

Given its subject matter, the *Albutt* judgment forms part of an important quartet of recent cases in which the Constitutional Court was asked to revisit the nature, scope and effect of the amnesty process administered in the late 1990s by the Truth and Reconciliation Commission (TRC) under the Promotion of National Unity and Reconciliation Act 34 of 1995.<sup>2</sup> An obvious way of reading the *Albutt* judgment would therefore be to explore its place within the recent constitutional retrospective of the TRC process. Fruitful and important as such a reading might be, it is not one which I wish to pursue here.

I wish to suggest, instead, that the *Albutt* judgment should be read in the context of another series of recent Constitutional Court

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<sup>1</sup> *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC). The interim interdict was granted by Seriti J in the North Gauteng High Court on 29 April 2009 (see *Centre for the Study of Violence and Reconciliation v President of the RSA* [2009] ZAGPPHC 35 (29 April 2009)).

<sup>2</sup> The quartet must be read together with *Azania Peoples Organization (AZAPO) v President of the RSA* 1996 4 SA 672 (CC) and, in addition to the *Albutt* judgment, includes *Du Toit v Minister for Safety and Security* 2009 12 BCLR 1171 (CC), *Minister for Justice and Constitutional Development v Chonco* 2010 4 SA 82 (CC) and *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC).

cases,<sup>3</sup> or as part of a democratic turn on the South African Constitutional Court.<sup>4</sup> Precisely what this democratic turn entails and in which direction it leads, have become vexing questions in South African constitutional scholarship.<sup>5</sup> As I argue in more detail below, the *Albutt* judgment sheds important light on these questions. It differs from the other cases of the democratic turn, in as far as it takes the TRC process and the meaning of national reconciliation as its point of entry into the limits and possibilities of post-apartheid democracy.

The TRC process has famously been criticised by Mahmood Mamdani and others for its failure to properly focus on the social, as opposed to the political, dimension of reconciliation.<sup>6</sup> While this critique holds true as far as it goes, it does assume more or less

<sup>3</sup> The series does not constitute a closed list and would include at least *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 621 - 630 (per Sachs J); *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC); *Matatiele Municipality v President of the Republic of South Africa* (2) 2007 1 BCLR 47 (CC); *SABC v National Director of Public Prosecutions* 2007 1 SA 523 (CC) para 134 - 153 (per Sachs J).

<sup>4</sup> The democratic turn is traced in more detail by T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106 130; and T Roux 'The principle of democracy in South African constitutional law' in S Woolman & M Bishop *Constitutional conversations* (2008) 79 94.

<sup>5</sup> In the context of socio-economic rights, Danie Brand argues that it represents an important counter-veiling tendency against the depoliticisation of social conflict inherent in socio-economic rights jurisprudence; that is, provided that the turn towards participatory democracy is not limited to participation in constitutional institutions. For this reason he takes issue with Theunis Roux's Dworkinian reading of the democratic turn as nothing but a constructive interpretation of the constitutional principle of democracy (D Brand 'Writing the law democratically: a reply to Theunis Roux' in Stu Woolman & Michael Bishop (eds) *Constitutional conversations* (2008) 97). Beyond this debate, Stu Woolman and Henk Botha understand the democratic turn as a shift in the Court's jurisprudence from private law dignitas to dignity as self-government (S Woolman & H Botha 'Limitations' in S Woolman et al (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2008) 34 - 116. In the context of value-based rights interpretation and limitation analysis, this means that the former primacy of dignity as a value has now been (or should be) replaced with a focus on democracy as the animating value of the Constitution. The implications of this shift from dignity to democracy as far as the theory of constitutional interpretation is concerned, remain largely under-explored. The revival of legal process thinking in the USA represents a democratic turn of its own. See further JH Ely *Democracy and distrust*; C Sunstein *The partial constitution*; and S Breyer *Active liberty* (2005). It is perhaps worth recalling that the latter work occupies a central place in the *Doctors for Life* judgment.

<sup>6</sup> M Mamdani 'Amnesty or impunity? A preliminary critique of the Report of the Truth and Reconciliation Commission of South Africa' in S Benhabib et al *Identities, affiliations, and allegiances* (2007) 325. Mamdani claims that the TRC had the freedom to define its own mandate, and thus had to explore the link between 'the political reconciliation at Kempton Park' and a larger social reconciliation (359). The failure to do so narrowed the TRC perspective 'to a political reconciliation between state agents and political activists, individual members of a fractured political elite' as opposed to a 'societal reconciliation between perpetrators and victims' (326). What the 'political reconciliation at Kempton Park' entailed is not fully explored by Mamdani. It is the question to

uncritically that the TRC process worked with and resulted in an adequate understanding of political reconciliation as a constitutional value.<sup>7</sup> The *Albutt* judgment provides a welcome opportunity to problematise that assumption and to revisit the supposed success of the TRC process on this score as well; or at least to reopen the question exactly what model of political reconciliation the TRC process introduced as constitutional standard for post-apartheid South Africa.<sup>8</sup>

The discussion below of the judgment proceeds in three sections. Each section is organised around a different and directly competing re-interpretation of the TRC process and the model of political reconciliation implied in that process. The first section explores the re-interpretation undertaken by former President Mbeki as he announced a Special Dispensation for apartheid criminals in 2007. The second section explores the constitutional challenge against the Mbeki interpretation and the alternative interpretation of the TRC process adopted in *Albutt* (per Froneman J). The final section explores the re-interpretation of the TRC as a counter-monument suggested by Aletta Norval, in an attempt to assert the (im)possibility of political reconciliation against both Mbeki and Froneman J's understanding of democratic politics.

which *Albutt* seeks to provide an answer. Mamdani's critique is echoed by Karin van Marle 'Lives of action, thinking and revolt: a feminist call for politics and becoming in post-apartheid South Africa' in W le Roux & K van Marle (eds) *Post-apartheid fragments: law, politics, critique* (2007) 34 38 - 40.

7 Mamdani's distinction between political reconciliation and social reconciliation also informs the distinction between the 'first transition' (political) and the 'second transition' (social) in recent policy statements of the ANC (see M Mataboge 'ANC wants new constitution' *City Press* 4 March 2012 1). For a defense of national reconciliation understood primarily in a political sense, see D Moellendorf 'Reconciliation as a political value' (2007) 38 *Journal of Social Philosophy* 205. Moellendorf defends the idea (206) that 'a political community in which former strangers view and treat each other as equal citizens is partially constitutive of reconciliation as a normative goal for political purposes. When the erstwhile stranger is taken as a fellow citizen, treatment that might have been thought permissible in the past will be proscribed. Now the person is a co-participant in the political process, not one to be driven out, contained, or suppressed. This approach takes reconciliation to be a normative political ideal that is less than the whole of social justice, but that offers a basis for reasonable hope that further justice is within the reach of those pursuing it by constitutional means'.

