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# A BRIDGE TOO FAR? HISTORY AS CONTEXT IN THE INTERPRETATION OF THE SOUTH AFRICAN CONSTITUTION

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## ABSTRACT

Judges and other interpreters of the South African Constitution are faced with the dilemma of how to achieve a semblance of objectivity in constitutional adjudication given the open-ended and often vague nature of the provisions with which they are faced. In an attempt to solve this dilemma, the judges of the Constitutional Court often turn to South Africa's history and use it as a 'grand narrative'—a universally accepted, meaning-giving story about the origins and purpose of the Constitution. This 'grand narrative' or 'super context' purports to limit the discretion of judges by providing the context within which the various provisions of the Constitution can be understood without recourse to the personal, political or philosophical views of judges. This attempt to deploy South Africa's recent history cannot be successful, however, because it ignores the emerging view of history as a profoundly subjective account of selected events in the past. History is just as much about the present as the past, and it reflects choices about who and what must be included and who and what excluded. The use of a 'grand narrative' of history in constitutional interpretation is therefore highly problematic: it presents these choices as inevitable, thereby potentially precluding different, more inclusive, understandings of the Constitution. This does not mean that South African judges should not deploy history when they are called upon to interpret the Constitution. If history is deployed not as 'grand narrative' but with an acknowledgement of its open-ended nature, it might assist in establishing the Constitution as a living document, a document that will adapt to changing circumstances in South African society.

'Those who control the present control the past and those who control the past control the future.' George Orwell in *1984*

'The future is certain, it is the past that is unpredictable.' Evita Bezuidenhout

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## I INTRODUCTION

Lawyers, legal academics and judges are today faced with a vexing philosophical dilemma in constitutional adjudication.<sup>1</sup> This dilemma stems from the realisation, now shared even by some traditional lawyers, that the language of the 1996 Constitution<sup>2</sup> in general and the Bill of Rights in particular (often) has no single 'objective' meaning and that judges who interpret and apply the Constitution cannot (at least not always) do so with reference only to the language of the constitutional text.<sup>3</sup> While this realisation had only begun to dawn on most South African legal scholars and practitioners with the inception of constitutionalism in the early 1990s, it has its roots in the work of the legal realist movement that originated in the United States in the early half of the twentieth century.<sup>4</sup> In the last 30 years, the view that the language of constitutional texts (and also other legal texts) is not objectively determinable has gained momentum, especially in the United States, first through the work of the Critical Legal Studies movement,<sup>5</sup> and later because of the increased use by legal academics of post-structural linguistic theory.<sup>6</sup>

- 1 While this dilemma manifests itself in all spheres of legal interpretation, the relevant actors most readily acknowledge it in cases of constitutional interpretation. When I refer to constitutional adjudication—as I do consistently throughout this article—I am in no way implying that there is a fundamental difference between statutory interpretation and constitutional interpretation. Although a distinction is often made between the interpretation of the Bill of Rights, on the one hand, and the Constitution, on the other, this is a difference of degree rather than a difference in kind. See J Kentridge & D Spitz 'Interpretation' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1999 revision) 11-15.
- 2 Constitution of the Republic of South Africa Act 108 of 1996 (the 1996 Constitution).
- 3 See, for example, J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* 3 ed (2000) 117 ('[a]s with ordinary language, the meaning of a constitutional provision depends on the context in which it is used'). I do not dispute the observation made by Karl Klare that South African lawyers still have a relatively strong faith in the precision, determinacy and self-revealingness of words and texts. (See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146, 168.) My point is that despite these deeply entrenched views, the new constitutional order has finally begun to force (at least some) South African lawyers to begin to rethink these assumptions. Although South African legal culture thus remains deeply conservative, the first stirrings of a new way of looking at legal texts can be observed.
- 4 See L Kalman *The Strange Career of Legal Liberalism* (1996) 5. Kalman argues that: 'Once the legal realists had questioned the existence of principled decision making, academic lawyers spent the rest of the twentieth century searching for criteria that would enable them to identify objectivity in judicial decisions.' On current-day descriptions of legal realism, see generally WW Fisher III, M Horwitz & TA Reed (eds) *American Legal Realism* (1993); and J Singer 'Legal Realism Now' (1988) 76 *California LR* 465. Karl Klare, in his recent article in the pages of this journal, laments the lack of knowledge of and insight into legal realism among South African legal scholars and practitioners. Klare (note 3 above) 170n51.
- 5 The critical legal studies movement emphasised the indeterminacy of language and hence of legal decision-making and argued for an acknowledgement of this fact. See generally M Tushnet 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' (1983) 96 *Harvard LR* 781; and D Kennedy *A Critique of Adjudication: {Fin de Siècle}* (1997).
- 6 See, for example, SM Feldman 'The Politics of Postmodern Jurisprudence' (1996) 95 *Michigan Law Review* 166; HL Dreyfus 'Beyond Hermeneutics: Interpretation in Late Heidegger and Recent Foucault' in MT Gibbons (ed) *Interpreting Politics* (1987) 203. For recent examples of

While not all—or even a majority of—judges, lawyers and legal academics in South Africa embrace the insights of legal realism, Critical Legal Studies or post-structuralism, an ever-increasing number of the participants in the debate on constitutional interpretation agree (sometimes rather reluctantly) that the language of the Constitution can not (always) produce one absolute or fixed meaning.<sup>7</sup> This is (at the very least) because the language of a modern constitutional text—and especially a bill of rights contained in such a text—is viewed as broad in scope, and as setting out general principles exhorting judges to interpret and apply them. This, so the argument goes, makes it very difficult if not impossible for judges to claim that their decisions are always made in an objective fashion—merely by comparing the clear and unambiguous provisions of the Constitution against the statute or action being challenged and deciding whether the latter squares up with the former.<sup>8</sup> The fact that the text of the 1996 Constitution is often vague, ambiguous and seemingly contradictory, means that it cannot provide a self-evident and fixed meaning to those who read it. Instead, it requires interpretation, and to do so it seems necessary to invoke sources of understanding and value external to the text and other legal materials.<sup>9</sup>

Most judges, lawyers and legal academics in South Africa, however, seem profoundly uncomfortable with the notion that judicial decision-making in the constitutional sphere is not (always) aimed merely at discovering a ‘true’, ‘objective’ or ‘original’ meaning of the text and is hence not based (solely) on predictable and neutral principle.<sup>10</sup> For if this

this line of reasoning in the South African context, see J de Ville ‘Meaning and Statutory Interpretation’ (1999) 62 *THRHR* 373, 374–76 and De Ville ‘Legislative History and Constitutional Interpretation’ (1999) 62 *TSAR* 211. As De Ville (*THRHR*, 376) explains, according to this insight, a written text cannot have one pure or true meaning because meaning is a function of language itself and not of some or other mental process of the author of the text. In this view, the meaning of a text is never fixed or stable but changes with the context within which the text is situated. But while reference to the context assists us in determining the ‘meaning’ of the text, this context is boundless: it can never be determined fully in advance and can therefore never provide an absolute and final stability to the meaning of any text. Personally, I find myself largely in sympathy with these insights and this article is therefore an attempt to analyse one aspect of constitutional interpretation from the perspective of a somewhat sceptical adherent to the post-structuralist view of language. The increasing distrust among South African lawyers of the fixed meaning of language in constitutional interpretation, however, is not dependent on adherence to or sympathy with this view.

7 There still seems to exist a very strong view among most lawyers, judges and legal academics that because of the broad and general language employed in it, the constitutional text is unique in this regard and that ‘ordinary’ statutes usually do not present the same interpretative problems. Although I strongly disagree with this traditional view of how language works, the point I am making here is not dependent on a rejection of the traditional view.

8 See B Friedman ‘Book Review: The Turn to History: *The Strange Career of Legal Liberalism*’ (1997) 72 *New York Univ LR* 928, 932.

9 Klare (note 3 above) 157.

10 See, for example, the various writings by the Fagan brothers: A Fagan ‘In Defence of the Obvious: Ordinary Meaning and the Identification of Constitutional Rules’ (1995) 11 *SAJHR* 545; E Fagan ‘The Longest Erratum Note in History: *S v Mhlungu*’ (1996) 12 *SAJHR* 79; and E Fagan ‘The Ordinary Meaning of Language: A Response to Professor Davis’ (1997) 13 *SAJHR* 174.

is so, the interpreter of the constitutional text will (often) have to rely on other, subjective and extra-textual factors—perhaps even the interpreter's own personal, political and philosophical views—to give meaning to that text.<sup>11</sup> The discomfort flows from the fact that most judges, lawyers and legal academics in South Africa broadly adhere to the traditional liberal school of adjudication, a tradition that jealously guards the boundary between law and politics. As Karl Klare has recently pointed out, this traditional view of adjudication maintains a view of law as 'describing rational decision-procedures ... with which to arrive at determinate legal outcomes from neutral, consensus-based general principles expressed or immanent within a legal order'.<sup>12</sup> The dilemma of constitutional adjudication within this traditional liberal paradigm is that it threatens to blur this purported boundary between subjective and partisan politics, and 'neutral' and 'objective' legal interpretation.

In order to deal with this dilemma without jettisoning the liberal project, most judges, lawyers and legal academics believe that they must find a way to uphold the distinction between law and politics through the identification of objective criteria for judicial decision-making.<sup>13</sup> To this end, they search for devices or criteria that may be employed to place a rhetorical, symbolic or what they perceive to be a factual distance between their own personal views, opinions and political philosophy, on the one hand, and the interpretation of legal provisions and the outcome of a particular case, on the other.<sup>14</sup>

11 See, for example, the remarks made by Sachs J in *S v Makwanyane* 1995 (3) SA 391 (CC) para 349: 'Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject [of capital punishment] might be, our response must be a purely legal one.'

12 Note 3 above, 158, referring to the work of J Singer 'The Reliance Interest in Property' (1987) 40 *Stanford LR* 611, 624n39. For a recent discussion of this dilemma within the South African context, see H Botha 'Democracy and Rights: Constitutional Interpretation in a Postrealist World' (2000) 63 *THRHR* 561.

