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Judicial review and religious values

ABSTRACT

This article discusses the inherent propensity of a Constitutional State to degenerate into a legalistic society where jurisprudence exercises the same kind of power that religion exercised in medieval theocratic societies. The first part of the article identifies such developments in South African Constitutional jurisprudence. Examples are cited where Courts have imposed a liberal understanding of rights on society, imposed values on South African society that are alien to most South Africans, and relegated religion to the private sphere of life. In the second part of the article some suggestions are made for ways in which this can be prevented. The article concludes that measures must be introduced to restrain the power of courts. Conversely it is important that Christian theologians and philosophers translate Christian values to the public realm in a juridical applicable way.

1. INTRODUCTION

The idea of a Constitutional State (rechtstaat) is often hailed as one of the most advanced expressions of democracy, because the legislative process is bound to constitutional measures and external checks and balances that safeguard basic human rights which protect minorities against majoritarian tyranny. This stands opposed to other forms of democracy such as the Westminster System where courts can test the procedures of constitutional legislative processes, but the laws of Parliament itself cannot be scrutinised.

The concept of a Constitutional State indicates a standard according to which the balance, fairness and effectiveness of a certain state dispensation can be measured. It does not indicate a form of government, but rather a way in which a country's legal system works. A Constitutional State recognises constitutional government and the rule of law. This means that the government's responsibilities are determined and delineated by legal prescriptions. At the same time the private and public liberties and the rights of each individual is protected, such as freedom of speech and the freedom of movement and association without state interference. A Constitutional State, therefore, facilitates the political participation of individuals and civil authorities in a differentiated society. It also provides formal guarantees for the realisation of the principle of constitutional government. This includes the separation of powers, legal protection against mal-administration, independent jurisprudence and administration in accordance with the written laws of Parliament (cf Le Roux 1994:56). A constitutional state is in its nature value driven: it is intended to promote and preserve order, justice, social balance, and advancement, none of which can be understood in a value-free context (Venter, 2000:191).

It is precisely because of the safeguards build into a system of constitutional government that the post-Apartheid South African society opted for such a system during pre-election negotiations. The preamble to the South African Interim-Constitution stated that a need existed to create a democratic Constitutional State. The 1996-Constitution did not explicitly refer to South Africa as a constitutional state, though the principles of a constitutional state are

contained in the provisions of the Constitution. A key feature of the 1996-Constitution is the specific provision that the Constitution is the supreme law of the Republic and that any law or conduct inconsistent with it is invalid (Klug, 2006:267).

Unfortunately, the South African experience has shown that the supposed strength of a constitutional state (Rechstaat) - the supremacy of law – also has a serious downside. Because the Constitutional Court is seen as the final authoritative interpreter of the Constitution, a Constitutional State can easily degenerate into a legalistic society where jurisprudence becomes an all-embracing, all-pervading power that does not only regulate juridical relationships, but also imposes a value framework on society by promoting certain values at the expense of others and enforcing its views even if it contradicts the values of the majority of people in a country. In a legalistic society definitions, constitutional requirements, court decisions etcetera determines the structure and value framework of public discourse, while religious and other extraneous ethical systems are not considered as relevant for public ethical discourse.

The central theoretical argument of this article is that a Constitutional State has an inherent propensity to degenerate into a legalistic society because of the amount of power that constitutional jurisprudence possesses within such a system. This excessive power to enforce values upon society is partly due to the standard notion of human rights as ethical principles that invoke not only universal but also absolute principles (cf Gordon, 1998:699).

The first part of the article will illustrate this by referring to disturbing developments in the South African Constitutional State. The second part of the article will focus on ethical issues that needs to be addressed in order to prevent a constitutional democracy from degenerating into a legalistic society where jurisprudence becomes an all embracing power.