8 This suggestion should not be misunderstood as a claim that it is fully possible or even meaningful to distinguish between the political and the other elements of reconciliation (as some theories of constitutional patriotism seem to imply). Nancy Fraser, for example, argues that cultural recognition, economic redistribution and political representation form three inseparable elements of a comprehensive theory of social justice (Nancy Fraser *Scales of justice: Reimagining political space in a globalizing world* (2009) 12 - 30.)

## 2 Thabo Mbeki and the TRC: towards ‘a new and common patriotism’

The origins of the *Albutt* case date back to 21 November 2007, when former President Thabo Mbeki announced before a joint sitting of Parliament that he intended to deal with the ‘unfinished business’ of the Truth and Reconciliation Commission (TRC) in a ‘flexible, decisive and speedy manner’, so as to finally bring South Africa’s experiment with transitional constitutionalism to a close.<sup>9</sup> Mbeki explained that some of the business of the TRC remained unfinished, because the amnesty process was hemmed in by an arbitrary cut-off date which did not take into account the ongoing violence which accompanied the transition to democracy.<sup>10</sup> This meant that 13 years after apartheid, there remained thousands of sentenced criminals in prison for crimes that originated in political violence immediately after the end of apartheid.

To deal with these cases in the spirit of transitional constitutionalism, it was necessary to extend the earlier cut-off date with some five years to 16 June 1999. However, this would still provide only part of the answer to the problem. Because the TRC amnesty process could not be reopened, former President Mbeki announced that he was willing, on application, to pardon all apartheid criminals who would otherwise have qualified for amnesty under the TRC process. Mbeki committed himself to deal with each application on an individual basis, guided by the values of transitional constitutionalism (‘nation-building and national reconciliation’) and upholding the ‘principles, criteria and spirit that inspired and underpinned’ the TRC amnesty process.

In order to confirm and to illustrate his own understanding of this commitment to the integrity of the TRC process, Mbeki announced that he would not exercise his Presidential prerogative at his own discretion:<sup>11</sup>

I requested the convening of this Joint Sitting to inform the Hon Members of Parliament that, considering what the nation sought to

<sup>9</sup> T Mbeki ‘Address to the joint sitting of Parliament to report on the processing of some Presidential pardons’ [www.anc.org.za/show.php?id=4240](http://www.anc.org.za/show.php?id=4240) (accessed 20 January 2012).

<sup>10</sup> The interim Constitution initially determined 6 December 1993 as cut-off date for those political crimes that could be considered for amnesty. Because this date did not accommodate the political violence that surrounding the 1994 general elections, it was later extended to 10 May 1994 (the date of the inauguration of former President Mandela). The new date, in turn, did not take into account that political violence persisted well after the arrival of democracy (especially in areas such as KwaZulu-Natal).

<sup>11</sup> Mbeki (n 9 above).

achieve through the TRC process, I have decided to institute a special process to assist me as I discharge my constitutional obligation to consider the requests for pardon ... Further to entrench the practice the nation has sought to cultivate, of acting in unity as it addresses the crimes of the past, I would like the political parties represented in our Parliament to assist me properly to discharge my constitutional responsibility.

In an attempt to stay true to the spirit of the TRC process, and in the best tradition of parliamentary or representative democracy, Mbeki announced the establishment of a multi-party Parliamentary Reference Group (PRG), with the task of making considered recommendations to the President about each pardon application that had been received. To ensure that the PRG was not divided by the strategic pursuit of party political interests, Mbeki invited every party represented in Parliament to appoint one single representative to serve on the PRG. This principle of party political equality effectively neutralised the power of the majority party in Parliament on the PRG. As the leader of that party, Mbeki wished to symbolically and practically illustrate that the true spirit of national reconciliation and nation building found expression in the conscious turn away from strategic interest group politics and majoritarian democracy, to an alternative, deliberative or dialogical model of democracy.<sup>12</sup>

The establishment and composition of the PRG powerfully symbolised the deeper deliberative nature of post-apartheid constitutional democracy. It also embodied an alternative self-image of the post-apartheid nation: as collectively engaged in a deliberative political project in which political power has been traded for political or constitutional principle. The reconciled nation appears here as a 'community of principle' in Dworkin's sense of the term; the PRG as the deliberative telos of nation-building and national reconciliation.<sup>13</sup>

<sup>12</sup> For our purposes the following definition of deliberative democracy by Frank Michelman will suffice ('Conceptions of democracy in American constitutional argument: The case of pornography regulation' (1989) 56 *Tennessee Law Review* 291 - 319 293):

Deliberative politics connotes an argumentative interchange among persons who recognise each other as equal in authority and entitlement to respect. [...] [I]t refers to a certain attitude towards social cooperation, namely, that of openness to persuasion by reasons referring to the claims of others as well as one's own. The deliberative medium is a good faith exchange of views in which all participants remain open to the possibility of persuasion by others and in which a vote, if any vote is taken, represents a pooling of judgements.

<sup>13</sup> It is easy to see where this interpretation of Mbeki's own democratic turn could lead. Dworkin suggests that once we accept the image of the nation as a community of principle, then the Court can legitimately assume the task of holding us true to that better image of ourselves, and to ensure that Parliament always operates as a forum of principle (as opposed to power). The Constitutional Court could then be understood as the permanent institutionalisation of the PRG, as a fragile deliberative space within the context of otherwise strategic parliamentary politics. As I suggest below, the value of *Albutt* is precisely that it

For Mbeki the PRG was thus from the start far more than merely the functional heart of the Special Dispensation process. It was also the symbolic expression of the true deliberative nature of post-apartheid parliamentary democracy and national reconciliation.<sup>14</sup>

That we are dealing here with a counter-factual and demanding conception of democracy is immediately clear from Mbeki's own address. Having announced the Special Dispensation for apartheid criminals, Mbeki immediately turned his attention to the opposition parties in Parliament, in the hope of convincing and motivating them to accept his invitation to participate in the PRG process. He did so with a direct appeal to the Preamble of the Constitution and the TRC process. Mbeki reminded Parliament that the victims of apartheid did not ask for retribution, but for public remembrance (this was the powerful message of the TRC process). Public remembrance in this sense required that we put our own party political interests aside, and recall the principles for which the victims of apartheid had suffered and died in everything we do. Mbeki can even be read to suggest that it was precisely in order to facilitate this public memory that those principles were entrenched in the Constitution. In this way the Constitution serves today as their memorial and our loyalty to the constitution's founding values and principles as our commemoration of the past.<sup>15</sup> It was in this spirit that Mbeki called on all political parties to stand together in unity behind the Special Dispensation, 'moved by a new and common patriotism'.<sup>16</sup>

enables us to resist this attempt to put the Court forward as a mirror of the nation's ideal political self or its absent self-government.

