**Northwestern University School of Law** 

**Comparative Constitutional Law** 

**Research Paper** 

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"When the Supreme Court declares unconstitutional a legislative act....it thwarts the will of the people of the here and now; it exercises control, not on behalf of the

prevailing majority, but against it"

A. Bickel

The Counter-majoritarian Difficulty & the South African Constitutional Court

Introduction

The South African Constitutional Court (hereafter "the Constitutional Court")

occupies an enormously difficult position in society. It bears the burden of being the

guardian of the Constitution, which entrenches socio-economic rights but also

admonishes the judiciary to protect democratic values and the principle of separation

of powers. This paper explores the "counter-majoritarian difficulty" at a unique

juncture in South Africa's constitutional history, a democratic nation only slightly

older than 10 years.

Part I briefly looks at the establishment of a constitutional democracy in South Africa. Part II broadly surveys scholarly views on the counter-majoritarian difficulty. Part III scrutinizes a few of the judgments of the Constitutional Court in which it faced counter-majoritariarhurdles. Albeit that other rulings impact on the debate, as would a discussion on role of the Constitutional Court in the development of the common law, 1 this does not prevent an exploration about the judicial philosophy that has flowed through some of the more significant decisions of the Constitutional Court. In Part IV the following issues are explored: (a) the extent of the countermajoritarian difficulty in South Africa (b) the stance of the judiciary toward the counter-majoritarian difficulty (c) the methods used or available to the judiciary to minimize potential conflict with the political branches. Part V concludes that although the Constitutional Court has gone to great pains to position itself as an unbiased mediator it has demonstrated unwarranted deference to Parliament. In addition, the Court must pay greater attention to developing a unified view of its institutional competence. However, it is beyond doubt that constitutionalism remains fundamental to building a stable and effective democracy in South Africa.

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<sup>1</sup> In Carmichele v Minister of Safety and Security [2001] JOL 8613 (CC) and Du Plessis v De Klerk 1996(3) SA 850 (CC) the Court considered the development of the common law in accordance with the Constitution. The reform of the common law via the horizontal application of the Constitution may have implications for the counter-majoritarian role of the Court. For debate see M. Osborne and C Sprigman "Behold: Angry Native Becomes Post Modernist Prophet of Judicial Messiah" 118 S. African L. J. 693 2001 and D. Davis Democracy and Deliberation (Juta) 1999

### Part I: Establishment of South Africa as a Constitutional Democracy

In 1948 the Nationalist Party (NP) rose to power, through an electoral system that enfranchised only whites. The NP developed the theory of separate development, which came to be known as "apartheid", a rigid and cruel legal system created for the purpose of "economic and social segregation". The apartheid government was characterized by a strong centralized government operating under the banner of parliamentary sovereignty and domination by the executive. The system of apartheid was composed of a vast network of legislation, regulations and policies, buttressed by draconian security legislation that extinguished all avenues of political dissent. With few exceptions, the judiciary acted as "accomplices" to the apartheid project by deferring to the executive on a regular basis. Not surprisingly, judicial legitimacy is a fundamental issue in a new democratic South Africa.

During the late 1980's unofficial contact began between Afrikaner elites and the African National Congress (ANC) in exile. In 1989, the ANC pledged itself to democracy and constitutionalism with its draft Constitutional Guidelines for a new South Africa,<sup>5</sup> which reflected popular aspirations for political and social transformation. At the same time, the NP also began drafting a bill of rights for a

<sup>2</sup> Ex parte Chairperson of Constitutional Assembly in re. Certification of the Constitution 1996(4) SA744 (CC)

<sup>3</sup> Until the introduction of the Interim Constitution in April 1994, there was no constitutional review of legislation, which could only be reviewed on limited technical and procedural grounds, such as legality

<sup>4</sup> M. Matua "Hope and Despair for a New South Africa" 10 Harv. Hum Rts J 63 1997 104

<sup>5</sup> ANC Constitutional Guidelines (reprinted in 21 Colum. Hum Rts L. Rev 235 App A)

new constitutional dispensation. Its purpose however was the protection of elite minority interests.<sup>6</sup>

In February 1990, the NP inaugurated the transition to democracy by lifting the ban on the ANC and other liberation organizations. Although the NP and other ruling elites were prepared to surrender power to the majority they had resolved to play a major role in designing the normative structure and principles regulating the future government.<sup>7</sup>

Representatives of the NP, the ANC and other political groupings began meeting in a multi-party forum, the Convention for a Democratic South Africa (CODESA) during 1991. CODESA fashioned a compromise two stage process: the establishment of an interim government of national unity under an interim constitution which would govern until the final Constitution could be finalized through a democratically elected legislature.

The NP ensured they would have say in the final Constitution by persuading the CODESA delegates to agree to principles<sup>8</sup> with which the final Constitution would have to comply. Although the final Constitution would be drafted and adopted by a democratically elected constitutional assembly, it would only become law after an independent constitutional court had certified that it complied with the agreed

6 E. Van Huysteen "In Search of Hercules: Democracy, Constitutionalism and the South African Constitutional Court" [1996] Advanced Social Research, Univ of Witwatersrand, Seminar Paper No. 410 7 Ex parte Chairperson of Constitutional Assembly in re. Certification of the Constitution 1996(4) SA744

(CC) at par 12

<sup>8</sup> These "Constitutional Principles" constituted a "solemn pact" incorporated into the Interim Constitution, see Schedule IV

Constitutional Principles. The NP, with a firm hold on power when the Constitutional Principles were negotiated, ensured that its primary concerns were safeguarded in the final Constitution.