13 Kalman (note 4 above) 5.

14 For an example of such an attempt from a fairly traditional liberal perspective, see D Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997). Discussing the difficulties involved in interpreting the phrase 'open and democratic society based on human dignity, equality and freedom' in the limitation clause of the 1996 Constitution, Meyerson asks: 'Is it possible to supply an interpretation of the phrase which avoids ... problems of subjectivity, uncertainty, and apparent conflict between the fundamental values of the Constitution? I believe it is.' (Ibid xxv.) Meyerson's optimism on this point is debatable. Judges and legal academics are generally uncomfortable with the idea that the law requires its main actors to take ethical responsibility for their decisions. This article is situated within the post-structural approach which is generally critical of those actors in the legal field who operate within a discourse of 'objectivity' and 'neutrality', in other words, in terms of universalising modes of thought. According to such critics, these lawyers, judges, academics and other actors advertently or inadvertently attempt to hide behind the discourse of objectivity and thus fail to take ethical responsibility for their actions and decisions. See generally D Cornell *Transformations: Recollective Imagination and Sexual Difference* (1993). Klare ((note 3 above) 147) argues that no one has yet devised or is likely to devise such a system of total constraint on the interpretation of the Constitution consistent with democratic values and hence that adjudication is inevitably 'a site of law-making activity'.

For participants within traditional legal discourse, the stakes in this quest are high. Failure to provide credible answers to this troublesome question may undermine the legitimacy of the process of constitutional adjudication and even the courts themselves. For, it is argued, if it is accepted that the text of the Constitution does not have one objectively determinable meaning, a failure to identify objective or objectively determinable criteria that will constrain judges in their interpretation of the open-ended or at least ambiguous text will open up the judicial process to criticism of arbitrariness, politicisation and even bias.<sup>15</sup> In other words, such a failure will be seen as tantamount to admitting that judges decide on the content and scope of fundamental rights with reference to their own personal, political and philosophical views and not with reference to an objectively determinable text or at least to objective or objectively determinable criteria.<sup>16</sup> This will force an acknowledgement of the inherently political nature of constitutional adjudication and within the traditional liberal paradigm of constitutional adjudication this will potentially detract from the legitimacy of the Constitutional Court itself.

## II THE CONSTITUTIONAL COURT AND THE INTERPRETATION OF THE INTERIM AND 1996 CONSTITUTIONS

Given the dilemma set out above, it is not surprising that since its inception in 1995 South Africa's Constitutional Court has been in a quandary about how to deal with the seeming lack of objectivity in constitutional adjudication. In the first decision handed down by the Constitutional Court, *S v Zuma*, Kentridge J signalled awareness of (but skirted) this issue when he remarked:

I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.<sup>17</sup>

This passage neatly demonstrates the fundamental tension inherent in the Court's approach to the interpretation of the Constitution, in this case the interim Constitution of 1993.<sup>18</sup> On the one hand, the Court acknowledges the fact that the language of the Constitution does not necessarily yield one 'objective' and 'true' meaning that the Court must

15 See, for example, Meyerson (note 14 above) xxvi-xxvii.

16 The very real problem of objectivity in judicial decision-making was well demonstrated by the case of *President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) in which the legal representatives of the Football Union requested that five of the judges of the Constitutional Court recuse themselves because of their alleged personal links to the President.

17 *S v Zuma* 1995 (2) SA 642 (CC) para 17.

18 Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution).

merely discover. It thus recognises the need to refer to extra-textual factors—such as the South African context and history and comparable foreign case law—when interpreting the Constitution. On the other hand, the judgment resists any move that would implicate the personal views, politics and philosophy of the judges themselves in the interpretative project. Kentridge J thus reiterates that the lack of one objective meaning does not mean that the language of the Constitution should not be respected or that it can be ignored in favour of a general resort to ‘values’. This, the Court asserts rather contradictorily, would constitute not interpretation but ‘divination’.<sup>19</sup> While Kentridge J therefore purports primarily to have relied on the constitutional text, he implicitly admits that the text to which he was referring was not objectively determinable. Rather, the meaning of this text could only be determined with reference to South Africa’s specific historical and legal context. In *S v Makwanyane*,<sup>20</sup> several of the justices continued in this vein by, in effect, denying their own agency in the interpretative endeavour. They did this first, through vehement assertions of the irrelevance of their personal, political or philosophical views in the interpretation of the interim Constitution and, second, through attempts to justify their judgments with reference to general human rights principles that could be made to sound above political controversy.<sup>21</sup> At the same time, many of the justices tentatively acknowledged the open-ended nature of the language of the interim Constitution and the inherent need to refer to ‘extra-legal’ values and texts, including the South African political context and history, to justify their decisions.<sup>22</sup> The Constitutional Court has since often declared its commitment to the centrality of the constitutional text in constitutional interpretation, while acknowledging that any such interpretation can only be conducted with

19 *S v Zuma* (note 17 above) para 33.

20 Note 11 above.

21 Klare (note 3 above) 173. See also *Makwanyane* (note 11 above) para 207, per Kriegler J (‘methods to be used are essentially legal, not moral or philosophical . . . it would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgements in which extra-legal considerations may loom large. Nevertheless, the starting point, the framework and the outcome of the exercise must be legal’); para 349, per Sachs J (‘Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject might be, our response must be a purely legal one’); para 266, per Mahomed DP (‘[t]he difference between a political election made by a legislative organ and decisions reached by a judicial organ, such as the Constitutional Court, is crucial’).

22 Ibid para 321, per O’Regan J (language of fundamental rights is ‘broad and capable of different interpretations’); para 207, per Kriegler J (‘it would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgements in which extra-legal considerations may loom large’); para 266, per Mahomed J (Constitution must be interpreted with reference, inter alia, to the text, context and the factual and historical considerations); para 382, per Sachs J (in seeking the kind of values which should inform the court’s approach to interpretation the ‘rational and humane adjudicatory approach’ must be preferred).

the assistance of objective, or objectively determinable criteria, or (at the very least) with reference to criteria that are somehow distanced from the personal views, opinions and political philosophy of the presiding judge.<sup>23</sup> The criteria employed by the Constitutional Court to do the work in the interpretation of the constitutional text have varied. The Court has resorted to an array of traditional devices such as references to common law, its own precedent, the history of the drafting of the interim and 1996 Constitutions, international law or foreign case law, and canons of constitutional interpretation. At times it has also resorted to less traditional factors such as the surrounding circumstances of the case, the social context of the case, or the general history of the country.<sup>24</sup>

While it is difficult to claim that the Constitutional Court has developed a clear and unambiguous approach to the interpretation of the interim and 1996 Constitutions in general or even of the Bills of Rights, it is safe to say that, apart from its use of traditional methods of interpretation to signal the 'legal' (as opposed to 'political') nature of its task, the Court has developed what can loosely be termed a 'contextual' approach to constitutional interpretation. In applying this approach, the Court has often found guidance in the more recent decisions of the Canadian Supreme Court,<sup>25</sup> and in line with these decisions, has often referred to the historical context in which the interim and 1996 Constitutions were adopted.<sup>26</sup> Of course, it cannot be said that the

23 See Klare (note 3 above) 172-87 for examples of this kind of reasoning by the judges of the Constitutional Court.

24 See generally *Makwanyane* (note 11 above) para 266, per Mahomed DP, for a summary of the Court's approach: 'What the Constitutional Court is required to do in order to resolve an issue is to examine the relevant provisions of the Constitution, their text and their context; the interplay between the different provisions; legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical considerations bearing on the problem; the significance and meaning of the language used in the relevant provisions; the content and the sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text; and by a judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits.'

25 See *Zuma* (note 17 above) para 15 (reference to *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) at 321); *President of the RSA v Hugo* 1997 (4) SA 1 (CC) para 41 and *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 32 (quoting from *Egan v Canada* (1995) 29 CRR (2d) 79, 104-5).

26 On the use of contextualism by the Canadian Supreme Court see SM Sugunasiri 'Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability' (1999) 22 *Dalhousie LJ* 126. On the use of contextualism by the Constitutional Court, see for example *Prinsloo* (note 25 above) para 19 (the equality provision must be interpreted in relation to 'the text and the context of the ... Constitution'); *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) para 141 (freedom of religion clause must be interpreted with reference to the 'text and the context of our own Constitution').

On the use of history see, for example, *Zuma* (note 17 above) para 15, per Kentridge J ('regard must be paid to the legal history, traditions and usages of the country concerned'); *Makwanyane* (note 11 above) para 39, per Chaskalson P ('we are required to construe the South African Constitution ... with due regard to our legal system, our history and circumstances'); and para 264, per Mahomed DP ('[i]t is against this historical background and ethos that the constitutionality of capital punishment must be determined'); paras 322-23, per



Court always uses a contextual approach or that it always uses it in the same manner (or even that the different judges understand and apply this approach in the same way). Yet, in case after case, the various judges of the Court have been carefully sketching the political and social context within which the Constitution in question operates, before proceeding to give an interpretation of the relevant constitutional provision.

The contextual approach to constitutional interpretation employed by the Court is a complex and multifaceted endeavour. It is consequently beyond the scope of this article to describe and analyse it in full.<sup>27</sup> Rather, this article focuses on the use of what may be termed a 'grand narrative' or 'super context' about South Africa's constitutional order in the interpretation of its successive democratic Constitutions. This 'grand narrative' has been, and continues to be, constructed by the jurisprudence of the Constitutional Court, and in turn plays an important role in the construction of the scope and content of the 1996 Constitution.<sup>28</sup> The creation, maintenance and deployment of this grand narrative constitutes an ambitious attempt to situate (almost) any

O'Regan J ('[t]he values urged upon the Court are not those that have informed our past ...' and in 'interpreting the rights enshrined in chap 3, therefore, the Court is directed to the future'); *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) para 61, per Chaskalson (nature and extent of the power of Parliament to delegate its legislative powers ultimately depends 'on the language of the Constitution, construed in the light of the country's own history'); *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 46 per Sachs, quoting L Trakman *Reasoning with the Charter* (1991) 201 ('Rights are not self-explanatory. They are principled constructions informed by social history'); *Brink v Kitshoff* 1996 (4) SA 197 (CC) para 40 per O'Regan (the equality provision is the product of our own particular history and 'its interpretation must be based on the specific language of [the provision], as well as our own constitutional context' and our 'history is of particular relevance to the concept of equality'); *Prinsloo* (note 25 above) para 31, per Ackermann, O'Regan and Sachs JJ ('given the history of this country we are of the view that discrimination has acquired a particular pejorative meaning'); *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 126, per Kriegler J (viewed in its textual and historical context the rights and freedoms in the Constitution have a poignancy and depth); *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development*; *Executive Council, KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC) 1377 para 44, per Ngcobo J ('A provision in a Constitution must be construed purposively and in the light of the constitutional context in which it occurs. History could not be ignored in that process'); *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35, per O'Regan J ('The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied').