2. LEGALISTIC ELEMENTS IN THE SOUTH AFRICAN CONSTITUTIONAL DEMOCRACY

Why can jurisprudence so easily become an all embracing and pervading power within a constitutional state ? The simple answer is that a constitution only states broad abstract principles. In contrast to statutes, constitutions tend to be very general and flexible. Most constitutions also contain indeterminacies and inconsistencies that need to be reconciled or resolved. The positivistic ideal of judicial discretion based upon objective legal criteria alone is therefore impossible to realise in practise. Legal disputes force Courts to give content to the broad principles in a constitution, to create an interpretative framework of principles within which a constitution can be understood and applied, to balance different values, and to supplement a constitution by resolving indeterminacies. This interpretation process is by no means an objective exercise of applying juridical principles. It is a meaning creating activity that is profoundly influenced by values and worldviews, often the worldviews of judges themselves. Rautenbach and Malherbe (1996:6) rightly state that there are no pure legal criteria to determine what is fair. What is fair depends on religious, ethical, moral, social, economic and political convictions. Particular rules of law and a legal system as such are never neutral or value free. Every normative theory of constitutional rights presupposes some sort of theory of values, principles or purposes (cf Alexy, 2002:380). The idealistic notion that a Constitution articulates the will of a nation and reflects the dominant values of a society is only true in a very general sense. Judicial authorities, not the people, give normative content to constitutional values.

South African constitutional jurisprudence is especially value-driven in nature, since the South African Constitution expressively incorporates abstract values and principles. Section 1 for example declares that the State is founded upon certain basic values including human dignity, equality, human rights, the rule of law and democracy, while section 39 requires that

the Court interpret constitutional rights so as to promote the values that underlie an open and democratic society based on human dignity, equality and freedom (cf Goldsworthy, 2006:334, 1996-Constitution: section 1, 39). The rights entrenched in the Bill of rights are consequently interpreted and provided with content in the light of these foundational values. Due to the fact that the Constitution is based on abstract norms of political morality of which the content can change according to the judges' impressions of contemporary values or their personal values, South African Constitutional justices possess a remarkable power to reshape the Constitution. Judge Kentridge identified this danger when he warned that if the language of the text were ignored in favour of a general resort to values, the result would be "divination rather than interpretation" (*State v Zuma*, par 2). Since then the Court has repeatedly emphasized the importance of the ordinary and plain meaning of the text (cf *State v Makwanyane*, par 349). Unfortunately the Court succumbed to the temptation to create law instead of applying law in later decisions. Goldsworthy (2006:335), for instance, mentions that some of the Court's decisions seem strongly normativist.

2.1 Imposing an alien concept of rights on society

The first disturbing tendency in South African constitutional jurisprudence is that it enforces a certain concept of rights on society without taking into account the traditions, beliefs and values of the society.

The Court recognized from the start the importance of developing a cohesive set of ideals indigenous to South Africa. In *State v Makwanyane* Judge Mokgoro stated that constitutional interpretation frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done with reference to a system of values extraneous to the constitutional text itself (par 302). Judge Sachs supported Mokgoro's view by saying that the Court needs to take account of values of all sectors of South African society in developing jurisprudence (par 361). Though the Court theoretically recognized the importance of creating an inclusive framework for constitutional interpretation, the Court never succeeded in developing such a framework.

South African constitutionalism is overwhelmingly influenced by a liberal Enlightenment morality. The 1991 census found that 70% of the South African population professed to have religious affiliations, 94.5 percent of whom are Christian, and that only 1.2 % of the population stated that they have no religious inclination (cf Du Plessis, 1996:442).

Yet since its inception in 1993 the Court opted for the secular Western understanding of constitutional rights. Instead of contextualizing and adapting the concept of human rights to the South African context, the Courts uncritically adopted the Western concept of human rights and enforced it on an African society. This was clearly illustrated in Constitutional Court pronouncements on the nature of rights. The South African Constitutional Court defined rights as being the "inalienable entitlements of all people" (*State v Zuma*, par 50). In *State v Makwanyane* (par 389) Judge Sachs stated that constitutionalism is a product of the age of Enlightenment. It bases itself on the twin propositions that all persons have certain inherent rights that came with their humanity, and that no one has a God-given right to rule over others. Judge Ackermann in a similar vein remarked in *State v Dodo* (par 3) that "human beings are creatures with inherent and infinite worth, they ought to be treated as ends in themselves, never merely as means to an end". The liberal- ideological presuppositions of the abovementioned remarks are clear: Human rights are founded in the autonomous nature of the human being and therefore invokes absolute ethical principles that cannot be questioned (cf Gordon, 1998:699).

This liberal concept of rights had a profound influence on the morality of South African

society, because, amongst other things, a new view of freedom was formulated. The Court defined freedom in accordance with the liberal concept of rights as the autonomous individual's inherent right to self determination. Freedom was defined negatively as "freedom from the constraint of others".