The Interim Constitution<sup>9</sup> negotiated primarily through CODESA, was adopted by the white minority government and came into effect on April 27 1994, the date of the first democratic elections. The Interim Constitution had been negotiated by unelected delegates, with no popular mandate. The Interim Constitution required that the final Constitution be adopted by a two-thirds majority of the members of the elected Constitutional Assembly.<sup>10</sup>

Following the 1994 elections, the newly established Constitutional Assembly, in which the ANC held a majority of seats, set about drafting the final Constitution. At face value, the drafting process was characterized by massive public participation<sup>11</sup> accomplished through educational communications via internet, radio, television and newspaper, by soliciting written comments as well as verbal submissions through a constitutional radio talk line. A nationwide survey concluded that the media campaign conducted by the Constitutional Assembly reached more than 73 percent of all adult South Africans and more than 2 million submissions were made to the

<sup>9</sup> Constitution of the Republic of South Africa Act No. 200 of 1993

<sup>10</sup> Section 73(5), read with sections 73(6) and 73(8) provides that in the absence of a two-third vote of approval by the Constitutional Assembly (CA), the draft Constitution could become law if it received 50% approval in the CA and 60% percent support in a national referendum. However, the negotiating parties believed that failure to reach a negotiated settlement would undermine investor confidence and be more 'costly' for the country (see C. Murray "Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court" in S. Ellman & P. Andrews (Eds) *Post-Apartheid Constitutions* Witwatersrand Univ. Press (2001) at 118)

<sup>11</sup> Although the process remained at all times under the control of the negotiating parties

Constitutional Assembly<sup>12</sup>. However, the drafting of the final Constitution was "formally constrained by a complex set of Constitutional Principles" such as the recognition and protection of "collective rights of self-determination".<sup>13</sup> Accordingly, the compromises battered out in CODESA, including entrenchment of property rights and "collective rights of self-determination" made their way into the final Constitution. It is not surprising therefore that the transition to democracy is characterized by some as founded upon "pacts between adversarial elites"<sup>14</sup>.

# Part II: Nature of the Counter - Majoritarian Difficulty

Before discussing the counter-majoritarian difficulty, a few brief comments are necessary. Firstly, legislatures do not inevitably neglect minority concerns. It may be that the "insecurity of elective office discourages non-judicial officials from ignoring minority interests." Furthermore, the judiciary is not obstinately countermajoritarian, especially since judicial appointments are never completely insulated from political control and influence<sup>16</sup>. Views held by judges are often fashioned by

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<sup>12</sup> See Murray, Post Apartheid Constitutions, note 10 at 107

<sup>13</sup> C Rickard "The Certification of the Constitution of South Africa" in Post Apartheid Constitutions op cit note 10 at 226

<sup>14</sup> Adler and Webster in "Challenging Transition Theory: The Labor Movement, Radical Reform and Transition to Democracy in South Africa" cited by E. Van Huysteen in Seminar Paper 410, Advanced Social Research (Univ of Witwatersrand) at 7

<sup>15</sup> K. Whittington "Extra-Judicial Constitutional Interpretation: Three Objections and Responses" 80 NC Law Rev 773 (2001-2002) at 835

<sup>16</sup> Judges in the United States may hold life time tenure but frequent judicial vacancies give current majorities the gap to influence the make up of the bench (*Id* at 832).

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the same changes in public mood and judges experience the same shifts in political

and social circumstances that impact on public officials.<sup>17</sup>

The counter-majoritarian difficulty describes the friction between majoritarian

politics and constitutional restraints, which are more stabilizing in nature. Many have

struggled to rationalize why a nation, founded on the consent of the governed, would

bind itself to a constitution, enforced by an unaccountable judiciary, when those

constitutional pre-commitments are intentionally organized such that they are difficult

to alter. 18 However, it is said that the real difficulty with constitutional judicial

review is not so much that judges are unelected but that their decisions are final save

for an unwieldy constitutional amendment process.<sup>19</sup> From this standpoint,

constitutionalism is portrayed as being fundamentally anti-democratic.

Justifying the counter-majoritarian role of constitutional court is not an easy task.

It is sometimes said that the nature of constitutional review is justified because of the

institutional position of the judiciary, which places it uniquely in a position where it

has access "to different information, perspective, and incentives". However, this

argument is unpersuasive, it cannot escape being fundamentally paternalistic.

Others justify the role of constitutional courts on the basis that legislatures, from

time to time, are only too happy for the judiciary to step in and take contentious

17 Note 15, 832

18 Stephen Holmes "Precommitment and the Paradox of Democracy" in Elster and Slagstad (Eds)

Constitutionalism and Democracy (1998) at 195

19 H Wellington Foreword to A. Bickel's The Least Dangerous Branch (1962) page xii

20 Note 15, 833

issues off their hands. However, by itself, this does not explain away the counter majoritarian difficulty.

It has also been said that a judicial ruling, which may at first glance appear to be counter majoritarian, may reflect a policy choice that the majority would itself adopt if the issue were considered with calmer heads. An independent judiciary is therefore required to "protect [the people] from the violence of their own passions".

Constitutionalism finds its best justification in the adoption of a broader notion of democracy. This is entirely justified since democracy is "not simply the rule of the people but always the rule of the people within certain predetermined channels, according to certain prearranged procedures". <sup>22</sup> Accordingly, majority rule without any constitutional restraints may therefore be anti-democratic.

The judiciary, empowered by the Constitution, plays a vital role in upholding the system of checks and balances necessary for the effective functioning of any democracy. In a new democracy, in which "the structural design is yet to be tested" judicial monitoring of separation of powers is essential.<sup>23</sup>

21 Note 15, 829

<sup>22</sup> Note 18, 231 It is important to bear in mind that representative democracy is far from perfect and not always "representative" given problems such as low polls, the influence of electoral systems on election outcomes, the impact of lobbyists, corporate campaign funding, self interest, careerism and racism. See K Whittington "An Indespensable Feature? Constitutionalism and Judicial Review" 6 NYU J. Legis. & Pub. Pol'y 21 2002-2003 at 22-27, 30-32

<sup>23</sup> S. Ellman "Separation of Powers in Post Apartheid South Africa" 8 Am. U. J. Int'l L & Pol'y 455 (1992-1993) at 481

Parliament cannot easily regulate itself and control its own powers. As was stated in *Marbury v Madison* "[i]f Congress could define its powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means', 24.

History teaches us that it is popular government and the "people themselves" that may endanger and threaten rights and notions of justice<sup>25</sup>. Religious, racial or ethnic minorities inevitably require protection from will of the majority. The very nature of democracy lends itself to an imbalance in the ability of minorities to partake in policy debates. It is not infrequent that the majority will be inclined to make decisions that disproportionately affect minority communities.<sup>26</sup>

## Part III: Jurisprudence of the Constitutional Court

Not long after its establishment, the death penalty, an enormously controversial issue, presented itself to the Constitutional Court. As the Court stated, the question arose in the context of violent crime that had "reached alarming proportions" and "posed a threat to the transition to democracy". In *State v Makwanyane*<sup>27</sup> the Court was required to determine the constitutionality of section 277(1) (a) of the Criminal Procedure Act, 1977, which permitted the imposition of the death penalty for murder. At the time, the Interim Constitution was applicable.