27 For a short review of contextual interpretation by the Constitutional Court, see De Waal et al (note 3 above) 126.

28 This concept of the grand narrative borrows from the work of Jean Francois Lyotard. Lyotard has argued that meaning in modern society (as opposed to post-modern society) is predicated on so-called meta-narratives. Such narratives operate as great structuring (metaphysical) stories that are supposed to give meaning and make us understand all other events and interpretations. Post-structuralists such as Lyotard are generally sceptical about such meta-narratives and point out that the loss of this legitimating function creates a crisis in metaphysical philosophy. See, generally, JF Lyotard *The Post-Modern Condition* (1984) xxiv, 34-37. See also K Jenkins *Re-thinking History* (1991) 60. What I refer to as a grand narrative is an attempt to apply Lyotard's work on a micro level.

understanding of the constitutional text within the context of a universally accepted structuring, meaning-giving story about the origins and purpose of the interim and 1996 Constitutions. The Court deploys this grand narrative in an attempt to limit the appearance of its own agency in the interpretative project and to assist it in 'discovering' (what some judges seem to believe is) a relatively fixed and determinable meaning. If this grand narrative can be established in South Africa's political and legal culture as a relatively fixed, uncontested and objectively determinable starting point for understanding the constitutional text, the assumption seems to be, it could assist in solving the dilemma of objective adjudication. It could then be argued that, while many of the provisions in the constitutional text do not have one objective meaning, and while the meaning of a text (often) depends on the context in which it is being interpreted, the grand narrative provides exactly such a context (or at least the major tenets of such a context). This context thus seemingly enables lawyers, legal academics and judges to interpret the 1996 Constitution without recourse to their own social, moral and political opinions. This strategy holds the promise of allowing the Court to move away from the traditional liberal or modernist view of legal texts as holding one distinct and fixed meaning—a view that has become unsustainable in the age of constitutional interpretation—without doing away with the distinction between law and politics. The text of the Constitution may not always have one objective meaning, so it is said, but if we read it in the context of our history it will pretty much tell us what we want to know without our having to have recourse to our own personal, political or philosophical views.

The next section of this article elaborates on the Court's creation and use of a grand narrative of South African history to justify its interpretations. It then proceeds to discuss the potential problems inherent in such an approach, using examples from selected Constitutional Court decisions. Lastly, the article suggests ways in which the Court may use history in a more responsible and open-ended way in order to justify its interpretations—not in order to show that such interpretations are inevitable, but in order to open a dialogue with the legislature and other relevant stakeholders.

### III THE CONSTITUTIONAL COURT'S VIEW AND USE OF SOUTH AFRICAN HISTORY

#### **(a) The grand narrative as interpretative tool**

When the late Etienne Mureinik seized on the postamble to South Africa's 1993 Constitution to proclaim that it was a bridge from a culture of authority to a culture of justification, he could hardly have guessed how influential this idea would become in South Africa's subsequent

constitutional jurisprudence.<sup>29</sup> The idea of the interim Constitution as a link between a dark, apartheid past and a bright, human-rights-based future has been embraced by the Constitutional Court and now forms the basis for the 'grand narrative' within which the interpretation of both the interim and the 1996 Constitutions is usually situated.<sup>30</sup> It is not surprising that the Constitutional Court has seized on South Africa's past to assist it with the interpretation of its successive democratic Constitutions, as these Constitutions themselves contain several provisions signalling their historical self-consciousness.<sup>31</sup> Most notably this self-consciousness was articulated in the postamble to the interim Constitution in the passage seized on by Mureinik. It also finds specific voice in the preamble to the 1996 Constitution, which recognises the injustices of the past and honours those who 'suffered for justice and freedom in our land'.<sup>32</sup> The Constitutional Court first embraced the metaphor of the Constitution as a bridge in *S v Makwanyane*.<sup>33</sup> In the words of O'Regan J, the Court in interpreting the Constitution is required 'to look forward not backward, to recognise the evils and injustices of the past and to avoid their repetition'.<sup>34</sup> The Court has deployed the same strategy in several subsequent cases,<sup>35</sup> a fact that has not escaped the notice of traditional liberal constitutional commentators.<sup>36</sup>

29 E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 31-32. Under the heading, National Unity and Reconciliation, the interim Constitution declares: 'The Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.'

30 *Makwanyane* (note 11 above) para 156, per Ackermann J ('We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be ... justified rationally'); para 220, per Langa J (the Constitution signalled a 'dramatic change in the system of governance'); paras 262, per Mahomed J (the Constitution represents a 'decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive' and must be interpreted against this historical context); para 302, per Mokgoro J (the historical context within which the Constitution was adopted helps to explain its meaning); para 322, per O'Regan J (the values of the Constitution are 'not those that have informed our past'). *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) para 10 (quoting the postamble to the interim Constitution); *Azanian Peoples Organisation (Azapo) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) paras 2-3, per Mahomed DP (Constitution is committed to a more just, democratic order); *Shabalala v Attorney-General of the Transvaal* 1995 (12) BCLR 1593 (CC) paras 25-26; *Lawrence* (note 26 above) para 147; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94, per Kriegler J 897; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 8, per Chaskalson P (a commitment to 'transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order').

31 The terminology of 'historical self-consciousness' is borrowed from Klare (note 3 above) 155.

32 Preamble to the 1996 Constitution paras 2-3.

33 See notes 26 and 30 above.

34 Note 11 above, para 323.

35 See notes 26 and 30 above.

36 See for example De Waal et al (note 3 above) 123-24; Kentridge & Spitz (note 1 above) para 11-8, 11-25.

The notion of the Constitution as bridge has thus become a powerful metaphor in constitutional adjudication. In terms of this scheme, the text of the interim and 1996 Constitutions can be better understood with reference to their historical context. In other words, the meaning of the text can (at least partly) be discovered with reference to South Africa's recent past because the Constitutions were designed precisely to guide our society in its movement away from the past. In *Qozoleni v Minister of Law and Order*,<sup>37</sup> the Eastern Cape High Court went so far as to argue that the interim Constitution must be interpreted with reference to the 'mischief' which it seeks to remedy, and that that mischief was indeed 'the previous constitutional system' itself.<sup>38</sup> This view was endorsed by Kentridge AJ in *S v Zuma* with the proviso that this did not mean that 'all the principles which have hitherto governed our courts are to be ignored'.<sup>39</sup> Put bluntly, according to this approach one can get to grips with the meaning of the constitutional text if one refers to the specific apartheid past to identify all the wicked attitudes and practices that existed before commencement of the interim Constitution. It is thus only with reference to this shameful history that we can really understand what the text of the Constitution is trying to achieve.<sup>40</sup>

The term 'past' is used here in at least two distinct but interrelated ways. First, it refers to the actions and events associated with the implementation of apartheid and the inhuman, unequal and repressive conditions that came to exist under this system. The past, in this sense, seems to refer to South Africa's *apartheid* past and the injustice, repression, discrimination and lack of democracy that existed during this period. Second, it refers to the *manner* in which South Africa has moved away from the apartheid system towards a new constitutional state. The past in this sense refers to recent past events in which the white minority government reached a negotiated settlement with the representatives of

37 (1994) (1) BCLR 75 (E).

38 Ibid 81 (per Froneman J). The mischief rule formed part of South Africa's traditional rules of statutory interpretation. The aim of the rule was to contextualise the statutory provision to be interpreted with reference to its precautionary nature. This means that the situation prior to and during the passing of the Act could be considered to assist in the interpretation of a specific provision of that Act. See L du Plessis *The Interpretation of Statutes* (1986) 33; and GE Devenish *Interpretation of Statutes* (1992) 130. Froneman J's resort to this rule in the context of constitutional interpretation thus makes creative use of an existing rule of statutory interpretation to ensure that a more contextual approach to the interpretation of the Constitution is followed. This approach foreshadows that later adopted by the Constitutional Court and shows remarkable insight at a very early stage of constitutional interpretation in South Africa.

39 Note 17 above, para 17.

40 In this approach one finds echoes of traditional approaches to legal interpretation that purport to identify the 'intention of the legislature' in determining the meaning of the relevant text. Since if one has identified the 'mischief' that the Constitution was designed to remedy, one may more easily determine the intention of the writers of the Constitution. I suspect that the Constitutional Court's 'contextual' approach to interpretation is often little more than a revamped version of the traditional methods of legal interpretation. It is, however, beyond the scope of this article to explore this fascinating aspect any further.

the black majority to facilitate the transition from an undemocratic apartheid state to a democratic state based on the supremacy of the Constitution. The Constitutional Court uses these references to the 'past' interchangeably, depending on the context of the case before it.

### **(b) The grand narrative of South Africa's history**

The Constitutional Court has expressed its view of South Africa's past—in both senses in which it uses the term—in a number of judgments, relying heavily on the wording of the postamble to the interim Constitution. Thus, the Constitutional Court has described South Africa's past as that of a 'deeply divided society characterised by strife, conflict, untold suffering and injustice' which 'generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge'.<sup>41</sup> The past 'institutionalised and legitimised racism' and 'assaulted the human dignity of persons' on the grounds of race, colour and gender. It allowed detention without trial and repressed freedom of expression, association and movement. It limited the right to vote and to hold property based on race or colour.<sup>42</sup> This ideological conflict<sup>43</sup> was mainly caused by the system of apartheid in which race became the all-pervasive and inescapable factor on which participation by a person in all aspects of political, economic and social life hinged.<sup>44</sup> As the struggle of almost all disenfranchised and disadvantaged South Africans against the apartheid system<sup>45</sup> intensified, the minority government, backed by powerful security apparatus, became more repressive and authoritarian.<sup>46</sup> In the process, 'the legitimacy of law itself was deeply wounded' as the conflict 'traumatised the entire nation'.<sup>47</sup> 'Our history is therefore one of repression not freedom, oligarchy not democracy, apartheid and prejudice, not equality, clandestine not open government.'<sup>48</sup>

But then this history suddenly and miraculously took a turn for the better. In the eighties 'it became manifest to all' that South Africa was on

41 *First Certification Case* (note 30 above) para 5, quoting from the postamble to the interim Constitution.

42 *Makwanyane* (note 11 above) para 262, per Mahomed DP. See also *Du Plessis* (note 26 above) para 125, where Kriegler J in a dissenting judgement argues that South Africa's past is not merely one of repressive use of state power: 'It is one of persistent, institutionalised subjugation and exploitation of a voiceless and largely defenceless majority by a determined and privileged minority. The untold suffering and injustice of which the postscript speaks do not refer only to the previous years, nor only to Bantu education, group areas, security and the similar legislative tools used by the previous government.'