<sup>14</sup> See *Democratic Alliance v Masondo* 2003 2 SA 413 (CC) for a similar understanding of the deliberative and dialogical character of representative politics, precisely in order to secure national reconciliation and unity at the level of our deeply divided cities (per O'Regan and Sachs JJ).

<sup>15</sup> Johan Snyman presents a reading of memorial constitutionalism which serves to undermine this legitimating rhetoric powerfully. The duty to remember the principles for which the victims of apartheid suffered died can never be discharged in the form of loyalty to the present Constitution or the present interpretation of its founding values and principles (a Dworkinian engagement with the Constitution). It requires a constant refusal of this kind of constitutional closure and constitutional patriotism. As he says: 'The politics of memory is never completed, because the norm for what we have to do today can never be stated in terms clear enough' (Johan Snyman 'Thoughts on dealing with the legacies of radically unjust political behaviour' in W le Roux & K van Marle (eds) *Law, memory and the legacy of apartheid* (2007) 3 - 10.) For a fuller reflection on this radical incompleteness of constitutionalism as a politics of memory, see W le Roux 'War memorials, the architecture of the Constitutional Court building and counter-monumental constitutionalism' in W le Roux & K van Marle (eds) *Law, memory and the legacy of apartheid* (2007) 65 - 90. I return to this theme further below in section 4 of this note.

<sup>16</sup> Mbeki's fear that some political parties might refuse to participate in the PRG must be understood in light of the reference earlier in his address to the political violence between supporters of the ANC and IFP in KwaZulu-Natal, and the anger caused by his failure, over a period of five years, to deal with a large number of pardon applications by IFP members. The dispute between the IFP and the President eventually ended in the Constitutional Court. See *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC).

Mbeki did not further clarify what he understood by this ‘new patriotism’ but the context in which the term was used, as I explained it above, made clear enough what he had in mind.<sup>17</sup> As Elsa van Huyssteen suggests, the ‘new patriotism’ celebrated by Mbeki (and Nelson Mandela before him), must be understood as a local version of the constitutional patriotism (*Verfassungspatriotismus*) that Jürgen Habermas started popularising in the late 1980s as the only basis for the political integration of post-communist Germany and Europe as a whole.<sup>18</sup> It was the spirit in which Mbeki wanted Parliament to conduct its business in the shadow of the TRC process.

### 3 *Albutt* and the TRC: towards the ‘pervasive demands for participatory living’

One of the apartheid criminals who could not apply for amnesty under the TRC process was Ryan Albutt. When the Special Dispensation was announced, Mr Albutt was serving an eight years prison sentence for his part in a fatal attack by a white vigilante group on striking black municipal workers.<sup>19</sup> The attack was organised by the right wing separatist *Afrikaner Weerstandsbeweging* (AWB) and took place in Kuruman at the end of August 1995, well after the cut-off date for amnesty under the TRC process (10 May 1994). Having being invited by former President Mbeki to do so under the Special Dispensation discussed above, Mr Albutt applied for a Presidential pardon during the window period between 15 January 2008 to 31 May 2008.

<sup>17</sup> This was of course not the first time that Mbeki had spoken about a ‘new patriotism’ that united the post-apartheid nation. In fact, the phrase had dominated the Presidential rhetoric and thinking of Nelson Mandela in die mid 1990s, when Mbeki was serving as deputy President and began adopting it into his own vocabulary and constitutional thinking. At the unveiling of a mural in Cape Town on 8 May 1996, to celebrate the adoption of the Constitution, former President Mandela celebrated the ‘power of the New Patriotism’ and, just as Mbeki would do a decade later, suggested that this patriotism originated in and was sustained by the unique nature of public memory in post-apartheid South Africa: ‘The moving testimony of witnesses before the Truth and Reconciliation Commission has reminded us of the injustices of the past and of the great debt we owe to those who suffered for freedom and justice. It has moved us all to renew our resolve that never again shall racial discrimination be allowed to blight the lives of our people’ (full speech available at [http://www.info.gov.za/speeches/1996/960513\\_0x772.htm](http://www.info.gov.za/speeches/1996/960513_0x772.htm) (accessed 28 October 2012)). Mandela’s words clearly borrowed from the Preamble of the Constitution where the idea of the Constitution as an apartheid memorial found formal expression. His words also remind us that the drafting process of the Constitution and the TRC process coincided for a short but decisive period in the autumn of 1996.

<sup>18</sup> E van Huyssteen “‘The glowing fire of our new patriotism’”. The Constitutional Court, civil society and constitutional patriotism in South Africa’ in T Cruz Maria & SA Sitas (eds) *Gathering voices. Perspectives on the social sciences in Southern Africa* (1996) 73. See J Habermas *The divided west* (2006) 67 - 82 and J Werner-Müller *Constitutional patriotism* (2007) 15 - 45.

<sup>19</sup> Detail about the offence is contained in *S v Whitehead* [2007] ZASCA 171.

Having received Mr Albutt's application (along with more than 2000 other applications), the PRG began processing the cases one by one, looking primarily at the record of the criminal proceedings.<sup>20</sup> It did so behind closed doors, without releasing the names of the applicants to the general public. A number of civil society organisations approached the PRG, and eventually also the President, requesting that more detail about the applications be released and that the victims of the crimes in question be given an opportunity to make representations to the PRG. Both the PRG and the President refused to accede to these requests. The civil society organisations thereupon approached each of the political parties represented on the PRG individually, in an attempt to secure greater openness and transparency in the PRG process, but without any more success.

When it was announced in March 2009 that the PRG had finally provided the President with a list of the apartheid criminals which it recommended for pardon, a coalition of civil society organisations, including the Centre for the Study of Violence and Reconciliation (CSVr), applied on an urgent basis in the North Gauteng High Court for an interim interdict preventing the President from granting any pardon, unless and until the victims have been given access to the applications and an opportunity to make representations. Mr Albutt, whose name appeared on the list of approved applicants, intervened in the litigation and opposed the application, arguing with the President that the victims had no constitutional right under the PRG process to a hearing.

Seriti J granted the interim interdict in favour of the NGO coalition on 29 April 2009. He ruled that the decision whether to pardon an offender constituted administrative action under the Promotion of Administrative Justice Act 3 of 2000;<sup>21</sup> that the right of victims to make representations before a prisoner is released on parole should equally apply when a prisoner is pardoned;<sup>22</sup> and that the President should be held to his public commitment to adhere to the basic spirit and principles of the TRC process, which included victim participation and transparency (the direct opposite of the PRG process up to that point).<sup>23</sup>

Mr Albutt thereupon applied to the Constitutional Court for leave to appeal against the interim interdict issued by Seriti J (an application supported by the President). It was of course not the first

<sup>20</sup> The factual background appears from the judgment of Seriti J in *Centre for the Study of Violence and Reconciliation v President of the RSA* [2009] ZAGPPHC 35 (29 April 2009).

<sup>21</sup> Para 7.3. This finding was set aside by the Constitutional Court para 76.