<sup>24</sup> Marbury v Madison 5 U.S. (1 Cranch) 137, 177 (1803)

<sup>25</sup> Note 15, 829

<sup>26</sup> See Whittington, note 22, at 31 32

<sup>27</sup> CCT3/94

The Constitutional Court was acutely aware the Interim Constitution<sup>28</sup> had not been democratically adopted and it was cognizant of the difficulties which could arise from an unpopular ruling. In this context, the Constitutional Court can hardly be blamed for its suggestion that the legislature (in which the ANC, an abolitionist party, held a majority of seats at that time) ought to have dealt with the issue.

The South African government argued that the death penalty was cruel, inhuman and degrading punishment and that it should be declared unconstitutional. However, the Attorney General, an independent state institution, argued that the death penalty was necessary and did not constitute cruel, inhuman or degrading treatment.<sup>29</sup> The Constitutional Court unanimously found that the statutory provisions which permitted the imposition of the death penalty were unconstitutional.

The main judgment was written by the President of the Constitutional Court, Chaskalson P, however each of the other judges wrote separate judgments emphasizing different aspects of the debate. In this way, the Court demonstrated its awareness of the importance of the issue and the difficult role played by the judiciary in the death penalty debate.

In the main judgment, Chaskalson P accepted that the majority of South Africans believed that the death penalty ought to be imposed in extreme cases of murder. He accepted that public opinion may hold some degree of relevance but stated that, by

<sup>28</sup> The Court noted in par 17 of its judgment that the Interim Constitution was "the product of negotiation conducted at the Multi-Party Negotiation Process. The final draft adopted by the Multi Party Negotiation Process was, with few changes, adopted by Parliament".

<sup>29</sup> Such treatment was prohibited by section 11(2) of the Interim Constitution

itself, public opinion is no replacement for the duty vested in the judiciary to interpret the Constitution and to uphold its provisions without fear or favor. As he explained, "if public opinion were to be decisive there would be no need for constitutional adjudication"<sup>30</sup>. Chaskalson P pointed out that the negotiating parties at CODESA had debated the death penalty but reached no resolution and this amounted was a delegation of power to the judiciary. He contended that the use of a referendum to determine the issue would not protect the weakest and most marginalized who "cannot protect their rights adequately through the democratic process"<sup>31</sup>.

Ackerman J stressed that "If the death penalty is to be abolished...society is entitled to the assurance that the state will protect it from further harm from the convicted unreformed recidivist killer or rapist" In his judgment, Didcott, J emphasized that while "great attention" must be paid to public opinion, it should be borne in mind that public opinion was based on the fallacious assumption that the death penalty had a significant deterrent effect. Kentridge AJ declared that the Constitutional Court does not determine the constitutionality of the death penalty because it can "claim a superior wisdom" but because the framers of the Interim Constitution imposed a duty on the Constitutional Court. Kentridge AJ maintains that if public opinion on the death penalty were clear it could not ignored but in the present case public opinion had not been expressed in a referendum and was therefore unclear. Mahomed DJP declared that while public opinion played a significant role in the determination of policy and political issues, the judicial process was different and

<sup>30</sup> Par 88

<sup>31</sup> Par 88

<sup>32</sup> Par 171

the Court could not avoid the Constitution makers' intention to leave the issue to the judiciary.

The approach taken was anything but consistent. Although some members of the Constitutional Court implicitly recognized<sup>33</sup> the issue as a political one best addressed by the legislature, others simply declared that the matter was purely judicial.<sup>34</sup>

*Makwanyane* provoked an outcry. It was criticized by opposition leaders as out of touch with public opinion and there were calls for a referendum<sup>35</sup>. However, despite some hesitation, ANC leaders stood firm and did not rework the final Constitution to permit the reintroduction of the death penalty.

The Constitutional Court was then faced with the daunting task of determining if the final Constitution, which had been drafted by the first elected Constitutional Assembly in the nation and which had been approved of by more than two thirds of those elected representatives, should become law<sup>36</sup>. Indeed, *Ex parte Chairperson of* 

33 Recognition that the matter was inherently political is evident from the Court's suggestions that public opinion was relevant.

<sup>34</sup> Kriegler J stated that the incumbents of the Court "are judges, not sages, their discipline is the law, not ethics or philosophy and certainly not politics. In par 89, the Court quotes West Virginia State Board of Education v Barnette "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles…"

<sup>35</sup> H Klug "Participation in the Design: Constitution-making in South Africa" (in Post-Apartheid Constitutions note 10) at 148, 149

<sup>36</sup> The task of the Court was to weigh the Interim Constitution against the Constitutional Principles adopted as part of the Interim Constitution.

Constitutional Assembly in re. Certification of the Constitution<sup>37</sup> had no precedent of its kind anywhere in the world.

Interestingly, although the constitutional text which was submitted for certification had been passed unanimously in the Constitutional Assembly,<sup>38</sup> several of the parties who had voted for the text, opposed its certification. Commentators therefore suggest that a positive vote in the Constitutional Assembly did not indicate approval of the constitutional text, but only that the text be sent to the Constitutional Court for consideration.<sup>39</sup>

Certification placed the Constitutional Court in quandary. Refusal to certify could have placed the democratic transition in jeopardy while certification could have undermined the credibility of the Constitutional Court, if the Constitution ultimately proved to be unpopular<sup>40</sup>.

The Constitutional Court found that the constitutional text overwhelmingly complied with the Constitutional Principles, but refused certification because of those instances where the text did not comply with the Constitutional Principles<sup>41</sup>. The

37 1996 (4) SA 744 (CC)

<sup>38</sup> On 8 May 1996, 87 % of the Constitutional Assembly voted in favor of the new constitutional text.

<sup>39</sup> Note 13, 229

<sup>40</sup> Note 13, 228

<sup>41</sup> The Court found certain provisions were inconsistent with the Constitutional Principles including (a) the failure to grant individual employers the right to collective bargaining (b) various provisions which shielded legislation from constitutional review (c) the independence and impartiality of the Public Protector and Auditor General were not sufficiently protected (d) the independence and impartiality of the Public Service Commission (PSC) were not adequately safeguarded (e) the powers and functions of the PSC was not specified (f) there was no framework for structures of local government (g) no formal legislative procedures were required of local government (g) provincial government and categories of local

Constitutional Court was quick to point out that none of the reasons for its refusal of certification should constitute significant obstacles to the transition process.