43 *First Certification Case* (note 30 above) paras 8 and 9.

44 *Ibid* para 7.

45 *Ibid* para 8.

46 *Ibid* para 9.

47 *Azapo* (note 30 above) para 1, per Mahomed DP.

48 *Makwanyane* (note 11 above) para 322, per O'Regan J.

a disaster course unless the conflict was reversed.<sup>49</sup> According to the Constitutional Court, a 'remarkable' thing happened and the country's political leaders 'managed to avoid a cataclysm by negotiating a largely peaceful transition from the rigidly controlled minority regime to a wholly democratic constitutional dispensation'.<sup>50</sup> This was achieved through the drafting of an interim Constitution designed to act as a bridge between the old oppressive order and the new order based on human rights and democracy.<sup>51</sup> Agreement on the content of this Constitution was made possible by a historic compromise that addressed the fears of those who 'feared engulfment by a black majority' while at the same time addressing the aspirations of those who were 'determined to eradicate apartheid once and for all'. This compromise thus enabled 'both sides' to the conflict 'to attain their basic goals without sacrificing principle'.<sup>52</sup> This was a difficult task only attained through a 'firm and generous commitment to reconciliation and national unity' and agreement 'to close the book' on certain crucial aspects of the past.<sup>53</sup>

The Court has used this grand narrative in the interpretation of the nature and scope of many of the rights contained in the bill of rights, including the right to equality and non-discrimination,<sup>54</sup> the right to dignity,<sup>55</sup> the right to privacy,<sup>56</sup> the right of access to information,<sup>57</sup> the right to freedom of religion and conscience,<sup>58</sup> the right of access to court,<sup>59</sup> the right of access to health care,<sup>60</sup> and the right of access to housing.<sup>61</sup>

Much of this version of South Africa's history and the events that led up to the adoption of the first democratic Constitution is today generally viewed as uncontroversial and nothing more than a 'common-sense'

49 *Azapo* (note 30 above) para 2.

50 *First Certification Case* (note 30 above) para 10.

51 *Ibid* para 11. See also *Azapo* (note 30 above) para 2 and Mureinik (note 29 above) 32. Mureinik, taking his cue from the postamble to the interim Constitution, argued that the said Constitution was a bridge from a culture of authority to a new culture of justification. In Mureinik's view, it was the culture of authority that made it possible for the gardeners of apartheid to cultivate 'the forest of apartheid statutes' (*ibid*).

52 *First Certification Case* (note 30 above) para 13.

53 *Azapo* (note 30 above) para 2.

54 *Hugo* (note 25 above) para 41.

55 *Dawood* (note 26 above) para 35. See also *Makwanyane* (note 11 above), para 329, per O'Regan J: 'Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.'

56 *Ferreira v Levin NO: Vryenhoek v Powell NO* 1996 (2) SA 621 (CC) para 51, per Ackermann J.

57 *Shabalala* (note 30 above) para 25-26.

58 *Lawrence* (note 26 above) para 147.

59 *Azapo* (note 30 above) para 2.

60 *Soobramoney* (note 30 above) paras 8-9.

61 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) paras 6, 22.

description of what came before and how South Africans came to be where they are today. It certainly represents the well-entrenched consensus among the political elite, the same elite that was instrumental in bringing the new order into existence.<sup>62</sup> Professional historians as well as individuals to the left and right of the political mainstream, however, have questioned the Constitutional Court's version of the nature of oppression under apartheid, as well as the nature of South Africa's transition to democracy. For example, there is a well-established view among neo-Marxist historians that segregation and apartheid resulted from class domination by capitalists, rather than from racial domination by whites.<sup>63</sup> In this view, apartheid was not (simply) a form of racial separation and oppression, 'but a means of creating a dispossessed and closely controlled labour force for white-owned enterprises'.<sup>64</sup> More radical historians have gone further and have argued that the mechanisms that facilitated racial oppression were indeed created by the system of capitalist colonialism in order to ensure the success of the capitalist, colonial project.<sup>65</sup> Other historians have pointed out the gendered nature of oppression in colonial and apartheid South Africa, arguing that the result has been the marginalisation and oppression of all women in South African society.<sup>66</sup>

Regarding the transition to democracy, historians are far from unanimous in their endorsement of the grand narrative put forward by the Constitutional Court. Under the influence of 'transition theory', some historians have expressed the view that South Africa's transition was achieved at the expense of addressing the major social questions facing the country. In this view, the transition allowed the old white elite to retain considerable power and ensured that the unequal structure of society remained largely the same as during the apartheid era.<sup>67</sup> Others have argued that the 'negotiated miracle' is a smokescreen that represents a step backward for South Africa as its foundation rests on the entrenchment of the colonial capitalist system, a system that, according to such critics, could never become a vehicle for social and economic transformation.<sup>68</sup>

62 This elite also includes many of the judges now sitting on the Constitutional Court. Arthur Chaskalson and Albie Sachs, for example, assisted the African National Congress during constitutional negotiations.

63 N Worden *The Making of Modern South Africa* 3 ed (2000) 3. See also J Pampallis *Foundations of the New South Africa* (1991) and H Jaffe *European Colonial Despotism: A History of Oppression and Resistance in South Africa* (1994).

64 E Foner "'We must forget the past": History in the New South Africa' (1995) 32 *South African Historical J* 163, 166.

65 Jaffe (note 63 above) 11.

66 P van der Spuy 'Silencing Race and Gender' (1997) 36 *South African Historical J* 256, 262; H Bradford 'Women, Gender and Colonialism: Rethinking the History of the British Cape Colony and its Frontier Zones, c 1806-70' (1996) 37 *J of African History* 351.

67 Foner (note 64 above) 167-68.

68 Jaffe (note 63 above) 227-28.

It is not only historians, of course, who question the veracity of the Constitutional Court's grand narrative of South Africa's recent past. A substantial number of South Africans, particularly right-wing individuals harbouring nostalgia for apartheid, do not view the past as one defined by repression and oligarchy. They bemoan the transition to democracy as a catastrophic tragedy and criticise the interim and 1996 Constitutions for ringing in a new and unfair dispensation. At the same time many other South Africans, particularly those from the left of the political spectrum or those harbouring strong Africanist or black consciousness views, do not view the political compromise reached during the transition as fair or just, and consider the 1996 Constitution as a stumbling block — not a vehicle — in the transformation of South Africa to a truly just society.

This diversity of views regarding South Africa's recent past does not necessarily torpedo the Constitutional Court's grand narrative strategy. This is because the Court seeks to place its strategy firmly within the boundaries of the constitutional text. As noted above, both the interim and the 1996 Constitutions possess a certain historical self-consciousness. The postamble to the interim Constitution is an explicit attempt to sanction a version of that Constitution's birth closely related to the Court's grand narrative. Supporters of the Court's reliance on history (and the judges of the Constitutional Court themselves) might therefore argue that, although different versions of South African history exist, only one version—the version described by the Court—is actually sanctioned by the text of the two Constitutions. At first blush, such an argument seems rather ingenious. It is logically consistent with the claim that the use of the grand narrative in interpreting the Constitutions allows the judges of the Court to avoid reliance on their own personal opinions, political views and philosophy. If the text of the Constitutions themselves require the Court to refer to South Africa's past, it would mean that the constitutional texts—despite their obvious gaps and the absence of one objective meaning—could be viewed as far less vague than the Court's detractors might argue. The constitutional texts may be vague and must be interpreted, yes, but the grand narrative as set out in the Constitutions closely and irrevocably binds the Court into a fairly fixed interpretation of their provisions. Although this version of South Africa's recent past is not shared by all South Africans, it is the one thrust upon any interpreter of the Constitutions by the constitutional texts themselves. It therefore *forces* the responsible judge to disregard his or her personal opinions, political views and philosophy and to interpret the Constitutions within the context of South Africa's recent history as spelt out by the constitutional texts. This view thus seems to let judges off the hook, limiting their personal responsibility for choosing a specific interpretation of the constitutional texts by providing an easily determinable context within which the task of constitutional adjudication should be conducted.



At first glance this view seems rather compelling. However, any attempt to use history in this way to avoid the politicisation of the institution of constitutional review must fail, as it would be based on a fundamentally flawed notion of the nature of history. This is not to say that historical interpretation as such has no merit. Indeed, the final section of this article attempts to rescue history for use in constitutional interpretation. Rather, the point is that history—even history presented as grand narrative and backed up by the metaphor of the Constitution as bridge—can never rescue judges from their responsibility to interpret the 1996 Constitution in accordance with a particular value system.

#### IV CRITICAL EVALUATION OF THE GRAND NARRATIVE STRATEGY OF INTERPRETATION

By situating the interpretation of the interim and 1996 Constitutions in general, and the Bills of Rights in particular, within the grand narrative related to South Africa's recent past, the Constitutional Court has acknowledged the historical self-consciousness of the Constitutions. As argued below, this strategy is not without merit and may even hold the promise of a style of constitutional interpretation that will embrace the open-ended nature of the constitutional text, thereby keeping it alive to the challenges of the future. However, this strategy also holds profound dangers for the constitutional project as it may be deployed in ways that foreclose, rather than open up, possibilities for discovering new meanings in the text demanded by changing circumstances. This is not merely a strategic quibble, but is based on an understanding of history that differs profoundly from that implicitly embraced by the Constitutional Court in its quest for the grand narrative.

##### **(a) The past, history and objectivity**

The way in which the Constitutional Court has deployed South Africa's recent history in its interpretation of the interim and 1996 Constitutions relies on a rather naïve and outdated view of the nature of history. In the past the problem of history was perceived as a problem of finding the 'truth' about events which had happened in the past in a way that was as honest, objective and neutral as possible. In this view, most of what we call history is seen as being self-evident and uncontroversial. By the middle of this century, however, South African historians began to see the inadequacy of this approach, and over the past fifty years there has been a 'historiographical revolution' in accordance with changing views about the nature of history.<sup>69</sup> Despite this, the Constitutional Court's

<sup>69</sup> See Worden (note 63 above) 2-5. At first this revolution encompassed a revision by liberal historians of the traditional historical narrative by including previously silenced voices and perspectives into the traditional liberal narrative. Later, neo-Marxist historians questioned the liberal grand narrative itself, choosing to focus on the role of colonial capitalism in the formation of oppression in South Africa. More recently, feminist and post-structuralist influences have led to a questioning of the deployment of a grand narrative of any kind, choosing instead to focus on the way in which history is constructed in South Africa.

view of history seems largely to accord with the traditional view, without any apparent anxiety about the now widely accepted idea that history is fluid and (at least to some degree) open-ended and contested.