<sup>22</sup> Para 7.4.2. This finding was set aside by the Constitutional Court para 76.

<sup>23</sup> Para 7.4.3. This finding was confirmed by the Constitutional Court para 69. See further below.

time that the Constitutional Court had been asked to review a decision by the President to pardon (or not to pardon) a convicted criminal. Previous case law of the Court had firmly established that the exercise of this prerogative power is subject to judicial review, and that such a review could focus on the legality of the decision (was the power sourced in law?); the rationality of the decision (was the exercise of the power related to its objective?); and the reasonableness of the decision (does the exercise of the power unreasonably limit any fundamental right?). While the issue of legality dominated the Court's previous judgment on the issue in *Chonco*,<sup>24</sup> and the issue of reasonableness the judgment in *Hugo*,<sup>25</sup> the judgment in *Albutt* turned solely on the question of rationality, or the relationship between the means chosen (consideration behind closed doors without any victim input) and the end to be achieved (national reconciliation in the political sense of the term).<sup>26</sup>

While the Constitutional Court granted Mr Albutt leave to appeal, the appeal itself was unanimously dismissed. Ngcobo CJ concluded that the decision by the President and the PRG to exclude the victims from participating in the process was irrational, given the objectives of 'national reconciliation and national unity' that the President had himself identified as objectives when he announced the Special Dispensation. Even though rationality review is very much an internal form of critique, measuring the threshold effectiveness of a policy or dispensation against the objectives it set for itself, the process requires a clear understanding of what the objectives in question entail.

In as far as the South African understanding of 'national reconciliation and national unity' was largely determined by the TRC process, the arguments before the Court in *Albutt* turned for the most part on a reinterpretation of the TRC process. What did the TRC process really say about the nature of the nation as a reconciled unity? What was the test for the successful *political* reconciliation of the

<sup>24</sup> *Minister for Justice and Constitutional Development v Chonco* 2010 4 SA 82 (CC). The question was whether the Minister had any legal power to grant or receive or consider applications for Presidential pardons.

<sup>25</sup> *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC). The question was whether relieving only female prisoners with young children violated the right to equality of fathers with young children.

<sup>26</sup> The legality of the power of the President to pardon apartheid criminals and to institute a Special Dispensation to do so, was universally accepted to be derived from section 84(2)(j) of the Constitution (see *Albutt* para 52). It was also universally accepted, given what was said in *Hugo*, that the pardoning of apartheid criminals could not be said to unreasonably limit any fundamental rights (save possibly the right to fair administrative action, an issue which the Constitutional Court deliberately decided not to consider (see *Albutt* para 79 - 82). This left only the rationality of the Special Dispensation as basis for constitutional review.

South African nation?<sup>27</sup> Was former President Mbeki correct that the PRG, as a non-majoritarian model of multi-party deliberative democracy, best represented the political dimension of post-apartheid reconciliation?

As an answer to this question and an insightful reinterpretation of the TRC process as a model of political reconciliation, the judgment of Ngcobo CJ is highly disappointing. Studded with rhetorical platitudes, the judgment never explains why the TRC process, including the central role of victim participation, provides a condensed model (or as we will see later perhaps even an anti-model) of the post-apartheid political process, and thus can serve as binding model for other political institutions like parliament, or more specifically the PRG. In order to do so, the court would have had to directly engage the nature of national reconciliation as a political concept, or, failing that, to carefully deal with the differences and similarities between the TRC and the PRG.

There is no attempt in the judgment to undertake the first task. An attempt to undertake the second eventually runs out of steam when Ngcobo CJ announces that the effort to establish the differences and similarities between the two processes is misguided.<sup>28</sup> The simple fact is that, even if there were indeed significant differences between the two processes, former President Mbeki was aware of those differences and had '[d]espite these differences' decided to apply the principles and values of the TRC process to the PRG process. Irrespective of the merits of this decision, 'the subsequent disregard of those principles and values without explanation was irrational'.<sup>29</sup> A great deal of the judgment is, on this basis, simply devoted to a descriptive overview of the principles and values that underpinned the TRC process (as if to remind Mbeki about the implications of the decision he had taken, without giving Mbeki's own interpretation of that commitment any time of day).

Ngcobo CJ does not find that the exclusion of victims is irrational, let's say for argument's sake, because participation in all decision-making processes is a necessary precondition of post apartheid democracy, so that exclusion of this condition would be defeating the object of the exercise. He finds instead that the decision is irrational,

<sup>27</sup> The case turned on the political dimension of national reconciliation only. The idea of constitutional patriotism as a theory of reconciliation assumes that this constitutional or political dimension (citizenship) can be meaningfully distinguished from other dimensions of reconciliation. This does not mean that democratic citizenship, or what Nancy Fraser calls 'participatory parity', cannot embody an exacting post-nationalist and post-national theory of social justice (see further N Fraser 'Re-framing justice in a globalizing world' in T Lovell (ed) *(Mis)recognition, social inequality and social justice* (2007) 17 - 35).

<sup>28</sup> *Albutt* paras 66 - 68.

<sup>29</sup> *Albutt* para 69.

simply because former President Mbeki had changed his mind without any apparent reason. Ngcobo CJ turns what might at worst have been a misunderstanding into a patent irrationality.

To be fair, Ngcobo CJ states over and over again that victim participation is a necessary condition for national reconciliation. The problem is that he never explains the reasoning behind what soon turns into a mostly rhetorical statement. The closest Ngcobo CJ comes to such an explanation is to list a number of instrumental considerations which necessitated victim participation in the TRC process (most notably the lack of available knowledge about the gross human rights violations of the past,<sup>30</sup> and to provide an opportunity (in the absence of criminal trials) for those who were violated to receive public recognition that they had been wronged).<sup>31</sup>

The weakness of this instrumental explanation of victim participation in the TRC process, as basis for the claim that victims must also participate in the PRG process, is exposed in the counter-argument put forward by Albutt and the President.<sup>32</sup> They argued that victim participation was not instrumental to the PRG process because all the applicants for Presidential pardons were already convicted criminals. The truth about their crimes had been conclusively established during criminal trials, and the victims of these crimes had participated in those trials as witnesses, thus receiving public recognition that they had been wronged. These crimes thus no longer stood in the way of national reconciliation as numerous unearthed apartheid crimes did at the end of apartheid, before the TRC process. In fact, in contrast to the amnesty process of the TRC, justice had not been compromised in these cases for the sake of the truth. This was more than the TRC process had ever sought or managed to achieve.

As said above, Ngcobo CJ's final response to this argument is that Mbeki knew about this crucial difference, but nevertheless decided to apply the requirement of victim participation to the PRG process; and that, as far as Ngcobo CJ was concerned, was the end of the matter.<sup>33</sup> This is an extremely weak basis for the judgment, given, as I have tried to point out above, that it is at least open to interpretation whether Mbeki had indeed deviated from his original understanding of what the principles and values of the TRC process had required of him, given the unique circumstances of the Special Dispensation process. In the absence of a deeper understanding of what reconciliation means in a political sense, or a theory of post-apartheid democracy, Ngcobo CJ seems unable to respond to the argument that

<sup>30</sup> *Albutt* para 65.