The Constitutional Court stated, a little superficially, that it did not exercise a political role by determining the certification of the Constitution. In its words "...the Court has a judicial and not a political mandate."<sup>42</sup> To bolster this argument and justify its role, the Constitutional Court stated that it "...had no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs"<sup>43</sup>.

The judgment, divided into two parts<sup>44</sup>, reflects a tension in the Constitutional Court's attitude toward the issues of counter-majoritarianism<sup>45</sup>. Initially, there is recognition of the difficulty of exercising judicial review over a Constitution that had been drafted by democratically elected representatives. The Constitutional Court terms this "the political price which had to be paid for the introduction of democracy into South Africa."<sup>46</sup> Deference to the democratic process is evident from the Court's interpretive stance, an "interpretative policy that was designed to facilitate

government were not allocated appropriate fiscal powers (h) the powers and functions of provinces were less than and inferior to that provided for in the Interim Constitution.

<sup>42</sup> Par 27

<sup>43</sup> Id

<sup>44</sup> The first part, Chapters I and II, which deals with the role of the Court in the certification process and the second part, Chapters III to IV which deals with whether each of the constitutional provisions comply with the Constitutional Principles.

<sup>45</sup> D Davis and M. Chaskalson "Constitutionalism, the Rule of Law, and the First Certification Judgment: Ex Parte the Chairperson of the Constitutional Assembly in Re: Certification of the Constitution of the Republic of South Africa" 13 S Afr. J on Hum. Rts. 430 1997 at 432 46 *Id* 433

certification<sup>3,47</sup>. Where the constitutional text was capable of more than one reasonable meaning, one inconsistent and one consistent with the Constitutional Principles, the Court determined that it would adopt the interpretation consistent with the Constitutional Principles. However, the Constitutional Court later adopts a strong defense of constitutionalism. This approach ultimately won the day and outweighed its earlier deferential approach. The Constitutional Court held that the constitutional text did not comply with the Constitutional Principles in nine respects, although only two of those instances were clearly necessary.<sup>48</sup> The Constitutional Court rejected any provisions of the draft constitution that "interfered or threatened to interfere with institutions and mechanisms designed to protect constitutionalism and the rule of law".

Commentators suggest that the Constitutional Court's approach reflected its institutional confidence<sup>50</sup> as well as the general public acceptance of its role in the certification process.<sup>51</sup> The role of the judiciary was indeed linked to the extent of freedom accorded to it by the public as some scholars sugge st is the norm.<sup>52</sup> Although certification is a striking instance of the counter-majoritarian dilemma, it arose directly from a compromise between political actors, several of whom held a significant degree of public confidence.

<sup>47</sup> Id 434

<sup>48</sup> Id 439

<sup>49</sup> Id 444

<sup>50</sup> H. Klug "Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review" (1997) 13 SAJHR 185

<sup>51</sup> Note 13, 229

<sup>52</sup> B. Friedman "The History of the Countermajoritarian Difficulty, Part Four: Law's Politics" 148 U. Pa. L. Rev. 971 1999-2000 at 977

It has been suggested that the Constitutional Court overstepped its mandate when it made disparaging remarks about provision that catered for derogations from rights during states of emergencies. These comments were not strictly up for scrutiny. However, the comments have been welcomed because they reflect the court's firm

commitment to act as the guardian of fundamental rights and liberties.<sup>53</sup>

The Certification judgment raised no objection. The losers, the ANC, remained

capable of guiding the debate at the Constitutional Assembly. The opposition parties

were pleased at the second chance to negotiate the text.<sup>54</sup> The public understood that

the Court was merely playing a necessary political role and viewed the decision as

credible<sup>55</sup>.

Following the judgment, the text was amended by the Constitutional Assembly

with little difficulty and resubmitted to the Constitutional Court. The Constitutional

Court heard the matter again and certified the amended text as compliant with the

Constitutional Principles. Thereafter the amended text was signed into law and

became the final Constitution<sup>56</sup>.

The right of access to housing came before the Constitutional Court in

Government of the Republic of South Africa v Grootboom and others.<sup>57</sup>. The case

raised many questions about the role of the Court and the difficulties of enforcing

53 Note 13, at 265, 266

54 Note 13, 288

55 Note 13, 289

56 Constitution of the Republic of South Africa Act No. 108 of 1996

57 2001(1) SA 46 (CC)

socio-economic rights, specifically the argument that the judiciary, as an unelected body, lacks legitimacy to determine the distribution of state resources. It is said that enforcement of these rights require judges to exercise discretion on policy matters, in which they have little expertise or institutional support.

In *Grootboom* the Constitutional Court considered the right of access to adequate housing and the nature of the duty on the state. Section 26 of the South African Constitution provides that: "(1) Everyone has the right of access to adequate housing (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of this right." Section 28 provides that children have the right to shelter. Section 28 is not limited by internal qualifiers such as progressive realization nor is it made subject to available resources.

First, the facts need brief explaining. A desperately poor community of 390 adults and 510 children had lived in the Wallacedene informal settlement, under appalling conditions, until they left and illegally occupied a site that had been earmarked for low cost housing. Following their eviction from that site, they settled on a sports field and an adjacent community hall. They applied to the High Court for an order requiring the state to provide them with adequate basic shelter or housing until they obtained permanent accommodation.

Although the High Court refused to grant relief to the applicants under section 26, it granted relief under section 28 by ordering the state to provide the children and their parents (relief was therefore granted only to some of the applicants) with shelter

in the form of tents and potable water, the "bare minimum". The High Court judgment concentrated on the differences between section 26 and 28 and uncritically adopted<sup>58</sup> the approach taken by the Committee on Economic, Social and Cultural Rights (the ESCR Committee) in relation to the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ESCR Committee defined with the substance of the right to adequate housing by reference to its "minimum core".

The state appealed from the High Court to the Constitutional Court, which took a very different perspective on the matter. The Constitutional Court defined the issue as one relating to the *reasonableness* of the measures taken by the state. The Court held that socio-economic rights can always be enforced in a negative manner, by preventing the state or other entities from impairing the right.