The implications of this negative definition of freedom were clearly illustrated in *Curtis v Minister of Safety and Security and others.* In this case the constitutionality of Act 37 of 1967, that prohibited the possession of indecent photographic matter, was scrutinised. The Court found that no person can be prohibited to possess sexually explicit or pornographic material, though the right to possess pornographic material could be limited in certain instances. According to Judge Mokgoro the prohibition of the possession of pornographic material would jeopardize the right to free speech that is a *sine qua non* for every person's right to realise her or his full potential as a human being, free of the imposition of heteronymous power (par 26).

The Court clearly argues that courts cannot regulate people's private morality. The liberal tradition in general is of the opinion that the right to privacy entails that there are areas where decisions are too closely fused to judgment to permit them to be matters within the collective life of a communal democracy (cf Dworkin, 1990:31). This is correct in as far as private behaviour has no effect upon the collective. However, making something a private matter can be a convenient way of removing collective responsibility for it. In the case of pornography, private behaviour has consequences for the broader society. In South Africa five million people are HIV positive. The Aids pandemic has demonstrated that the liberal distinction between private morality and public mores are artificial. Private morality has significant implications for the social well being of society. Though the pronouncement does not enforce sexual immorality on any person, it has significant implications for the moral well being of a society. The decision to legalise pornography led to an explosion of the sex industry and the distribution of immoral sexual material in a society where sexual immorality can be deadly. The fact is that because of its liberal concept of rights, the Court came to a different conclusion on pornography than would have been the case if Christian and African value systems which emphasize moral responsibility towards the group, had been consulted.

2.2 Relegating religious values to the private sphere

The second disturbing element in South African constitutional jurisprudence is the relegation of religious values to the private sphere of life through dichotomist distinctions between the sacred realm and the secular realm. In *Christian Lawyers Association of South Africa v Minister of Health and others* the constitutionality of the *Choice on Termination of Pregnancy Act 72 of 1996* came under scrutiny in the Transvaal High Court. Judge McGreath stated that the issue is a purely legal one, and that it cannot be decided on any religious or philosophical grounds (par. 1438). Thereby he not only denounced religion as an irrational social force that should be relegated to the private sphere of life, but also denied that all law is based upon philosophical convictions. The underlying assumption is that the law is somehow infallible because it is based on objective rational criteria that are devoid of philosophical presuppositions. The Court referred to internationally accepted norms, but discarded the religious and philosophical objections that sectors of the South African society might have against abortion, and also discarded the fact that a large segment of South African society is religious.

In *Minister of Home Affairs and another v Fourie* the Constitutional Court found that the common law definition of marriage is inconsistent with the constitutional provisions on equality and human dignity and invalid to the extent that it does not allow same-sex couples to enjoy marital status. The Court eventually ordered that the Legislature must redefine the institution

of marriage so as to include same-sex couples. The judgment was characterized by strong anti-religious sentiments. According to Judge Sachs courts would be placed in an intolerable position if they were called upon to construe religious texts. The religious sentiments of some cannot be employed as a guide to the constitutional rights of others. Judge Sachs stated that it is unacceptable for a court to make references to religious texts, and that religions themselves are divided on the issue of same-sex marriages. Courts therefore cannot take religious views on this matter into account (par 48). This is a surprisingly sweeping and unsubstantiated statement that is designed by Judge Sachs to serve his argument. The vast majority of religious people in South Africa strongly reject same-sex marriages.

The problem with the abovementioned dichotomist distinction between the sacred and the secular is the notion that discourse in the secular domain is based on reasonable and verifiable discourse, while discourse in the sacred realm is not. However, all forms of law and ethics are predetermined by a basic worldview that, if not grounded in theology, at least has a theological dimension. Reason cannot be severed from the worldview in which it is grounded. Every worldview is grounded in a specific anthropology and cosmology, in an ethical determination as to what man intends to be and what he regards as the purpose of his existence. Law cannot function in an ethical vacuum, and cannot escape philosophical presuppositions. Secular discourse is therefore no less religious than other ethical discourses. However, resolving conflicts between different liberties when it comes to issues such as same-sex marriage, the legitimacy of affirmative action and the range of free speech raised by pornography, cannot be done without referring to our comprehensive moral commitments. Bellamy (2006:xx) rightly states that it is impossible for judges to resolve conflicts between basic liberties in the abovementioned cases in a 'pure' manner simply on the basis of constitutional law. Rather judges will end up drawing on their own more comprehensive and often partial background values, opinions, prejudices and interests. The result of the dichotomist and narrow-minded approach of Judge McGreath and the South African Constitutional Court was that alien secular values were imposed upon a non-secular society.