<sup>31</sup> *Albutt* para 60.

<sup>32</sup> *Albutt* para 62.

<sup>33</sup> *Albutt* para 67.

victim participation is at best a contingent feature of some reconciliation processes, but not of all.

Perhaps it was because he realised that Ngcobo CJ's judgment did not sufficiently engage the substance of national reconciliation as a political concept, that is, that it lacked a working definition of democracy, that Froneman J felt compelled to write a short concurring judgment in which he directly confronted the deliberative model of parliamentary democracy which Mbeki sought to institutionalise with the creation of the PRG. Froneman J's starting point is that it is necessary to look beyond the contingencies of our recent history (which includes the contingent participatory features of the amnesty process and the contingent way in which the pardon process was introduced) to the deeper principle of democracy that is at work in our broader constitutional history, stretching back as far as pre-colonial times.<sup>34</sup> This shift in perspective allows Froneman J to present the centrality of victim participation in the TRC process as the culmination of an old and pervasive understanding of democracy. Borrowing a phrase from Amartya Sen, Froneman J presents this broader constitutional history as a response to the 'pervasive demands for participatory living'.<sup>35</sup> This demand constantly resurfaces in that history, not as a binding model or foundational moment, but as an inspirational leitmotiv.<sup>36</sup> This demand is also respected in our Constitution. As the democratic turn on the Constitutional Court has made clear, 'the democracy our Constitution demands is not merely a representative one, but is also, importantly, a participatory democracy'.<sup>37</sup> That we live in a participatory democracy with roots that reach back to pre-colonial times also holds true when Presidential pardons are to be granted to apartheid criminals.<sup>38</sup>

Council for the applicant argued that the requirement of victim participation was met through the process set in place by the President which involved all the political parties represented in Parliament. Put differently, the argument was that representative democracy was sufficient in the circumstances. It is not.

As this passage makes clear, Froneman J understood the case before him as a direct confrontation between representative democracy and participatory democracy, and the further question which of the two conceptions best understands the meaning of the TRC process for post-apartheid democratic politics. One could also say that the case turns on different understandings of what constitutional patriotism

<sup>34</sup> *Albutt* para 89.

<sup>35</sup> *Albutt* para 92. See Amartya Sen *The idea of justice* (2009) 322.

<sup>36</sup> *Albutt* para 91.

<sup>37</sup> *Albutt* para 90.

<sup>38</sup> *Albutt* para 90.

demands of post-apartheid citizens after the TRC. In as far as the memory and constitutional recognition of past injustices (the TRC process and the Preamble of the Constitution) precludes a certain celebratory engagement with history and the revival of an uncomplicated national pride, constitutional patriotism arises as the only achievable, but even more so, only permissible form of political identification for South Africans. Mbeki accepted as much when he called on political parties, in the name of the TRC process, to convert their party loyalties into a new constitutional patriotism. However, he was deeply mistaken to assume that the privileged site for the formation of this new patriotism could be Parliamentary politics, even in the exacting form of deliberative democracy required by the PRG process.

In contrast to Mbeki, Froneman J follows most champions of constitutional patriotism, including Habermas himself, to insist that the emergence of a proper constitutional patriotism in divided societies depends on active citizen participation in a vibrant public sphere. If we were to take the memory work of the TRC process seriously, if the TRC became the eyes with which we look at the past, forced backwards into the future, then we would have to do everything we can to deepen and strengthen active citizenship and participatory democracy in society. A narrow focus on the perfection of the internal dynamics of representative democracy would be misplaced, especially for somebody who understood and wanted to take seriously Mbeki's call for a new constitutional patriotism.

Froneman J does not further elaborate on the different forms that active citizen participation in a fragile post TRC public sphere could take. We know from *Albutt* that active citizen participation would at the very least include the right of apartheid victims to participate in the PRG before a final decision about the granting of a pardon is taken. Such participation would have constative and not merely instrumental value. But how should we understand citizen participation in the broader sense after *Albutt*? The question is complex and cannot be fully pursued here. The task is not made easier by the fact that Froneman J's judgment seems to lead us in two different directions and two versions of participatory democracy. The first opens a place for civil society participation or politics *within* the constitutional matrix, in the name of a life in politics not limited by or restricted to party political activities, like electioneering and voting. The second shifts the focus to the tensions *between* politics and the constitutional matrix, in the name of a life in politics not limited by or restricted to constitutional activities, like making and litigating rights claims or deepening the rights discourse generally, but driven rather by the attempt to think and bear witness to the

political and activating the *Differend* (as Lyotard might have phrased it).<sup>39</sup>

On the one hand, Froneman J explicitly relates his use of the term *participation* to the democratic turn of the Constitutional Court in *Doctors for Life* and *Matatiele*.<sup>40</sup> Both these cases read a requirement of public participation into the legislative process, and thus understood participatory democracy as the right to participate constructively within the specific institutional spaces and opportunities created for this purpose by the Constitution. Thus the PRG was constitutionally defective because it did not create a similar institutional opportunity for victim participation in the decision-making process. However, the Constitution does not only create or demand opportunities for first order institutional participation in this form, it also recognises the importance and entrenches the possibility of second order citizen participation in politics through constitutional review and litigation. The *Albutt* case provides a good example of this. The litigation provided an opportunity for and facilitated active civil society participation in society, in an effort to ensure an opportunity for victims of apartheid crimes to participate in the decision-making process of the PRG. Like *Doctors for Life* and *Matatiele* before it, the *Albutt* judgment vindicated the value and legitimacy of non-representative and extra-parliamentary political action and citizen participation in society; a life in politics not limited to party political activities and the right to vote. The case became a clear example of civil society flexing its muscles as is clear from Hugo van der Merwe's criticism of parliamentary politics directly after the judgment of the High Court.<sup>41</sup>

In Parliament [opposition parties] welcomed the announcement of the new prosecutions policy, which was subsequently judged unconstitutional. After they were co-opted into the reference group steering the presidential pardon process, they somehow became

<sup>39</sup> To deviate slightly from the discussion, Lyotard distinguished between two styles or modes of politics. The one aimed at litigating constitutional claims; the other at bearing testimony to and activating the *Differend* (note, not *the differences*, as Lyotard's postmodernist injunction is often misunderstood). As the *Differend* marks the inability to phrase something in a manner that would make litigation within a common constitutional idiom possible, Lyotard was never attracted to constitutional doctrine, but explored the possibilities that art and different styles of modernist writing presented for bearing testimony to the *Differend* (ultimately the inability of rephrasing normative claims (obligations) as constative claims, made in the name of 'We the people'). Postmodernism as a resistance to the hegemony of scientific discourse, and the demand for the phrasing of justiciable knowledge claims as model for phrasing within the political and ethical language games. See further Jean-François Lyotard *The Differend: Phrases in dispute* (1988). I return to this issue in the final section below.