The Constitutional Court noted that although the ESCR Committee had approached the enforcement of socio-economic rights with reference to the minimum core of the rights, it did not define the minimum core. The Constitutional Court held that the minimum core is only one consideration in determining whether the State has met its constitutional duty to implement reasonable legislative and other measures to progressively achieve the right of access to adequate housing.

The Constitutional Court noted that the reasonableness standard did not call for it to consider whether the state could have used other more desirable measures or if public money could have been better spent. The only question is whether the

58 C Scott and P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise" 2000 16 SA J. Hum Rts 226

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measures that had been adopted by the state are reasonable. As the Constitutional Court pointed out "It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations".<sup>59</sup>

The Court declared that the state had breached its obligation to devise and implement within its available resources a *comprehensive and coordinated programme* progressively to realize the right of access to adequate housing. The existing program was inadequate because it failed to cater for homeless and desperately poor communities such as the one before the Constitutional Court.

The Constitutional Court deferred to the political branches by declining to devise the content of the housing plan and by noting that sections 26 and 28 do not entitle anyone to claim shelter or housing immediately on demand. Nevertheless, the judgment reflected a shift forward for the realization of socio-economic rights in South Africa. There was praise for the move away from its earlier decision in *Soobramoney v Minister of Health, Kwa-Zulu Natal* and for the judicial recognition that socio-economic rights were indeed capable of enforcement. There was also

<sup>59</sup> Par 41

<sup>60</sup> The judgment marked a radical shift from *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998(1) SA 765 (CC) in which it was extremely deferential. In that judgment, the Court refused life saving dialysis treatment to the applicant because of budgetary constraints. The Court found that his treatment did not constitute emergency medical treatment as contemplated by section 27(3) which talks of "sudden catastrophe". The state had shown that the hospital resources only permitted it to provide dialysis to a limited number of individuals. The hospital had excluded Mr Soobramoney according to "rational and objectively fair criteria". The Court said it would be slow to "interfere with rational decisions taken in good faith by the political organs..." (par 29)

disappointment with the failure to adopt the 'minimum core' approach and the

decision to restrict grant only declaratory relief.<sup>61</sup>

In Minister of Health v Treatment Action Campaign<sup>62</sup> the Constitutional Court

was saddled with yet another hot potato. The state had decided, in July 2000, to

implement a program for the prevention of mother to child transmission (MTCT) of

HIV. The program was confined to two selected sites in each province, one rural and

one urban, for a period of two years. The objective of the state was to develop a

national policy for the extension of the program to other public facilities outside the

pilot sites. However, during the two year period, state doctors were not permitted to

make Nevirapine (an anti-retroviral drug) available outside of the pilot sites.

The Treatment Action Campaign (TAC), a non-governmental organization,

challenged the constitutionality of the government program in the High Court. The

High Court declared that the government must extend its MTCT program and make

Nevirapine available to pregnant women (and their children) with HIV when the birth

occurs in the public sector, where it was medically indicated and where the pregnant

woman had received HIV testing and counseling. The High Court also ordered the

state to develop a comprehensive national program to prevent or reduce MTCT.

The state was not thrilled with the decision of the High Court. In a statement

made soon after the judgment, the Minister of Health said:

61 Scholars argue that the Court ought to have exercised supervisory jurisdiction and issued an injunction. See: T. Bollyk "Paradigm for Judicial Remedies of Socio-Economic Rights Violations" (2002) 18 SA J

Hum Rts at 169

"If this judgment is allowed to stand it creates a precedent that could be used by a wide variety of interest groups wishing to exercise quite specific influences on government policy in the area of socio-economic rights...What happens to public policy if it begins to be formulated in a piecemeal fashion through unrelated court judgments?" 63

On appeal to the Constitutional Court, the TAC argued that the HIV policy was irrational<sup>64</sup> while the state argued that the High Court order infringed the doctrine of separation of powers. The state argued that its MTCT program was rational and consistent with its obligations under the Constitution. The state put forward a myriad of policy arguments, but these were unsupported by the facts. Most importantly, the state could not rely on the 'scarce resources' argument because the drug companies had offered Nevirapine to government free of charge for five years.<sup>65</sup>

The Constitutional Court noted that the right of access to health care services was expressed separately to the obligation on the state to implement the right

<sup>63</sup> See S. Jagwanth in Management of Social Transformations UNESCO Discussion Paper 65 at http://unesco.org/images/0012/001295/129557e.pdf

<sup>64</sup> TAC arguments focused on the several issues including the following: Nevirapine had been endorsed by government as the drug of choice and it was registered by the Medicines Control Council as safe; the drug companies had agreed to supply Nevirapine free of charge for 5 years; the restriction of Nevirapine to the pilot sites discriminated against women who could not travel to the pilot sites; doctors in the private sector could prescribe Nevirapine but most doctors in the public sector could not.

<sup>65</sup> Government argued that the pilot project was designed to research the cost and efficacy of Nevirapine; Nevirapine was not a guarantee against HIV since women transmitted HIV to their babies after birth via breastfeeding. Furthermore, bottle feeding was culturally stigmatized. The administration of Nevirapine to the mother and her child might lead to the development of resistance to the efficacy of Nevirapine and related drugs in later years. The effective use of Nevirapine required the state to provide a comprehensive package of care (HIV testing, counseling in respect of the use of the drug, breastfeeding substitutes, monitoring of progress, clean water supplies -which was absent in many rural areas, vitamin supplements). These measures were too costly and could not immediately be realized.

progressively through reasonable legislative and other measures within its available resources but held thatthese provisions should be read together.

The Constitutional Court rejected the argument that the right of access to health care had a core minimum stating that it would be impossible to give everyone access to a "core" service immediately. The Constitutional Court stated that it was not institutionally equipped to make wide ranging factual and political enquiries necessary for determining the "minimum core" standards.