2.3 Imposing values on society

A third sign of a legal juristocracy is the notion that the Court has the right to impose certain values on society as is clearly illustrated in *Minister of Home Affairs versus Fourie*. In the *Fourie* case the Court states very strongly that same-sex relationships must be seen as an acceptable and normal realities. Same-sex couples have the same capacity to express love in permanent relationships, to adopt children and constitute a family, than heterosexual couples (par. 53). The denial of marriage rights to same-sex couples is a denial of their humanity and constitutes a "crass, blunt, cruel and serious invasion of their dignity" (par. 54). The Court proceeds to state that there is no such thing as a fixed normative structure: The reference to 'men and women' in the marriage act is descriptive of an assumed reality, rather than prescriptive of a normative structure for all time. Legal conceptions of the family must change as social practices and traditions change (par. 57). The implication is that religiously founded views that same-sex relationships contradicts the normative structure of reality and therefore are immoral, is unfair. The court's repetitive notion that the South African society is more inclined to accept same-sex marriages and that legal conceptions of the family must therefore change is an unsubstantiated assumption that the Court makes in order to serve its own views. What prove does the Court have for this assumption?

The Court even goes as far as to state that it is the task of the legislature to promote equality by creating a greater degree of public acceptance for same-sex marriages (par. 139).

Not only must the interests of same-sex couples be protected, but it must be normalized in society. There are certainly no constitutional grounds for such a statement. Article 9(3) of the Constitution simply states that people must not be discriminated against on the basis of their sexual orientation. It is couched in negative language that protects people against illegitimate forms of intervention in their private lives. The Constitution does not recognize a positive right to marry anywhere. The Constitutional Court, however, makes a negative right suddenly a positive enforceable right. This is a clear sign of the arrival of a legalism that imposes values upon a society.

The danger of legalism lies therein that it enforces a worldview on society in the name of the law, rationality and objectivity, and thereby suppresses other ethical systems. People will be tempted to employ unreasonable methods, such as violent attacks on abortion clinics, instead of challenging it through legitimate channels, because they cannot dissent from the Court' view in cases such as same sex marriage, abortion and pornography that have vast moral implications. This could happen especially when an unrepresentative position is foisted on them (cf Bellamy, 2006: xxi).

3. PREVENTING LEGALISM

3.1 Restraining the power of courts

Judicial review is needed to avoid the tyranny of the majority, and constraints on judges are needed to avoid the tyranny of judges (Tushnet, 1980:1061). The inevitable influence of values on judicial review and the unavoidable normative function of courts do not mean that judicial review should be allowed to degenerate into normativism, intuitionism and subjectivism. If this happens the supremacy of law will be based on the elitist notion that courts are more likely to produce right answers than majoritarian democracy. Rather, judicial procedures need to have some intrinsic quality that restrains judicial activism, safeguards the authority of judicial review and makes judgements universally more acceptable.

Some kind of constitutional structure that the majority cannot change is certainly a prerequisite to democracy. There must be embedded constitutional rules stipulating, for instance, that a majority cannot abolish future elections or disenfranchise a minority (Dworkin, 1995:3). However the question is: Which rules are essential to constructing democracy and protecting the common good? Fabre (2000:79) rightly states that someone has a right if and only if an interest that he has is important enough to put a duty on some other person. A right has to have a correlating moral responsibility.

We can therefore ask whether it is essential to democracy and human dignity that women are allowed to have abortions, that individuals have access to pornography and that homosexuals are allowed to marry. The abovementioned issues hardly seem to function on the level of political justice. It certainly does not qualify as rights or interests that can demand a correlating duty. It also requires that other rights be recognised that are to the detriment of society, such as same-sex couples being able to adopt children that will lead to the existence of new forms of unconventional families, the right to sell and spread pornography for personal use and the right of women to take decisions on abortion without the input of the father. Embedding rights such as these that are not evidently connected to political justice, in a constitution that cannot be amended by the majority, is a constraint on the majority's legitimate right to govern. Constitutional constraint is not necessary to ensure that homosexuals or women who want abortions have the same political power as other people. If they lose in a political battle it is because their views are too unpopular and their numbers are too few to win in a fair electoral

fight. Gerstmann (2004:156), who is an advocate of the legalisation of same-sex marriages, concedes that there is something disturbing about an unaccountable institution that creates rights that are not explicitly found in the constitutional text when there is strong popular sentiment against it.