While the traditional view of history has come to be thoroughly discredited in South African historiographical circles, this has not necessarily led to a questioning of the modes of historical production themselves. As old orthodoxies were challenged and debunked, new grand narratives were constructed to facilitate the production of a new, 'true' version of history.<sup>70</sup> Recently, the idea that historians can uncover a 'true' or 'correct' version of the past has once again come under attack, most notably by scholars influenced by post-structuralism.<sup>71</sup> These scholars have begun to fashion a new understanding of the search for historical 'truth' as illusive if not impossible, and argue that the practice of history is just as much about the present as it is about the past.<sup>72</sup> According to this view, history is nothing more than a very specific, contextually situated, version of the past. But the past is made up of an infinite number of events — of which only a fraction can ever be captured in any particular version of history. The 40 million inhabitants of South Africa, for example, take part in and experience an array of events every day of their lives. Clearly, this indeterminable number of experiences can never be accurately reflected in any one version of history. History is therefore always a construction made in the present by people living in the present about a selected number of events that took place in the past. But even these events and situations that are recaptured in the name of history cannot recover the past — all that can be recovered are specific, contextually situated, *accounts* of certain events and situations. In other words, a particular version of history is nothing more than an *interpretation* by a specific person with a specific point of view at a specific historical juncture of selected past events. History is thus a discourse about the past, but it is decidedly different from that past.<sup>73</sup> No matter how widely accepted and verifiable, history remains inevitably a personal construct, a manifestation of the narrator of that history's perspective.

70 R Greenstein 'History, Historiography and the Production of Knowledge' (1995) 32 *South African Historical J* 217-229. Greenstein argues that the post-liberal historiography in South Africa replaced colonially inspired grand narratives with grand narratives of class, nation and political emancipation.

71 Ibid 228. Greenstein notes that very little explicit discussion has taken place amongst mainstream South African historians around the potential influence of post-structuralist philosophy on historiography. For one of the few debates on this issue in South Africa, see M Vaughan 'Colonial Discourse Theory and African History, or Has Post-Modernism Passed Us By?' (1994) 20 *Social Dynamics* 1; and D Bunn 'The Insistence on Theory: Three Questions for Megan Vaughan' (1994) 20 *Social Dynamics* 24.

72 P Novick *That Noble Dream: 'The Objectivity Question' and the American Historical Profession* (1988) 1-17. On the problems of finding truth in history and of doing objective history see also J Appleby et al *Telling the Truth about History* (1994) and K Windschuttle *The Killing of History* (1996).

73 Jenkins (note 28 above) 6.

Although the infinite number of past events can never be recovered and although a specific interpretation of history is nothing more than a construct, this does not mean that all versions of the past carry or should carry the same weight. After all, there seems to be a considerable amount of consensus amongst historians about what happened in the past. They (and with them the Constitutional Court?) 'read' the past in fairly predictable ways. Thus, some discourses on history carry more weight and are considered to be 'more true' or 'better' than others. In South Africa in the year 2001 the Constitutional Court's version of our recent history carries far more weight, say, than would the version Eugene Terreblanche might be pondering on daily in his prison cell. The reason for this agreement lies in power and discourse. As Michel Foucault has argued, knowledge and power are interrelated. Foucault contended that our knowledge of the present is deeply implicated in power relations in society.<sup>74</sup> Knowledge is the *effect* of a specific regime of power. In other words, power produces knowledge. Our way of understanding the present (and the past) is not innocent of power but is produced by the specific power relations in society. At the same time, modes of knowledge (of the present or the past) themselves assist in the production of power relations in society.<sup>75</sup> The way we describe and analyse the world helps to produce the reality (the balance of power) that we live in. While power produces knowledge, power cannot be exercised without recourse to knowledge. Those with the most power within social formations distribute and legitimate 'knowledge' vis-à-vis interests as best they can.<sup>76</sup>

To illustrate this point one need only refer to the current discourse on race and racism in South Africa. The most familiar discourse on race at present is clearly not something 'natural' and inevitable that has always been around in this country's intellectual life. The fact that South Africans now have words such as 'racism' in their vocabulary that can be deployed (sometimes very effectively) to fight prejudice and oppression, is the product of changing power relations in South Africa (and, indeed, the world) in the second half of the twentieth century.<sup>77</sup> Two hundred years ago the specific power relations circulating in Western societies made it

74 M Foucault 'Nietzsche, Genealogy, History' in P Rabinow (ed) *The Foucault Reader* (1984) 76.

75 Foucault *Discipline and Punish: The Birth of the Prison* (1977) (trans Alan Sheridan, 1978) 27-28.

76 Jenkins (note 28 above) 25-26.

77 By power I do not (merely) mean political power possessed by the government or powerful stakeholders. I use power here in the Foucauldian sense, to refer to the concept, developed by Foucault between 1975 and 1977, of what he called an 'analytics of power'. These ideas were contained in three of Foucault's books: *Discipline and Punish* (note 75 above); *The History of Sexuality* (1978) (trans R Hurley, 1979); and *Power/Knowledge* (1980) (trans C Gordon, L Marshall, J Mepham & K Soper, 1980). In Foucault's view, power is not something to be held by powerful people and exercised against the weak. Power is something that circulates and produces reality as we know it. In this sense, power is the sum total of all factors that produce the reality we live in.

impossible to deploy terms such as 'racism'—it was literally impossible to think and say that a person was a racist, as power relations and the discourse produced by it had as yet not produced this possibility.<sup>78</sup> But as Western society's view about race changed, concepts such as 'racism' came to the fore to be deployed in a variety of ways. This, in turn, accelerated the change in power relations vis-à-vis race. The ability to discursively deploy concepts such as 'race' and 'racism' has surely had an effect on power relations regarding race in South Africa. A historian living two hundred years ago who wanted to write the history, say, of the early Dutch settlers at the Cape, would not have had recourse to the concepts of 'race' and/or 'racism' when interpreting the events that occurred when Jan van Riebeeck arrived. His (for the historian would inevitably have been male)<sup>79</sup> rendition of the past would have reflected the discourse or, if you will, knowledge (or absence thereof) about race available to him and his society at the end of the eighteenth century. His version would also have influenced power relations in the society he lived in by, for example, reinforcing prejudice and discrimination and notions of the white man's natural superiority to black people living in Africa at the time. It would have formed part of a particular discourse.<sup>80</sup> Because history is just as much about what is left out as what is included, such a version would obviously have differed considerably from the version put forward by a historian writing that same history at the beginning of the twenty-first century. The latter historian would have available to her powerful concepts like 'race' and 'racism' and would be writing at a time and situated within a society where the discourse of race has become extremely powerful. This would allow her to include new events and leave out others, and thus to create a new version of history. And just as the version of history put forward by the historian at the end of the eighteenth century would have had the potential to influence the way his peers understood the past and also their present, so any version of history put out by a historian in the year 2001 has the potential to influence the way we understand and see our world today. Obviously law also plays a role in the construction of this discourse.<sup>81</sup>

78 Of course this does not mean that racial prejudice was absent in such societies and that such prejudice went unremarked on. Shakespeare's *Othello* is an excellent example of the way in which racial prejudices were indeed reflected in culture. But concepts such as 'racism' were not part of the public discourse—indeed of any discourse—in Shakespeare's time and could not be deployed in the fight against such prejudice. I would contend that Shakespeare's genius is once again displayed in the fact that, despite the absence of such a discourse, he managed to elicit some sympathy for Othello in his play.

79 And he would, invariably, also have been a white man, given the power relations in the particular society.

80 His version would have differed markedly from, say, the version of a local storyteller, but the latter version would not have enjoyed the same status as the former and would therefore have been invisible (or would have 'disappeared') in the dominant discourse.

81 On law and the construction of race, see generally CA Ford 'Administering Identity: The Determination of Race in Race-Conscious Law' (1994) 84 *California LR* 1231.

An important point follows from this: history is inevitably a product of the present and reflects our understanding of the present.<sup>82</sup> The past is always being created in the light of the present.<sup>83</sup> Any rendition of the past that we call history is therefore a reflection of how we see ourselves in the present. History helps us to situate ourselves in the present and provides us with our identities.<sup>84</sup> Without a past, we have no identity to anchor us. And without a sense of our identity, it is impossible or at least extremely difficult to make a case for anything.

Any representation of the past—any history—is therefore per se an ideological construct created to make sense of how we see the world (and ourselves in it) in the present and it is thus constantly being reworked by all the players affected by power relationships in a society. We are, to some degree, prisoners of the present and can therefore never claim to create history from a neutral perspective. Both the dominated and the dominant have their versions of the past to legitimate their practices—versions that might either be included in the dominant discourse or excluded as improper.<sup>85</sup> The discourse of history is therefore profoundly contested. History *is* politics; it is a ‘field of force’, or as Jenkins puts it:

a series of ways of organising the past by and for interested parties which always comes from somewhere and for some purpose and which, in their direction, would like to carry you with them. This field of force excludes and includes, marginalizes views of the past in ways and in degrees that refract the powers of those forwarding them. If we use the term discourse we acknowledge that history is never itself, is never said or read (articulated, expressed, discoursed) innocently, but that it is always for someone. And knowing this empowers the knower and this is a good thing.<sup>86</sup>

If one sees history in this way—as something deeply implicated in ideology and politics, as the product of a constant power struggle concerning who we are and what our place in the world is or should be—one has to conclude that the use of history for any purpose is potentially problematic. Because of power relations (or, to simplify, ideology or politics) some voices from the past are silenced, marginalised or systematically excluded in historians’ accounts of the past, while others are amplified and given pride of place. When we do history we have to choose a position and thus we have to select a version of the past and a way of appropriating it that has certain material effects. Your choice will inevitably align you with some reading(s) of the past (and the present) and against others. As Jenkins explains, ‘those who claim to know what history is ... have always already carried out an act of interpretation’.<sup>87</sup>

82 As Jenkins ((note 28 above) 18), puts it: ‘We should not ask, what is history, but who is history for?’

83 AC Danto *Narration and Knowledge* (1985) 92-93, 287, 297.

84 Friedman (note 8 above) 957.

85 Jenkins (note 28 above) 17-18.

86 Ibid.

87 Jenkins (note 28 above) 70.

When one works with history one should therefore strive to read history from a position of critical intelligence, aware that any reading is already a choice that excludes and includes—even when one might not realise it. Such a sensitive reading of the past will compel one to ask how many other ‘people(s), classes, have been/are omitted from histories and why; and what might be the consequences if such omitted “groups” were central to historical accounts and the now central groups were marginalized’.<sup>88</sup> As our world changes, so might the answers we discover when posing these questions. Thus we write a history of the present.