The Court set out its role in the following terms:

"Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. Thee Constitution contemplates rather a restrained and focused role for the Courts, namely to require the State to take measures to meets its constitutional obligations and to subject the reasonableness of these measures to evaluation" <sup>66</sup>

The Constitutional Court held that it was required to determine whether the MTCT policy constituted a *reasonable* legislative or other measure. Decisions about the 'reasonableness' of state action may have budgetary implications, but are not aimed at rearranging the budget. The Constitutional Court considered the fact that the existing policy discriminated against women who had no access to the pilot sites and found that the state policy failed to meet constitutional standards because it excluded those who *could reasonably* have been included where such treatment was medically indicated. The issue was not whether the best policy was immediately capable of

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realization but whether it was reasonable to exclude the use of Nevirapine at public health facilities where testing and counseling was currently available. The Constitutional Court noted that were no significant cost implications to administer Nevirapine to both mother and child at the time of birth, where testing and counseling facilities were already available.

The state contended that the Constitutional Court should not go further than declaring that the policy failed to meet constitutional standards, thereby giving government a free hand to adapt its policies. It claimed that this was required by the doctrine of separation of powers. These arguments were rejected because of the exceptional and urgent nature of the medical treatment in question. However, the Constitutional Court was careful to note that court orders about policy choices must be formulated in a manner that did not preclude the political branches from making other legitimate policy decisions.

The Constitutional Court ordered, among other things, the state to remove restrictions that prevented Nevirapine from being made available at public health facilities that are not research sites<sup>67</sup>. The state was not ordered to provide formula feed, because this was not explored fully and could hold significant budgetary implications. Most importantly, the judges framed the order in a specific manner that did not "preclude government from adapting its policy in a manner consistent with

<sup>67</sup> The state was also ordered to (a) permit and facilitate the use of Nevirapine and make it available at hospitals, if it is medically indicated (prescribed) and if the mother has been tested and counseled (b) make provision for counselors at public hospitals and clinics other than research sites to be trained for the use of Nevirapine (c) take reasonable measures to extend the testing and counseling facilities at public hospitals and clinics to expedite the use of Nevirapine for reducing MTCT

the Constitution if equally appropriate or better measures become available to it for reducing MTCT".68

Reconciling the policy decision inherent in the TAC remedy with the notion of separation of powers, although difficult, is not impossible. This task is made easier by the Constitutional Court's acknowledgment that it was entering into a policy arena. It acknowledged that the legislature and the executive should be the primary formulator of policy but stated that this did not mean that the "courts cannot or should not make orders that have an impact on policy" where this is mandated by the Constitution.<sup>69</sup> The court looked at foreign law and found instances where a declaration of unconstitutionality was considered preferable to injunctive relief because "there are myriad options available to the government that may rectify the unconstitutionality of the current system". 70

The court was acutely aware that Nevirapine was a potentially life saving drug and South Africa had one of the highest HIV infection rates in the world. The case was exceptional in another way: the victims of state policy were children with no access to the democratic process.<sup>71</sup> These extraordinary circumstances justified the court's intrusion into the policy arena. In any event, by formulating a flexible order, the court's intrusion did not preclude the state from adjusting or altering policy

<sup>68</sup> Pg 76 of the Judgment

<sup>69</sup> Par 98

<sup>70</sup> Par 110

<sup>71</sup> K Hopkins "Democracy in a post-TAC society" De Rebus (2002) 17

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The TAC judgment was hailed as a victory for the sufferers of HIV in South

Africa. It was subsequently said that judgment reflects that "the Constitution creates

a powerful tool in the hands of civil society to ensure that the government gives

proper attention to the fundamental needs of the poor, the vulnerable and the

marginalized."<sup>72</sup>

In Minister of Home Affairs v Fourie<sup>73</sup> the Court tackled the vexed question of

same sex marriages. The Constitutional Court was called on to determine whether the

common law definition of marriage as being between a man and woman, and section

30(1) of the Marriage Act, 1961 (which requires an exchange of vows with explicit

reference to the words "lawful wife" and "lawful husband") were constitutional.

The state argued that it was inappropriate for the judiciary to cause such

significant changes to the institution of marriage, which should be addressed by

Parliament. In its argument, the state drew on several threads: (a) whether

recognition of same sex marriages was an appropriate solution to discrimination

against homosexuals (b) the fact that the Constitution did not protect the right to

marry, and (c) the fact that international human rights law recognized only

heterosexual marriages.

In the majority judgment drafted by Sachs J, the Constitutional Court described

gays and lesbians as a "permanent minority in society" who are exclusively reliant on

72 G. Budlender in the Mail and Guardian "A Paper Dog with Real Teeth" 12 July 2002 at

the Bill of Rights for their protection. The court noted that Parliament had, through recent legislation, reflected an awareness of the shifting notion of family in society. The Court declared that the mere fact that the legal system might embody "conventional majoritarian beliefs on homosexuality does not by itself lessen the discriminatory effect of those laws".

The Constitutional Court refused to dismiss religious opposition to homosexuality lightly, warning that it must not be seen simply as chauvinism. Nevertheless, the Court found that religious sentiment should not obstruct it from upholding fundamental rights. The Court stated that no minister of religion was legally obliged to solemnize a same sex marriage if that marriage would contradict religious doctrine.

The Constitutional Court had little difficulty in finding that the common law and statutory obstacles to same-sex marriage were unconstitutional (because these provisions breached among other things, the right to equality and the prohibition against unfair discrimination, in a manner that did not pass scrutiny under the limitation clause) but shaping an appropriate remedy proved more challenging.

The state had argued against reading in the words "or spouse" into section 30(1) of the Marriage Act because this would be inappropriate. It argued that: (a) the public should be allowed to debate the issue (b) the judiciary was not competent to alter the institution of marriage in such a significant manner (c) only Parliament had the power to alter the institution of marriage in such a dramatic fashion. It claimed that a

74 Par 74

declaration of invalidity, of section 30(1) of the Marriage Act, should be suspended to enable Parliament to find an appropriate remedy.

Disagreement among the members of the Court regarding an appropriate remedy led to a split. The majority refused interim relief and suspended its declaration of invalidity for 12 months, to allow Parliament to remedy the constitutional defect in the Marriage Act (failing which the words "or spouse" would be read in). The majority noted that the South African Law Commission had proposed at least two different ways to remedy the problem. The majority reasoned that it was appropriate for Parliament, in light of its "democratic and legitimating role" to determine an appropriate remedy to encourage greater stability in the institution of marriage and greater acceptance of same sex marriages. However, in the minority judgment, drafted by O Regan J, it was held that a reading in of the words "or spouse" would not create great uncertainty in respect of same sex marriages when the legislation was amended and a reading in would not obstruct the legislature in its policy choices.