Judicial restraint should, in my view, begin by avoiding the enshrinement of rights in a constitution that are not essential for human dignity, the common good and political justice. Constitutions and courts ought to leave moral issues that do not function on the level of political justice to the legislature and the people themselves as far as possible. This includes secular moral arguments that falls outside the domain of the political (Rawls 1997:780). Judges are not moral philosophers, and are ill equipped to adjudicate on moral issues.

Judicial constraint can also be achieved by stipulating interpretative procedures in the constitutional text itself that courts must follow when adjudicating a case. In this way the value judgments of the court can be subjected to rational control through the structuring of legal argumentation. Such stipulations could include setting out comprehensive standards for what a fundamental right is that will guide judicial discretion; forcing courts to take the founders of the constitution's intention into consideration as far as is reasonably possible; expecting courts to do semantic and genetic analysis of the constitutional text and to read the words of provisions in the light of their purposes without allowing those purposes to supplement or override the words, or to have independent normative force; forcing courts to cite precedents for or against a decision and expecting them to bear the burden of argumentation when they decide to depart from precedent; and lastly to expect from courts to consult foreign jurisprudence[1]. It is important that these interpretative constraints must be embedded in the constitution itself in such a way that it is not subject to manipulation by judges.

3.2 Religion and constitutional jurisprudence

No one expects from the courts to construe religious texts or to accept the metaphysical premises of the various religions. What religious people can expect is that courts take the ethical values of religious people seriously, because religion is not only an exercise in spirituality, but also finds practical application in worldviews. In fact, courts in general show no regard for the sophistication of religious worldviews. In Christianity, for instance, very sophisticated Christian philosophical systems were developed such as the Neo-Calvinist system. It provides a systematic scientific view of reality and the nature of society. These philosophical systems contain many rationally acceptable perspectives that are juridically and universally applicable. Yet, courts seem to identify religion with unscientific and unverifiable irrational views, thereby showing a serious misconception of the nature and range of religion.

At the same time is important that Christians must continue to develop a philosophical anthropology and view of society that translate Christian principles into language that can be applied in the public realm. The Christian religion must, however, understand that is has to function within modern societies that are characterised by a multitude of incompatible and irreconcilable doctrines that are religious, philosophical and moral in nature. The question is: How can a plurality of incompatible but reasonable doctrines coexist within the framework of democratic institutions? John Rawls's notion of an overlapping consensus is important here. According to Rawls (1993:134) a well-ordered society needs an overlapping consensus that allows for a plurality of reasonable, though opposing, comprehensive doctrines, each with its own conceptions of the good. A well-ordered society can be stable when a political concept of

1 Section 39(1) of the South African Constitution expects from courts and other forums to consider international law.

justice can be offered that every reasonable doctrine can endorse from their own philosophical point of view. Such an overlapping consensus is possible, because the history of religion and philosophy shows that there are many reasonable ways in which the wider realm of values can be understood so as to be either congruent with, or supportive of, or else not in conflict with, the values of the political domain as specified by a political conception of justice.

The effect of an overlapping consensus, according to Rawls (1997:804), will be that it quiets divisiveness and encourages social stability, because it does not trespass upon religious beliefs and injunctions insofar as these are consistent with the essential constitutional liberties. The Rawlian notion of an overlapping consensus is sharply different from and reject Enlightenment Liberalism that historically attacked orthodox Christianity. It works with the assumption that there need to be no war between democracy and religion (Rawls, 1997:804). Christian theology and philosophy can function within an overlapping consensus if it translates Christian principles to the public realm in a juridical applicable way without imposing metaphysical notions on society. If Christian theology and philosophy does not succeed in translating Christian principles to the public realm that can function within an overlapping consensus, it will risk being marginalised even further.

3.3 Minoritarian interests versus majoritarian interests

In *State v Makwanyane* the Court repeatedly discounted the significance of public opinion to its role. Judge Chaskalson stated that if public opinion were decisive there would be no need for constitutional adjudication (par 88). Judge Didcott argued that certain decisions are the duty of the Court and not representative institutions (par 188). The Court also stated that concerns over counter-majoritarianism are overshadowed by the "evolving standards of civilization" (par 199, 201). These comments of the court are true in the sense that constitutional democracy demands that the rights of minorities must be protected against majoritarian intrusions, because minorities often cannot protect their rights adequately through the democratic process. Certain rights are so fundamental to human dignity that it must be placed beyond the reach of majorities.