<sup>40</sup> *Albutt* para 90.

<sup>41</sup> H van der Merwe 'No thanks to the opposition for brake on special pardons' *Sunday Independent* 3 May 2009 [www.armsdeal-vpo.co.za/articles14/pardons.html](http://www.armsdeal-vpo.co.za/articles14/pardons.html) (3 November 2011).

resistant to pleas to help bring survivor's voices into the process. Political parties were at best silent spectators, at worst collaborators, in this process that has also been declared to be inconsistent with our constitution. In both these cases, it has been civil society organisations and survivors themselves who have had to speak out, and eventually turn to the courts to curb the abuse of power. ... While much attention has been focused on the elections, we should keep in mind that a vibrant civil society remains a pillar of democracy and guarantor of human rights protection.

In the mind of the applicants at least, participatory democracy after *Albutt* is synonymous with the re-emergence of a vibrant civil society outside the institutional framework of representative democracy, capable of undertaking public interest litigation.<sup>42</sup> This positive view of the balance of political power that emerges from the *Albutt* judgment, has, predictably, not convinced everybody.

As the Zuma presidency gradually entrenches itself, *Albutt's* court centred version of participatory democracy has increasingly come under pressure from a growing constitutional populism. According to the champions of this populism, the court centred model of participatory democracy evidenced in *Albutt* is fundamentally subversive of the democratic political process. Shortly after the *Albutt* judgment was delivered, Minister of Justice, Jeff Radebe, warned a group of young lawyers about the rise of the new civil society ('the unbridled rush to create my own nongovernmental organisation') and described a litigation hunger civil society as the real threat to the constitution (as opposed to the hypothetical threat that the ANC under President Zuma supposedly posed to the Constitution).<sup>43</sup> A few months later, the ANC's General Secretary, Gwede Mantashe, again spoke out against the tendency of civil society groups and minority parties to abuse the Constitutional Court to sustain opposition politics against the electoral mandate of Parliament.<sup>44</sup>

These comments signal the return of the counter-majoritarian difficulty to the centre stage of post-apartheid constitutional debates. There is of course by now a ready answer available to the charge that civil society driven constitutional review is a counter-democratic force in society. That answer is that the Court and its review powers are, correctly understood, proto-democratic or hyper-

<sup>42</sup> The possibilities and limitations of public interest litigation has become a key theme in the aftermath of *Albutt*. See, for example, the special volume of *South African Journal on Human Rights* (2011) dedicated to the issue.

<sup>43</sup> 'NGO forces real threat to constitution – Radebe' [www.businessday.co.za/articles/Content.aspx?id=127404](http://www.businessday.co.za/articles/Content.aspx?id=127404) (accessed 20 January 2012).

<sup>44</sup> 'Full Interview: ANC's Mantashe lambasts judges' [www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges](http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges) (accessed 20 January 2012).

democratic in nature. This answer rests on the claim that parliamentary democracy is notoriously suboptimal as a matter of democratic process (Ely),<sup>45</sup> political principle (Dworkin),<sup>46</sup> and practical rationality (Michelman).<sup>47</sup> For these reasons, the review of Parliament by an independent Constitutional Court is actually democracy reinforcing or democracy perfecting.

While civil society organisations will no doubt take heart from these attempts to vindicate constitutional litigation as a viable form of democratic politics, the new parliamentarians are not the only ones who have expressed concern about a model of participatory democracy and constitutional patriotism that revolves primarily around the litigation of constitutional rights claims. Having carefully studied the dynamics of socio-economic rights litigation before the Constitutional Court, Danie Brand concluded recently that constitutional rights adjudication is at best a limited and at worst a limiting instrument for political transformation.<sup>48</sup> Brand relies on the work of Emiliios Christodoulides,<sup>49</sup> to suggest that South Africans check their uncritical ‘constitutional optimism’ (read constitutional patriotism) and start exploring alternative possibilities of agonistic politics in society.<sup>50</sup> Karin van Marle extends and radicalises Brand’s reading of socio-economic rights to a critique of modern law and constitutional democracy in general. Also relying on the work of Christodoulides, Van Marle suggests that we develop a memorial

<sup>45</sup> JH Ely *Democracy and distrust: A theory of judicial review* (1980) calling on Constitutional Courts to clear the canals of political change (105 - 134) and to facilitate the representation of minorities (135 - 180), the two constitutional pathologies of a democratic process of representation. Ely wished to restrict the work of the Court to these two democracy reinforcing tasks in an attempt to escape the intrusion of values into the adjudication process.

<sup>46</sup> R Dworkin ‘The forum of principle’ (1981) 56 *New York University Law Rev* 469; R Dworkin *Freedom’s law: The moral reading of the American Constitution* (1997) 1 - 38. According to Dworkin, it is perverse for a majority who has violated the conditions or moral foundation of democracy (treating everybody with equal concern and respect) to appeal to democracy to insulate itself from constitutional review.

<sup>47</sup> F Michelman ‘Law’s republic’ (1988) 97 *Yale Law Review* 1493 1531 - 1532 arguing that the civil rights movement shows that the primary arenas of jurisgenerative politics lie outside the major, formal channels of electoral and legislative politics in civil society and street life. This non-state centred notion of republican citizenship, not tied to centralised majoritarian power, provides a rejoinder to the majoritarian and populist objection to judicial review: ‘The Court helps protect the republican state- that is the citizens politically engaged - from lapsing into a politics of self-denial [...] to assume their own moral completion as they now are and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends’ (1532). In ‘The Supreme Court 1985 term - Foreword: Traces of self-government’ (1986) 100 *Harvard Law Review* 4, Michelman argues that the task of the Constitutional Court is to virtually represent to the people their otherwise absent democratic self-government.

<sup>48</sup> Brand (n 4 above) 101 - 106.

<sup>49</sup> E Christodoulides ‘Constitutional irresolution: law and the framing of civil society’ (2003) 9 *European Law Journal* 401.

<sup>50</sup> D Brand (2009) *Courts, socio-economic rights and transformative politics* unpublished LLD thesis, Stellenbosch University, 2009, 41.

constitutionalism in contrast to the monumental constitutionalism that she sees implied in our 'constitutional optimism',<sup>51</sup> or 'constitutional patriotism'.<sup>52</sup> She seeks to explore the possibility of non oppressive forms of community that are not grounded in or mediated by law. To this end she insists that we keep the possibility of political action alive, outside the framework of the constitution, and thus not as the making and vindication of rights claims. Van Marle does not simply mean that constitutional democracy (or community) is an oxymoron, and thus that democracy or community can constitute a self-present alternative to the mediation of law. It is a question of writing or opening the possibilities of community and political action in spite of the law, not in place of the law.<sup>53</sup>

I suggested above that Froneman J's judgment can also be read to further the more agonistic and less institutional understanding of participatory democracy suggested by Brand and Van Marle. Froneman J's reliance on the work of Amartya Sen points us in the direction of a second interpretation of the demand for participatory living.