Fourie received a mixed response. It was criticized by some gay rights organizations for not going far enough by failing to make same sex marriages immediately effective and by "deferring equality". The ANC welcomed the decision calling it "an important step forward" but many other political parties were not as enthusiastic. Furthermore churches, including the Anglican Church, voiced

<sup>75</sup> J Evans "Govt to respect gay marriage ruling" in Mail and Guardian, 1 December 2005 at http:///www.mg.co.za/printPage.aspx?area=breaking\_news/breaking\_news\_national/&article

their disappointment with the decision.<sup>76</sup> On the whole, the public response has not been positive.

## Part IV: Constitutional Court & Counter-Majoritarianism

This Part will explore the following questions: (a) what is the extent of the counter-majoritarian difficulty in the South African context? (b) how has the Court approached the counter-majoritarian difficulty? (c) What methods are available to the Court to minimize the counter-majoritarian difficulty?

Does the counter-majoritarian difficulty truly exist? Some scholars have sought to diminish the tension between democracy and constitutionalism arguing that in South Africa non-majoritarianism is democratically legitimate. Their argument is premised on the alleged existence of popular consent to constitutional review and the deliberate allocation of an activist role to the judiciary. These scholars would claim that the Constitution has a stronger "democratic pedigree" than common statutes. There is a counter-argument which goes as follows. The Constitutional Principles, being products of political compromise and having been negotiated between unelected and unmandated delegates, found their way into the final Constitution. Accordingly, they diminish the democratic credentials of final Constitution. In the absence of a referendum, it is hard to say whether the political compromises reflected the will of

<sup>76</sup> *Id* 

<sup>77</sup> Sarkin-Hughes J "The Political Role of the Constitutional Court" 114 S. Afr L J (1997) 138; see also D. Davis Democracy and Deliberation (1999)

<sup>78</sup> C Roederer "Dennis the Menace: Post Structuralist Dabbler or Constructive Interpreter? 118 S Afr. L. J. (2001) 191

<sup>79</sup> See note 1, Osborne & Sprigman at 702; Matua op cit note 4 at 81, 92, 112

the people. Speculation aside, we know that the vast majority of *elected* representatives adopted the political compromise in the final Constitution and there were no significant public protests against the adoption of the final Constitution.

How has the Court reacted to the counter-majoritarian difficulty? One notes that the views of the legislature are not always in sync with the beliefs of the electorate. This was evident in all four of constitutional cases discussed. It is also apparent that the Constitutional Court has not been significantly swayed by public or legislative opinion. It ruled against the political branches in all four of the cases and faced down strong public opposition in *Fourie* and *Makwanyane*.

Regrettably, in *Makwanyane* and *Fourie* the Constitutional Court also displayed some indecision. It vacillated in the face of strong public opposition. In *Fourie*, the Court demonstrated its uncertainty as to the appropriate degree of deference that should be accorded to Parliament. *Fourie* appears to be a fearless and bold ruling, but its justification for refusing relief is without real substance. Granting interim relief would not have created any obstacles for Parliament whereas refusing interim perpetuated unfair discrimination for 12 months.

*Makwanyane* represents a wasted opportunity to work out a consistent view on the institutional role of the judiciary. Despite the author's personal approval of the judgment, there is a compelling argument that the Court overstepped the mark. The legal elements of the death penalty debate did not diminish its broader political character. The court acknowledged this by its recognition that public opinion was

relevant. Furthermore, there was no express constitutional requirement that the Court determine the issue. <sup>80</sup> The public was therefore entitled to some say in the resolution of the death penalty issue <sup>81</sup> through a referendum or through their critique of elected representatives (had they repealed the offensive legislation). Greater respect ought to have been given to constitutionally-entrenched democratic norms. It may be that Parliament hoped the institutional legitimacy of the court, coupled with its reasoning abilities, would sway public opinion. If this was the case, it was irresponsible given the adverse impact the decision has had on the credibility of the Court. The only justification for the ruling lies in the fact it was capable of being reversed through the drafting of the final Constitution.

If the majoritarian perspective is constituted by the most popularly held view, then it is hard to view *Grootboom* and *TAC* as counter-majoritarian. Both generally received a warm public reception.

In *Grootboom* the Court was careful to minimize its potential conflict with Parliament by rejecting the ECSR Committee's approach that the state must devote all the resources at its disposal to the realization of the right and that the state must satisfy the 'minimum core content' of the socio-economic right regardless of resources. The Court avoided an interpretive approach that wouldalmost inevitably , have placed it at odds with the political branches. However, its stance also means that individuals have no constitutionally enforceable right to adequate housing.

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<sup>80</sup> The Court may have found ways to defer any decision on the death penalty to Parliament, through the Constitution or other restrictive techniques.

<sup>81</sup> Indeed, as the Court itself pointed out, the public has traded in its right to self help, in exchange for protection from the state.

The *TAC* decision was based primarily on equal protection reasoning, because the state made Nevirapine available at some sites but not others. The Constitutional Court took care to ensure that its remedy did not fix policy in a rigid manner that might have created unnecessary obstacles for Parliament. Although the Court went further than *Grootboom*, it still acted with self restraint, fully aware of its own institutional limits.

The adoption of the reasonableness standard of review, in relation to socio-economic rights, as opposed to fleshing out the 'minimum core', has been criticized for denying individuals an immediate claim to relief from the state. On the other hand, the court's approach is not as limited as it first appears and it has applied a high level of scrutiny in relation to government's resource and policy justifications. The state is obliged to take *reasonable legislative and other measures to achieve the right*. The court will assess whether the legislative and other measures are *reasonable* in light of principles such as comprehensiveness, transparency, effective implementation and short term provision for those in urgent need. 83

How can the Court minimize the counter-majoritarian difficulty? There are numerous mechanisms at the Constitutional Court's disposal to avoid unnecessary intrusions into the policy and political arena. For starters, the Court could expand the use of the courtroom as a forum for democratic deliberation by extending rules of standing.