Yet these remarks are also problematical. Firstly, there is a big difference between protecting minoritarian interests, and imposing the values of minorities on the broader society as is the case in *Minister of Home Affairs v Fourie*. There is also a difference between public opinion that are fluctuating in nature and public values that are part of the historic and traditional composition of a society. Secondly, the Court's notion of the "evolving standards of civilization" is very vague and abstract. The question is: What qualifies the Court to decide which values conform to the "evolving standards of civilization", and which not? It seems as if the Court ascribes itself the duty to do moral re-evalution and guide the nation in moral growth. This might, however, lead to the Court imposing values out of keeping with the morals of the present and future society. The legalization of same sex marriages, for instance, is hardly a practice that can be defined as universally accepted by other national jurisdictions and a sign of the 'evolving standards of civilization'.

It is imperative that a constitution must be acceptable in a sufficient degree for the citizenry. After all, authority in a constitutional state is characterized by democratic legitimization to which the minority also acquiesces (Venter, 2000:57). Venter (2000:58) rightly states that the force outside the Constitution that ensures its primacy is its practical legitimacy. Habermas (1995:270, cf Michelman 1996:9) also emphasizes that the idea of the rule of law must set in motion a spiralling self-application of law. If the public values of the majority of people in a society are ignored by Courts or even questioned as is the case in *Minister of Home Affairs vs Fourie*, the broader society might become alienated from the constitution. It is therefore essential that

courts develop inclusive frameworks of interpretation that resonate with the values and beliefs of all sectors of society, since public identification and acceptance will enable the growth of a sustainable constitutionalism.

The Courts thus far have not succeeded in doing this. The Court has made no attempts to consult existing well-developed legal Christian perspectives. Although the African concept of *ubuntu* was introduced into South African constitutional law by the post-amble to the Interim-Constitution and was discussed in the *Makwanyane* case, it was not developed further in subsequent cases, nor included in the final Constitution. The Court's effort to connect the concept of *ubuntu*, which was recognised in the Interim-Constitution, to constitutionalism has failed. According to Klug (2006:316) there was little commonality on either the specific content given by the Judges to *ubuntu* or the sources to which the Court may look in building its jurisprudence around the principles of *ubuntu* (Klug, 2006:317). The Courts have also avoided the difficult task of distinguishing those aspects of customary law that should be retained as part of the country's unique heritage, and those aspects which must be rejected as in violation of the promise new constitutional order (Klug, 2006:317). Judge Langa, Deputy President of the South African Constitutional Court, rightly expressed his concern in an interview about the individual focus of 'western law' and the neglect of indigenous values. He is worried that the majority of South Africans, who understand being part of a community as producing both rights and duties, will become alienated from rights unless interpretation gives a collective communal meaning to rights (Klug, 2000:216).

4 CONCLUSION

A value driven approach to constitutional jurisprudence creates difficult problems: It gives judges a lot of power to reshape the Constitution, it threatens to bring normativism, intuitionism and subjectivism into jurisprudence, it inevitably leads to the imposition of values on society that might be not resonate with society and it expects from judges to be moral philosophers – a task for which they are ill equipped. Though constitutional jurisprudence cannot escape the value driven nature of legal adjudication, the South African Constitution expressly incorporate abstract values in the constitutional text, and thereby encourages normativistic constitutional interpretation. The effect of this has been that the Constitutional Court has exceeded its proper boundaries and that secular concepts of rights and values that are in many respects alien to the South African society were enforced upon South Africans. The result is that religion is relegated to the private sphere of life.

If a constitutional crisis is to be avoided, courts will have to make an attempt to create an inclusive interpretative framework that resonate with the values of all sectors of society. This includes taking the legal perspectives developed with religions such as Christianity seriously. At the same time the Christian theologians and philosophers have to attempt to translate Christian principles to the public realm so that it can function within the overlapping consensus that is needed in a pluralist modern society.

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KEY WORDS
Constitutional jurisprudence
Constitutional Court
Theocracy
Constitutional State

TREFWOORDE
Grondwetlike regspraak
Grondwetlike Hof
Teokrasie
Regstaat

Kontakbesonderhede

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