In the Introduction to his book *The idea of justice* Sen distinguished between two traditions in the history of justice.<sup>54</sup> The first is a transcendental tradition which aims to define perfect justice and to focus on the stable institutional arrangements that would ensure justice in society. The second is a comparative tradition which relies on comparisons between already existing societies in order to identify and remove manifest injustices. Sen defends the second tradition in his book. In this tradition the idea of justice is sustained by public dialogue about the lives that people are actually capable of realising at different times and in different societies. In part IV of the book, the part cited by Froneman J, Sen points out that the difference between institutional and dialogical approaches to justice is mirrored by a difference between institutional (or representative) and dialogical (or participatory) models of democracy. Sen uses this distinction to undermine the claim that democracy is a uniquely Western concept without application in non-Western contexts. This might be true as far as constitutional democracy as a presumed institutional perfection of democracy is concerned, but it is not true of the participatory ethos that has informed the idea of justice since ancient times.<sup>55</sup>

<sup>51</sup> Van Marle (n 6 above) 53.

<sup>52</sup> K van Marle 'Constitutional patriotism or constitutional nationalism? A response to Wessel le Roux's paper' (2009) 24 *SA Public Law* 400.

<sup>53</sup> Van Marle (n 51 above) 406.

<sup>54</sup> A Sen *The idea of justice* (2009) 1 - 30.

<sup>55</sup> Sen (n 53 above) 326.

When Froneman J follows Sen by tracing the roots of democracy to pre-colonial times, he is clearly not interested in the institutional dimension of democracy, in constitutional democracy as such, but in democracy as a participatory mode of living or being in the world. In as far as democracy in the sense of the demand for participatory living attaches to the idea of justice and precede the constitution, it also exceeds it, and can thus mark the limits of the constitutional attempt to embody or contain that demand and the idea of justice. There is thus also a second meaning of participatory democracy latent in Froneman J's judgment, one that resonates with the critique by Van Marle and others against the the monumentalisation of institutional democracy that is implicit in strong forms of constitutional review.<sup>56</sup>

Froneman J does not pursue this second interpretation of participatory democracy any further. However, we do have an indication of how he might have proceeded had he decided to do so. In an essay on the work of Frank Michelman, which was written some time before he became a Constitutional Court judge, Froneman J spoke powerfully along these lines about the '[i]mpossibility of constitutional democracy'.<sup>57</sup> In the same volume of essays, Henk Botha developed a critique of Michelman's defence of court centred republicanism and spoke about '[r]ights, limitations and the (im)possibility of self-government'.<sup>58</sup> These reflections on the impossibility of any stable or monumental constitutionalisation of democracy also brings to mind an earlier essay on the TRC, in which

<sup>56</sup> My own attempts to explore the limits of a court centred or hyper-democratic solution to the role of the Constitutional Court has largely been inspired by Jean François-Lyotard's critique of institutionalised (or constitutionalised) politics, in the republican mold of Habermas and Michelman. Lyotard's basic point is that the discursive symmetries implied by democratic self-government, as a solution to the modern problem of justifying obligations, fails to account for the discursive asymmetry implied in the very idea of obligation and responsibility. It goes without saying that for Lyotard this essentially ethical asymmetry, and the modes of being and forms of community it opens onto, cannot be explored through law and the constitutional perfection of democracy as a discursive language game. See W le Roux 'Six (individually-named) notes on the counter-aesthetics of refusal' in K van Marle (ed) *Refusal, transition and post-apartheid law* (2009) 57 - 78. See also W le Roux 'Bridges, clearings, and labyrinths: The architectural framing of post-apartheid Constitutionalism' in Le Roux & Van Marle (eds) (n 6 above) 59 - 100 for an attempt along similar lines to explore the architectural design of the Constitutional Court building as a labyrinth, as opposed to a clearing prepared under a lekgotla tree for the deliberative gathering of the community (as the icon of the Court suggests). My previous reading of the Constitutional Court building and its urban environment as an apartheid memorial follows a similar argument (Le Roux (n 14 above) 65 - 90). Contrast my earlier attempt to present the Court as a place on the street, in which the idea of street democracy was still very strongly influence by Michelman's hyper-democratic ideal of the Constitutional Court as a democratic institution (W le Roux 'From acropolis to metropolis: The Constitutional Court building and South African street democracy' (2001) 16 *SA Public Law* 139).

<sup>57</sup> J Froneman 'The impossibility of constitutional democracy' in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2004) 93.

<sup>58</sup> H Botha 'Rights, limitations and the (im)possibility of self-government' in Botha *et al* (eds) (n 56 above) 13.

Aletta Norval suggested that the effect of victim participation in the TRC process is to mark the '(im)possibility of reconciliation' and so to open the possibility of a truly post-apartheid and non-identitarian form of democracy.<sup>59</sup>

#### 4 Aletta Norval and the TRC: towards 'the (im)possibility of reconciliation'

In her essay, Norval discusses the memory work of the TRC and the centrality of victim participation in the process. Like Ngcobo CJ and Froneman J, she claims that the most significant aspect of the memory work is the way in which it has offered an occasion for survivors to gain recognition of their plight in full public view.<sup>60</sup> It is the focus on the everydayness of injustice and the reoccupation of memory sites by ordinary citizens that reveals the real significance of the TRC hearings. However, Norval also suggests that the participation of ordinary citizens made the memory work of the TRC different from the standard nationalist uses of memory and monuments. From this insight she derives an understanding of reconciliation as a political concept that contrasts fruitfully with both the deliberative and participatory models celebrated by Mbeki and Froneman J respectively.

Norval relies on the work of John Gillis to locate the TRC in a broader history of commemoration in society; a history which reveals pre-national, national and post-national forms of commemoration.<sup>61</sup> For our purposes it is sufficient to reflect on the differences between the last two forms of commemoration. National memories tend to focus on the construction of unity and continuity and locate public memory in archival sites or public monuments. To capture the difference between national memories and post-national memories, Norval likens the difference to that between the Catholic practice of locating the sacred in certain ritualistic times and places, and the anti-ritualistic demand of Protestantism that the sacred be brought into everyday life itself. Post-national memories represent a similar iconoclasm in the sphere of public memory and 'attempts to *desacralise* the nation-state, to *democratise* memory, and to retrace

<sup>59</sup> A Norval 'Memory, identity and the (im)possibility of reconciliation: The work of the Truth and Reconciliation Commission in South Africa' (1998) 5 *Constellations* 250 - 265.

<sup>60</sup> Norval (n 58 above) 258.