### **(b) Consequences of this amended view of history**

If the above view of history is accepted, any attempt by the judges of the Constitutional Court to deploy their version of South Africa’s history as a device to place distance between their personal views, political opinions or philosophies and the interpretation of the constitutional text is doomed to failure. Because historical determinacy is itself impossible to attain, and because any interpretation of the past is deeply political, the use of history as a device to constrain judges seems impossible.<sup>89</sup> It is true that the interim and 1996 Constitutions contain several references to South Africa’s (recent) history and are therefore historically self-conscious, but in the light of a more critical view of history, these references can never be said to provide a bounded context within which interpretation of the constitutional text could take place without reference to the judges’ personal views, political opinions or philosophies. Although the grand narrative provided by the Court might at present be widely accepted as ‘true’ or ‘correct’, because it forms part of the dominant discourse produced by existing power relations in society, this acceptance is not inevitable or fixed, and the Court’s sanctioning of this grand narrative thus constitutes a political choice. As power relations change and the way we see ourselves in the present change, so will the ways of viewing and talking about our past change along with the dominant version of our history.<sup>90</sup> By choosing a particular version of history, by making choices of whom/what to include and whom/what to exclude, judges are therefore indeed making deeply political choices. And in so doing, they are assisting in the construction and maintenance of what it is legitimate to think of as South Africa’s history: of whom/what

<sup>88</sup> Ibid 8.

<sup>89</sup> See M Tushnet ‘Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles’ (1983) 96 *Harvard LR* 781, 784-85, 802.

<sup>90</sup> This point is a difficult one, because it might seem to suggest that the dominant historical discourse is more flexible than it really is. The point I am making is that history invariably changes as society changes. This does not mean that a dominant version of history—especially when it relates to the kind of grand narrative I have referred to—cannot become extremely powerful and can drown out other voices for a very long time. Inevitably, though, those voices (or other voices that may follow) will be heard.

must be included or excluded. The Constitutional Court's use of the grand narrative of South Africa's history can thus be seen as an attempt to replace (outdated) fictions about legal interpretation, fictions such as that the interpretation of a legal text should seek to establish the 'intention of the legislature', with a new fiction that the meaning of a legal text should be discovered with reference to the historical context in which it is read.

Supporters of the Constitutional Court's deployment of the grand narrative—this super context—might argue that this approach does constrain judges, at least to some degree. They might argue that although any version of history is potentially controversial and might become politically contentious, the grand narrative set out by the Constitutional Court is not only sanctioned by the two Constitutions but is also so widely agreed upon that it does, in practice, place some distance between the Court's judgments and the personal views, political opinions and philosophies of the judges. For all the reasons advanced in the previous section of this article, however, such a view is not sustainable with reference to the case law of the Constitutional Court itself. The problem is that no version of history, no matter how generally accepted, can escape controversy. Any version of history speaks to the present and, in constitutional interpretation, it speaks to our present understanding of the provisions of the Constitution. (At the same time, of course, any such process forms part of the net of power relations and hence helps to create and potentially even to perpetuate and reify a specific version of the Constitution and, indeed, of South Africa's history.) What judges choose to include and exclude from their version of South Africa's history will influence our understanding of what the 1996 Constitution actually means—now and in the future. The grand narrative will do no more than give the impression of constraint, or, worse, it will allow judges to fix the meaning of the constitutional text, excluding interpretations that do not cohere with their version of the founding myth. The next section discusses three decisions of the Constitutional Court in order to explore this point further.

*(i) S v Lawrence; S v Negal; S v Solberg—the big silence*

At least two distinct versions of South Africa's past emerge from the judgments handed down in *S v Lawrence*; *S v Negal*; *S v Solberg*.<sup>91</sup> Interestingly, these distinct versions seem to have had a direct bearing on the way the different judges chose to define the right to freedom of religion at issue in this case. One of the issues raised by the complainants was that the Liquor Act<sup>92</sup> violated the right to freedom of religion in s 14(1) of the interim Constitution because it prohibited grocers

<sup>91</sup> Note 26 above.

<sup>92</sup> Section 90(1) read with ss 159(a) and 163(1)(a) of the Liquor Act 27 of 1989.

authorised to sell wine and beer from selling these products on Sundays, Christmas and Good Friday. In the plurality opinion of Chaskalson P,<sup>93</sup> the right to freedom of religion was defined as encompassing the right to entertain, declare and manifest a religion of one's choice.<sup>94</sup> For Chaskalson P this meant that people could not be forced to act or to refrain from acting in a way that is contrary to their religious beliefs. In other words, he defined the scope and content of the right narrowly as a guarantee against religious coercion.<sup>95</sup> In so doing, Chaskalson P failed to mention the apartheid government's well-documented history of favouring and endorsing the Christian religion and imposing its practices on all South Africans.<sup>96</sup> Rather, he provided a history of South Africans' attitudes towards Sundays, stating that over the years Sundays have 'acquired a secular as well as a religious character' and have become a day when most South Africans take time off to rest.<sup>97</sup> Such an approach, it is submitted, is in line with the grand narrative strategy described above, ie a strategy in which the Court focuses on the particular apartheid past and not on other oppressive aspects of the past not explicitly related to the system of apartheid.

In contrast, the judgments of O'Regan and Sachs JJ provided a slightly broader definition of the religious freedom right. O'Regan J, for her part, endorsed Chaskalson P's definition, but added the requirement of fairness or equity in religious observance.<sup>98</sup> This meant, she held, that not only should the government not coerce individuals to act or refrain from acting in a way contrary to their religion, but also that the state must act even-handedly in relation to different religions. According to O'Regan J, this requirement of equity constitutes a

rejection of our history, in which Christianity was given favoured status by government in many areas of life regardless of the wide range of religions observed in our society.<sup>99</sup>

93 Three other judges, Langa DP, Ackermann and Kriegler JJ, signed Chaskalson P's opinion, which defined s 14 restrictively and found no infringement. O'Regan J's opinion provided a more expansive interpretation of s 14 and found that an infringement was present. This opinion was signed by two other judges, Goldstone and Madala JJ. Sachs J, supported by Mokgoro J, adopted an even more expansive interpretation of s 14 but found that, although the provisions of the Act did infringe on the s 14 guarantee, this was justifiable in terms of the limitation clause.

94 *Lawrence* (note 26 above) para 92, endorsing a definition of the Canadian Supreme Court in *R v Big M Drug Mart Ltd* (1985) 13 CRR 64, 97.

95 *Ibid.*

96 See O'Regan J (*ibid* para 123) and more specifically Sachs J (*ibid* paras 149-50). The closest Chaskalson P came to admitting that this history existed, was when he referred to the history of the impugned legislation, admitting that 'closed days [such as Christmas] was included into the Liquor Act for a religious purpose' (*ibid* para 86).

97 *Ibid* paras 95 and 96. Chaskalson P did not, however, remark on the possible views of South Africans about the secular character of Christmas and Good Friday.

98 *Ibid* paras 121-22.

99 *Ibid* para 123. See also the judgment of Sachs J, paras 148-52, where he provides an account of the ways in which Christian principles were endorsed by legislation and its practices often imposed on all South Africans regardless of their beliefs.



Sachs J, endorsing a similarly broad definition of the right to freedom of religion, explicitly elaborated on this history of state bias in favour of Christianity, mentioning numerous examples of how the apartheid state favoured the Christian religion, required observance of certain aspects of the Christian religion, and marginalised communities which adhered to minority religions like Hinduism and Islam.<sup>100</sup> Even more tellingly, Sachs J went on to link the religious marginalisation of the followers of non-Christian faiths in the past with racial discrimination, social exclusion and political disempowerment.<sup>101</sup>

Thus, any endorsement by the State today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation.<sup>102</sup>

In the result, O'Regan and Sachs JJ both found that the provisions of the Liquor Act violated the right to freedom of religion in s 14(1).

The difference between the approach adopted by Chaskalson P and that of these two judges can be explained by their different views on the role of religious oppression in apartheid South Africa. As we have seen, Chaskalson P completely ignored this aspect of South Africa's apartheid past and thus came to a narrow definition of freedom of religion. How should one interpret this silence? First, one could argue that Chaskalson P (inadvertently?) reneged on his previous endorsement of a contextual, historically attuned interpretation of the interim Constitution; or, alternatively, that there is no room in his version of the grand narrative for the stories of those small and marginalised groups and communities which suffered in the past, not because of racism and sexism, but because of other policies and practices of the deeply undemocratic, socially conservative apartheid state. This latter possibility is of particular interest because it would be in line with the proposition put forward in the previous section of this article that history is about the present just as much as it is about the past. If one's version of history is determined by one's view of the present, then the relative unimportance of religion in the political discourse of post-apartheid South Africa might give some indication of why Chaskalson P chose to exclude that aspect of apartheid history from his version. At the same time O'Regan and Sachs JJ seem to suggest that the grand narrative of South Africa's history should concern itself not only with the suffering experienced directly as a result of apartheid, but also with other kinds of prejudice and marginalisation that were prevalent in apartheid South Africa. Whereas one judge stuck to the grand narrative of South Africa's past as an apartheid-inspired event — a narrative that was, as I have attempted to show, developed in previous judgments, the others revisited that grand narrative and discovered its

100 Ibid paras 149-52.

101 Ibid para 152.

102 Ibid.

silence regarding religious minorities. The former judgment, I would argue, has the effect of reinforcing the status quo, while the latter two judgments attempt to challenge it.