<sup>61</sup> Norval (n 58 above) 255.

a *multiplicity of pasts*'.<sup>62</sup> Modern iconoclasm and the deinstitutionalisation of memory therefore results in a shift away from archival and monumental sites, to new civic spaces where individuals and groups can come together to debate and negotiate the past and, through this process, define their future. Post-national commemoration is characterised by a move away from traditional monuments and memory-places, precisely because monuments tend to become the opposite of what they set out to be. Instead of facilitating participation and contestation, they reduce us to passive spectators and consumers of national myths.

One of the most striking examples of this shift is presented by the counter-monument movement in Germany during the late 1980s. Norval refers in this regard to the memorial against fascism designed by Jochen and Esther Gerz in Hamburg. The memorial denies or subverts its own status as monument or memory place and its ability to stand in for or represent the otherwise absent public memory of citizens. It does so by gradually sinking into the ground. An inscription at the top of the disappearing column reads as follows:<sup>63</sup>

One day it will have disappeared completely, and the site of the Hamburg monument against fascism will be empty. In the end, it is only we ourselves who can rise up against injustice.

Given this typology of memorial cultures and forms of commemoration, Norval's central claim is that the TRC must be seen as a post-national form of memory making and thus as an opening onto a post-national political identity. Norval claims that the TRC shares many of the features of the counter-monument in Hamburg, and should be understood as an institutional counter-monument against apartheid. Three features provide the key to its post-national status. The first is the nature of the transition and the complex layering (as opposed to the radical break) that it implies. The second is the central role that was given in the process to participation of ordinary citizens. The third is the fact that the existence of the TRC is limited by statute. This prevents it from becoming a permanent fixture of the institutional landscape. Like the Hamburg counter-monument, it will disappear and leave citizens with the responsibility to continue the memorial process it would have started.

<sup>62</sup> Norval (n 58 above) 256. In this sense, the Constitutional Court building stands fully in the sign of this post-national iconoclasm. The design deliberately undermines all inherited iconographies of justice and refuses its status as an icon or monument to the modern post-apartheid state. I previously described this feature of the design as a shift from the iconic acropolis on the hill (the Union Building in Pretoria, for example) to the inner city metropolis (the Constitutional Court building in Braamfontein). In this sense the design calls provocatively for an iconoclastic jurisprudence that seeks to desacralise and democratise legal culture. See Le Roux (n 55 above) 139.

<sup>63</sup> Norval (n 58 above) 260.

As the key to an alternative interpretation of participatory democracy in Froneman's *Albutt* judgment, the second feature identified by Norval, victim participation, is of most significance. Norval distinguished in this regard between the participation in the TRC process by political parties, on the one hand, and ordinary citizens as perpetrators and victims, on the other.<sup>64</sup> As she reads the submissions by the political parties, they all served to provide the historical context or grand narratives which could explain, and so justify, the actions that were perpetrated in their names.<sup>65</sup> According to Norval, this kind of historiography belied the complexities and ambiguities that marked the transition process. The transition was simply not a linear process with a clear break between the past and the present that allowed for this kind of re-monumentalisation of the present. In the submissions by the perpetrators and victims, by contrast, the focus fell on the everydayness of injustice and the reoccupation of memory sites by ordinary citizens. If apartheid was characterised by an identitarian mythology of the past, in which competing histories were at best kept apartheid and at worst violently repressed, a truly post-apartheid society would begin by deconstructing this identitarian logic in memory making and politics alike.

Norval suggest that the memory work of the TRC, precisely because of its participatory character, is characterised by a double signification. It is a remembrance as such, which already reminds us about the incompleteness of the present given the injustices of the past, and a remembrance of the logic of closure, or of a different way of remembering.<sup>66</sup> It is in this sense that Norval links the TRC to the aesthetics of the counter-monument. Counter-monuments also have a dual signification. They are memorials and thus call to remembrance, but in the same process also marks the impossibility of achieving finality or monumentality in doing so (of becoming a monument). As a result of victim participation, the work of the TRC did not result in a new master narrative of the past (as the political parties desired), nor in a simple compilation of plural pasts, each with their own set of heroes and victims, in the spirit of toleration and national reconciliation. The TRC pointed to a fundamental impossibility of completion as such:<sup>67</sup>

In recognising that identity relies upon traces of the not-now, not-here, it opens identity out onto a beyond which is to be post-apartheid and post-national ... The TRC potentially celebrates and commemorates not completion and national myths of origin in their full splendor, but the

<sup>64</sup> Norval (n 58 above) 256.

<sup>65</sup> Norval (n 58 above) 257.

<sup>66</sup> Norval (n 58 above) 259.

<sup>67</sup> Norval (n 58 above) 261.

impossibility of identity, of the purity of origins, and also of reconciliation.

Victim participation in the TRC process thus inaugurated a kind of memory work in which the past and identity is continually reworked as a palimpsest of traces.<sup>68</sup> The palimpsest is a kind of double signification. It is a writing that immediately draws attention to its own future erasure. Could what Norval says about victim participation and the memory work of the TRC also be applied to citizen participation in the PRG and other democratic institutions?

At the juncture in our constitutional history marked by *Albutt* (a resurfacing of the centrality of Parliament and Party as representative institutions, as reflected in the displacement of the TRC process to the PRG process), it is perhaps not enough merely to remind us off the centrality of participatory democracy and to call for a renewal or intensification of our constitutional patriotism (as alternative to the more populist patriotisms of party and patriarch that have reasserted themselves), but to also start exploring counter-constitutional moments or better, to understand Froneman J call for participatory democracy a mode of being politically that is counter-democratic or counter-constitutional in the sense that Norval would understand the term. Participation in a participatory democracy, and the 'participatory living' celebrated by Froneman J in *Albutt*, would then also assume a dual signification. It would not simply mean living under different, democratically vindicated laws, but more importantly, living differently under the law.

<sup>68</sup> The palimpsest is a key memorial metaphor in memory work of the District Six Museum. The first exhibition of the museum, 'Streets: Retracing District Six' opened on 10 December 1994 and remains the central memorial device of the museum. It consists of two related elements: a series of old street signs from the area, and a large laminated map which covers the central floor space in the old church. Both elements represent an urban neighbourhood that no longer exists. However, as the plaque at the entrance of the museum says, in remembering the exhibitions 'do not want to recreate District Six but to work with its memory'. The map on the museum floor is an interactive space where ex-residents are invited to write their names, return their houses to the map, and add comments, poems, descriptions and stories. Empty space is thus reanimated and community invoked there is no linear narrative or prescribed order or completed exhibition. The museum is permanently in process and exclusively on the written comments of ex-residents and the fragmentary remains of their possessions. In this process, even the map of District Six, a so-called objective representation of the urban environment, becomes a palimpsest. In this sense the installation participates in the counter-monumental tradition of memorial sites to which Norval refers.