(ii) *Didcott J's decision in De Lange v Smuts NO*—frozen in history

In *De Lange v Smuts NO*,<sup>103</sup> the Constitutional Court was asked to consider the constitutionality of s 66(3) of the Insolvency Act 24 of 1936 (the Insolvency Act). This section empowers the officer presiding at a meeting of creditors to commit a recalcitrant witness to prison. The presiding officer may be the Master of the High Court, an officer in the public service or a magistrate.<sup>104</sup> The constitutional question raised was whether the impugned provision violated the right to freedom and security of the person in s 12 of the 1996 Constitution.<sup>105</sup> The case evidently posed complex and philosophically difficult questions about the scope and nature of this right since no less than five judgments were delivered.<sup>106</sup> The most pertinent aspect for the Court to consider was the exact scope and content of the prohibition contained in s 12(1)(b) of the 1996 Constitution that everyone has a right 'not to be detained without trial'.<sup>107</sup> Does this mean that only a court of law should be allowed to detain a person, or may a judicial officer with a degree of institutional independence, such as a magistrate, also legitimately commit an individual to prison? The various judges all grappled with the difficult question of how and when it would be constitutionally permissible to allow for a curtailment of an individual's freedom when such curtailment was effected outside the bounds of the criminal justice system. Some judges found that s 66(3) was unconstitutional in so far as it allowed the Master or an officer in the public service to preside at such a meeting, but not in so far as it allowed a magistrate to do so.<sup>108</sup> Other judges were of

103 1998 (3) SA 785 (CC).

104 Section 64 of the Insolvency Act.

105 The relevant part of the section reads as follows:

12. (1) Everyone has the right to freedom and security of the person, which includes the right
  - (a) not to be deprived of freedom arbitrarily or without just cause;
  - (b) not to be detained without trial;
  - (c) to be free from all forms of violence from either public or private sources;
  - (d) not to be tortured in any way; and
  - (e) not to be treated or punished in a cruel, inhuman or degrading way.

106 By Ackermann, Didcott, Mokgoro, O'Regan and Sachs JJ. It is perhaps not irrelevant that two earlier decisions of the Court based on s 11 of the 1993 Constitution — the predecessor to s 12 — provoked similar discord. In *Ferreira v Levin NO* (note 56 above) five judgments were delivered, with Ackermann J's extensive philosophical musings taking up 92 pages in the law report. In *Bernstein v Von Wielligh Bester NO* 1996 (2) SA 751 (CC), three judgments were delivered. On Ackermann J's judgment in *Ferreira*, see generally I Currie 'Judicial Avoidance' (1999) 15 SAJHR 138, 150-55.

107 *De Lange* (note 103 above) para 43, where Ackermann J stated: 'This question, though simple, raises profound issues concerning the nature of the constitutional State and the separation of powers . . .'

108 See the judgment of Ackermann J, in which Chaskalson P, Langa DP and Madala J concurred. Sachs J delivered a separate concurring judgment.

the opinion that s 66(3) was unconstitutional in its entirety,<sup>109</sup> while Didcott J found the provision constitutional in its entirety.<sup>110</sup>

Although the two majority judgments referred to South Africa's apartheid history in their arguments to justify their specific interpretation of s 12,<sup>111</sup> these references formed part of an often complex and theoretically multi-layered approach. It is therefore beyond the scope of this article to analyse these judgments in detail. Instead, I wish to focus on the minority judgment of Didcott J, because his interpretation of s 12(1)(b) purports to rely entirely on the grand narrative of South Africa's apartheid past. According to Didcott J, the meaning of the term 'detained without trial' cannot be viewed 'apart from our ugly history of political repression'.

For detention without trial was a powerful instrument designed to suppress resistance to the programmes and policies of the former government. The process was an arbitrary one, set in motion by the police alone on grounds of their own, controlled throughout by them, and hidden from the scrutiny of the Courts, to which scant recourse could be had. And it was marked by sudden and secret arrests, indefinite incarceration, isolation from families, friends and lawyers, and protracted interrogations, accompanied often by violence. Detentions without trial of that nature, detentions which might be disfigured by those or comparable features, were surely the sort that the framers of the Constitution had in mind when they wrote s 12(1)(b).

A committal to prison of the kind now in question bears no resemblance to a detention with such evil characteristics. It is not a legacy of apartheid and has nothing to do with either that era or the supposed security of the State. Nor does it serve any other political purpose. Indeed, the State has no interest in the proceedings but to oil the statutory machinery constructed for the proper administration of insolvent estates.<sup>112</sup>

This approach contrasts sharply with the approach taken by the other judges. For example, although Ackermann J explicitly linked his understanding of s 12 to 'our constitutional history' prior to the introduction of the interim Constitution,<sup>113</sup> this did not preclude him from engaging with the complex issues raised by the case in an open and transparent way. He situated his decision not merely within the context of South Africa's apartheid past as grand narrative, but also within a view of the constitutional state and the separation of powers based firmly on the idea (or some would say ideology) of the rule of law. In apartheid South Africa, he argued, the rule of law had been severely eroded in relation to personal freedom by a government 'based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of restraint'.<sup>114</sup> It is against the background of this more complex and explicitly value-laden version of South Africa's history that Ackermann J interprets s 12(1)(b) of the 1996 Constitution to find that a fair trial at

109 See the separate judgments of O'Regan and Mokgoro JJ.

110 Kriegler J concurred in the judgment of Didcott J.

111 *De Lange* (note 103 above) paras 26, 42; para 60, per Ackermann J; para 173, per Sachs J.

112 *Ibid* paras 115-16.

113 *Ibid* para 43.

114 *Ibid* para 47.

least requires a hearing presided over or conducted by a judicial officer in the court structure established by that Constitution.<sup>115</sup>

The judgment of Didcott J, on the other hand, relies on the concept of the Constitution as bridge, linked to a narrow version of the grand narrative of South Africa's past. The argument seems to progress as follows. To understand what s 12(1)(b) means, we need to look at South Africa's recent past to discover what mischief this section sought to cure. In the past — that is, before the advent of constitutionalism — individuals were detained without trial by the evil apartheid government. Clearly this was the mischief to be cured. Section 12(1)(b) must therefore be given the limited meaning of prohibiting detention without trial by the state apparatus for political ends. This approach has, perhaps, its simplicity and clarity to commend it, but nevertheless illustrates at least two problems with the historical approach to constitutional interpretation when linked to the grand narrative strategy.

First, such an approach allows the judge to avoid any engagement with the 'profound issues concerning the nature of the constitutional state and the separation of powers' presented by the case.<sup>116</sup> It allows him to present his interpretation of the relevant section of the Constitution as inevitable, merely stating what the framers of the Constitution intended. Thus, Didcott J does not explain his view on the nature of the constitutional state and the separation of powers, nor the personal views and values on which his decision is predicated. This allows him to avoid responsibility for the choices he makes in coming to his decision, instead hiding behind a rhetorically powerful version of the past to legitimise his interpretation.

Second, this approach illustrates one of the most problematic aspects of the deployment of the grand narrative in constitutional interpretation, namely that it may have the effect of creating a very narrow or restrictive meaning for a provision in the Constitution that will be very difficult to change as the grand narrative takes a firm hold in constitutional jurisprudence. In this case, the text of s 12(1)(b) clearly provided the interpreter with a wide array of possible interpretations, some more expansive and protective of the rights of individuals whose freedom is being curtailed and others more narrow and restrictive of such rights. A judge confronted with such a scenario has to make choices based on his or her personal views, political opinions and philosophy and must then proceed to justify them in a rhetorically convincing way. Although many of the provisions of the 1996 Constitution might at present yield a fairly expansive meaning when interpreted with reference to the grand narrative, this will not necessarily continue to be the case in future. As South African society changes and as conditions change, new threats to

115 Ibid para 58.

116 Ibid para 43, per Ackermann J.

freedom, liberty and equality will require courts to find new understandings of the Bill of Rights, something that will be difficult to do in the face of the grand narrative strategy. Given South Africa's recent past, and given the ever-changing power relations in society, the grand narrative is a powerful rhetorical tool that could be used by politically conservative or executive-minded judges to silence those who fail to see justice only or exclusively as rectifying the 'mischief' of apartheid. The grand narrative approach may thus potentially hamper the use of the Bill of Rights to protect newly emerging marginalised or oppressed people. It may also potentially thwart attempts by progressive judges to rise to the challenge of protecting individuals against new, perhaps even as yet unimagined, and unimaginable, threats to freedom and equality. The deployment of the grand narrative strategy to restrict our understanding of the scope of the rights in the Bill of Rights must therefore be profoundly troubling to those who believe that the Constitution in general and the Bill of Rights in particular must remain a living and growing document.

(iii) *Pretoria City Council v Walker* — same past, different outcome

There may be subtle differences among the various Constitutional Court judges about the events leading up to the birth of South Africa's new democratic order, but even where the judges seem to agree on a specific version of this story, they are not precluded from interpreting the Bill of Rights in different ways. In *Pretoria City Council v Walker*<sup>117</sup> the Court was asked to decide whether the different approaches to the levying and collection of service charges in 'formerly white' and 'formerly black' residential areas in Pretoria constituted discrimination in terms of s 8 of the interim Constitution (right to equality).

The equivalent clause in the 1996 Constitution, s 9,<sup>118</sup> contains a general equality provision<sup>119</sup> as well as a distinct prohibition on discrimination on any ground, including 16 grounds listed in section 9(3). The concepts of equality and non-discrimination employed in the 1996 Constitution are extremely complex and open-ended. As every statute or regulation employs classifications of one kind or another, it must be clear that not all classifications will fall foul of s 9. The Court has thus acknowledged that it has to identify 'criteria that separate legitimate differentiation from differentiation that ... is unequal or discriminatory

117 1998 (2) SA 363 (CC).

118 Section 9 is similar, but not identical to, s 8 of the interim Constitution. The Constitutional Court, however, has held (in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 15) that 'the equality jurisprudence and analysis developed by this Court in relation to s 8 of the interim Constitution is applicable equally to s 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions.'

119 Section 9(1).

“in the constitutional sense”<sup>120</sup> But because there are no ‘universally accepted bright lines for determining whether or not an equality or non-discrimination right has been breached’,<sup>121</sup> the Court must accept that the equality provision is the product of South Africa’s unique history and must be interpreted within the context of this history.<sup>122</sup> In fact, s 9(2) makes it clear that the concept of equality and non-discrimination must be understood with reference to the past as it expressly provides for measures designated to protect or advance persons or categories of persons disadvantaged by unfair discrimination. The Court has thus referred to South Africa’s recent history, particularly the systematic discrimination suffered by black South Africans under apartheid, to justify its interpretation of the equality provision.<sup>123</sup> In essence, the Court claimed that its interpretation of the equality provision was based on South Africa’s unique history.<sup>124</sup>

In *Pretoria City Council v Walker* the majority judgment of Langa DP and the dissenting judgment of Sachs J agreed that the difference in treatment regarding the levying of rates and service charges did not constitute unfair discrimination. The point of disagreement between the judgments centred on the claim that the selective enforcement policy of the Council, which led it to take legal action against residents living in ‘formerly white’ suburbs (but not against residents in ‘formerly black’ suburbs), constituted unfair discrimination. It must be noted that both the majority and the minority judgments explicitly refer to South Africa’s apartheid past and seem to agree on the aspects of this past relevant to this case.<sup>125</sup> The various references to the past sprinkled throughout the two judgments closely adhere to aspects of the grand narrative enunciated by the Court elsewhere. The different views in this case, therefore, are not the result of different views about the past; there are no silences or gaps in the two versions of history that explain why the judges came to different conclusions. Rather, the different conclusions are

120 *Prinsloo* (note 25 above) para 17. See also the Court’s reference to P Hogg *Constitutional Law of Canada* 3 ed (1992) para 52.6(b).

121 *Prinsloo* (note 25 above) para 18.

122 *Brink* (note 26 above) para 39.

123 *Ibid* para 40. See also *Prinsloo* (note 25 above) para 20.

124 In *Prinsloo* (note 25 above) para 31, the Court said the following: ‘Given the history of this country we are of the view that “discrimination” has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. . . . Although one thinks in the first instance of discrimination on grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender.’

125 *Walker* (note 117 above) para 17 (‘the disparities and imbalances inherent in our society which are the result of policies of the past’); para 46, per Langa DP (‘Differentiation made on the basis of race . . . was a source of grave assaults on the dignity of black people in particular’); para 107, per Sachs J (‘In the light of our history of institutionalised racism’).

attributable to the fundamentally different personal, political and philosophical views of the judges. For Langa DP and the majority, the respondents in this case belong to a racial minority that, in a political sense, must be regarded as vulnerable. The Court therefore has a clear duty to come to the assistance of such a group as long as this will not endorse and protect privilege and perpetuate inequality and disadvantage.<sup>126</sup> It was within this context that the majority was hesitant to endorse the selective enforcement of the law which was the result, not of a well thought-out policy to advance the interests of people previously disadvantaged by unfair discrimination, but of an arbitrary and piecemeal approach.<sup>127</sup> Although the majority seem to be guided by the grand narrative in their interpretation, their views on the importance of protecting vulnerable groups (as they see them), and the emphasis on the principle of legality, force them to a different conclusion from that reached in the dissenting judgment.

The grand narrative also guides the judgment of Sachs J, yet he arrives at a diametrically opposed view from the majority. Sachs J agrees that people who have been advantaged in the past can indeed be vulnerable and are by no means excluded from the protection of the equality provision of the interim Constitution.<sup>128</sup> However, on the facts, he finds that the group in *casu* was not in a vulnerable position at all. This is, first, because there was no evidence that they had been underrepresented in the council.<sup>129</sup> Second, the respondent lived in an affluent suburb and had the benefit of regular municipal services at all material times. All that was required of him was to pay for services as he had always been doing.<sup>130</sup> Since, on the facts, there was no sign of any identifiable disabilities, burdens or inconveniences placed on him through the selective enforcement of the law, there was nothing to complain about in the constitutional sense. The selective enforcement did not even reach him.<sup>131</sup>

One might well speculate why Langa DP and the majority interpreted the facts differently from Sachs J or why Sachs J did not care to reflect on the issue of legality raised by the majority, but in the end what his judgment clearly illustrates is the inability of the grand narrative strategy to produce identical results and hence to act as an effective constraint on judges.

### **(c) History, the master narrative and pipe dreams**

From the foregoing it is clear that a resort to the grand narrative of South African history in constitutional interpretation will never solve any of the

126 Ibid para 48.

127 Ibid paras 76-77.

128 Ibid para 123.

129 Ibid para 123.

130 Ibid para 103.

131 Ibid para 113.

difficulties faced by judges when called upon to decide what the provisions of the constitutional text actually mean. There are two important and insurmountable obstacles here.

First, the deployment of a structuring story to help the Court give meaning to the constitutional text might be problematic because of the limited and limiting nature of that story. As we have seen, any version of history is merely an interpretation of a select number of events by an individual from a specific personal, political and historical perspective at a given historical moment. Such a version will always have gaps, not only because we might deliberately or inadvertently choose to exclude certain events and groups from our version of history, but also because our knowledge of the world, of who we are and how we live, is limited. This limited knowledge will invariably lead to gaps and silences in any version of history that might only be filled in once it becomes possible to think and know what at the moment remains unthinkable and unknowable—a process that will never end. Deploying a grand narrative in conjunction with the metaphor of the Constitution as bridge will therefore probably lead to the entrenchment of one version of history, a version that could be deployed to limit the possibilities for discovering new meanings in the constitutional text. Such a scenario would be particularly troubling in cases where the Court finds itself unable or unwilling to reflect on the entrenched version of this grand narrative and hence to discover new forms of oppression and marginalisation. This path might lead towards a degree of certainty about the meaning of the constitutional text, but it will not allow the Constitution to grow along with the nation and along with South Africans' increasing knowledge of who they are and how they fit into the world. It will also potentially shut out more progressive interpretations of the Bill of Rights by placing a potentially powerful tool in the hands of executive-minded or socially conservative judges.<sup>132</sup>

Second, although the adoption of a grand narrative might bring a degree of certainty to constitutional interpretation, it can never constrain judges completely. Even within the confines of such a limited narrative, there will always be room for different interpretations and hence for different views of what the Constitution should mean. Any judge will therefore still have to choose between the 'official version' of South African history and a version that can rhetorically be reconciled with the official version but that is somehow to be distinguished from it. In making such a choice, a judge will have no alternative but to rely on her

132 For example, the way in which judges view the role of capitalism in apartheid South Africa and in the new democratic South Africa has the potential to have a profound influence on the interpretation of the Bill of Rights in the 1996 Constitution. As South Africa changes, progressive judges might want to rethink the benign role attributed to capitalism under apartheid, but will be unable to do so if the grand narrative—silent on this issue—becomes so entrenched and accepted that no challenge to it is possible.



own personal views, political opinions and philosophy. A decision to follow the official version is just as much a choice—albeit a choice that seems to skirt taking responsibility for the chosen interpretation—as a decision to attempt a slight reinterpretation of the grand narrative. However, reliance on the grand narrative strategy will to some extent allow judges to create the impression of objectivity and neutrality and will, therefore, to some degree shield their decisions from public scrutiny.

## V RECLAIMING HISTORY

As I have attempted to indicate, the deployment of the grand narrative strategy by the Constitutional Court in its interpretation of the interim and 1996 Constitutions is at least partly an attempt to find objective or objectively definable criteria to govern the interpretation of open-ended provisions. Any such attempts are doomed to failure for the reasons given. This does not mean, however, that history itself may not be a valuable tool in the hands of a judge who wishes to provide an ethically responsible interpretation of the 1996 Constitution. The 1996 Constitution's historical self-consciousness provides the Constitutional Court—or, for that matter, other courts called upon to interpret it—with a powerful tool that could be used to ensure that the 1996 Constitution remains a living and relevant document. As Karl Klare has argued, the historical self-consciousness of the 1996 Constitution can be read as a rejection of the 'fiction that the political community is founded at a single magic moment' that freezes its meaning forever.<sup>133</sup> Viewed thus, the 1996 Constitution is a transformative document, one that requires continual reinvention to make sense of the changing world and country South Africans live in—a contingent product of human agency.

This goal can be achieved by embracing history as an important instrument in the interpretation of the constitutional text: not the history of the master narrative, the history that purports to refer to a fixed and completely knowable past that will help us discover the 'true' and never-changing meaning of the constitutional text, but rather a history that is sensitive to the insights of post structuralism. This is a history continuously produced through a self-conscious and reflexive methodology—one that calls into question the conditions that produce specific versions of South Africa's past.<sup>134</sup> Such an approach will avoid the reification of these specific versions—no matter how convincing and rhetorically satisfying they might seem to be at present. Indeed, this approach will seek to question and destabilise certainties about the past and in this way open up gaps and uncertainties that will allow new histories to be made. Such a methodology would allow a dialogue with the past to ensure that we produce a history alive to the present or, in

<sup>133</sup> Klare (note 3 above) 155.

<sup>134</sup> See Jenkins (note 28 above) 69.

Foucault's words, a history of the present.<sup>135</sup> Thus, the constitutional text will remain open and alive to the demands of the time. As South Africans discover new ways of living and new ways of looking at their world, they will discover new versions of their past. They will also discover silences and exclusions in their history hitherto unknown. In interpreting the 1996 Constitution with reference to such new discoveries, they will extend the reach of its protection.<sup>136</sup>

Such an open-ended approach will not necessarily undermine the legitimacy of the constitutional project. On the contrary, rooting the interpretation of the 1996 Constitution in a history of the present will satisfy the deep-seated need we have to root ourselves in an (imagined) past. As Jenkins has pointed out, 'people(s) in the present need antecedents to locate themselves now and to legitimate their ongoing and future ways of living . . . . Thus people(s) literally feel the need to root themselves today and tomorrow in their [imagined] yesterdays.'<sup>137</sup> That is why minority groups or oppressed groups seek their own yesterdays. Finding this past enables people(s) to discover explanations for the way they are at present and how they plan to behave in future. History is therefore extremely important for human existence, as it is a 'way in which people(s) create, in part, their identities.'<sup>138</sup> History also has a legitimating function and as such is rooted in real needs and power.<sup>139</sup> By approaching South Africa's history in this way the Constitutional Court would acknowledge the importance of history for any understanding of who South Africans are, both as individuals and as a 'nation'. Such an approach has the potential to cloak the decisions of the Court in the powerful mantle of history, without closing off the meaning of the constitutional text for generations to come. What is required is not a rigid, exclusive and nationalistic version of history, but the fragile, self-reflexive and somewhat ironic history of the present.

135 M Foucault 'Critical Theory/Intellectual History' in LD Krizman (ed) *Politics, Philosophy, Culture: Interviews and Other Writings, 1977-1984* (1990) (trans A Sheridan, 1988) 39.

136 To some extent the Constitutional Court embarked on such an endeavour in *National Coalition* (note 118 above) when it focused on the history of gay men, lesbians and bisexuals and (re)interpreted South Africa's history to include in it the often silenced and hidden stories of marginalisation and oppression suffered by such groups. Although this silence is perpetuated in the Court's version of the master narrative—oppression in terms of race and gender seems to be the focus of this master narrative—in this case the Court reflected on history more broadly and produced a version that allowed for the rehabilitation of such groups.

137 Jenkins (note 28 above) 18.

138 Ibid 19.

139 Ibid.