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<sup>82</sup> S. Liebenberg "Needs, rights and transformation" ESR Review Vol 6 No. 4

<sup>83</sup> Id; In Rail Commuters Action Group v Transnet CCT56/03 at para 88 the Court pointed out that reasonableness also required a consideration of "the nature of the duty, the social and economic context in which it arises...the extent of the threat to fundamental rights...intensity of the harm that may result"

The court may fashion remedies in restrictive terms<sup>84</sup> continuing to set out only the *reasonable* standards required and leaving the legislature to provide greater safeguards. It may draw remedies that are the least obstructive to the legislature and ensure flexibility in the order, thereby allowing the political branches to make necessary policy shifts. In certain contexts, where the policy and budgetary implications are dramatic, the court may be inclined to adopt only negative methods of enforcement of socio-economic rights.

However, there are also instances where the Constitutional Court should refuse to grant relief. This includes instances where relief cannot be properly molded or where other interests preclude an order or where the interests of justice are outweighed by the disorder or administrative difficulties that would result from the issue of an order.<sup>85</sup>

Constitutional interpretation plays a crucial role in the court's ability to avoid entering into the political arena. The Constitutional Court is required to adopt a purposive approach to interpretation. But his does not eliminate the problem, explained as follows by Kentridge AJ in  $S v Zuma^{87}$ :

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<sup>84</sup> Section 172 provides, among other things, that courts must declare any law that is inconsistent with the Constitution inconsistent to the extent of the inconsistency. Courts may issue orders that are just and equitable limiting the retrospective effect of the declaration (of invalidity) and suspending such declaration to allow any competent authority to correct the defect.

<sup>85</sup> See *Fourie* judgment at par 170

<sup>86</sup> See section 39 of the Constitution. See further note 78 above. As Roederer puts it, this approach assumes that "the legislator's intention is captured in the plain meaning of words they chose to enact. Since the legislators are democratically accountable and judges are not, judges should yield to those democratic choices."

<sup>87</sup> S v Zuma 1995 (2) SA 642 (CC) at par 17-18

"While we must always be conscious of the values underlying the Constitution...well aware of the fallacy of supposing the general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions...the constitution does not mean whatever we might wish it to mean...If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination".

The limitation clause<sup>88</sup> which ought to guide interpretation of appropriate limitations on rights is not always of assistance. It has been noted, for instance, that the phrase "open and democratic society based on human dignity, equality and freedom" contains a "clutch of inherently contested concepts" and is capable of varied interpretation.<sup>89</sup>

#### **Part V: Conclusion**

The Constitutional Court may be the highest court of appeal in constitutional matters but we must not forget the constitutional duty of Parliament to give effect to the Constitution. Besides, the constitution entrenches democratic norms and the doctrine of separation of powers. In formulating a proper approach to the issue, it must be borne in mind that the legislature, for numerous reasons, does not necessarily reflect the will of the people. Corporations are sometimes so powerful that they

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<sup>88</sup> Section 36(1) provides that rights may be limited by a law of general application, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account (a) the nature of the right (b) the importance of the purpose of the limitation (c) the nature and extent of the limitation (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose

<sup>89</sup> D Davis "Democracy and Integrity: Making Sense of the Constitution" 14 S. Afr J on Hum. Rts 127 (1998) at 132 (citing D Meyerson "Reading the Constitution Through the lens of Philosophy" Inaugural lecture delivered at the University of Cape Town, 1997)

<sup>90</sup> Section 7(2) requires the state to respect, protect, promote and fulfill the rights in the Bill of Rights 91 Models of representative democracy are not particularly "representative" given problems such as low polls, the influence of electoral systems on election outcomes, the impact of lobbyists, corporate campaign

may threaten governments.<sup>92</sup> Parliament may believe that it has no choice but to defer to domestic elites or international financial institutions. Parliament may also prefer to "act on expediency rather than take the long view." Furthermore, let us not forget that in recent times the influence of the legislature has declined relative to the executive<sup>94</sup>. However, in the face of all this uncertainty, what we do know is that the judiciary is relatively independent and holds a progressive constitutional mandate.

Regrettably many South Africans do not yet readily recognize the virtues of constitutionalism. A study done in 1996 and 1997 found that South Africans have ambivalent attitudes toward the Constitutional Court, that only a narrow majority believed the Constitutional Court could generally be trusted and many asserted that if the Court makes unpopular decisions it should be abandoned. Accordingly, the Court has "relatively low legitimacy, at least as compared to other high courts; its legitimacy varies across racial groups; and most important, that the Constitutional Court is able to convert its legitimacy into acquiescence only in some circumstances and only with some groups". A study in 2002 concluded that 60% of South Africans agree that the "constitution expresses the values and aspirations of the South

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funding, self interest, careerism and racism. See R. Mattes "The Myths of Majoritarianism: Understanding Democracy in a New South Africa" IDASA Occasional Paper No. 43 (1992)

<sup>92</sup> S Ellman "A Constitutional Confluence: American "State Action" Law and the Application of South Africa's Socio-economic Rights Guarantees to Private Actors" 45 N.Y.L. Sch. L. Rev. 22 2001-2002 at 62 93 A Bickel The Least Dangerous Branch (1962) at 24

<sup>94</sup> S. Liebenberg "Needs, Rights and Transformation: Adjudicating Social Rights" CHRGJ Working Paper No. 8, 2005 at 11

<sup>95</sup> Van Huysteen, note 6, at 1

<sup>96</sup> J. Gibson & G. Caldeira "Defenders of Democracy" Journal of Politics Vol. 65 No. 1 (2003) at 2 97 *Id* at 3

African people". <sup>98</sup> Furthermore, the study concludes that belief in the legitimacy of the Constitution is statistically no different than it was four years earlier (i.e. in 1998).

Many argue that the efficacy of courts lies in their institutional legitimacy and the achievement of moral authority which permits them to make unpopular decisions.<sup>99</sup> It may be also be argued that the legitimacy of the Constitutional Court flows from the fact that it seeks to implement the Constitution<sup>100</sup>.

The legitimacy of the Constitutional Court is intrinsically linked to the legitimacy of the Constitution itself, and neither should be taken for granted. The relatively low legitimacy of the Constitutional Court requires that it tread more cautiously when seriously contentious and inherently political issues arise. The death penalty issue springs to mind. It is hard to accept constitutional 'interpretation' when one is aware that the constitutional framers deadlocked on the death penalty. The issue required debate and resolution in a democratic forum. Parliament was best placed to mediate a long term solution for a society deeply divided on the death penalty. Such an issue can only be finally resolved by an actor with unshakable legitimacy - courts "shape rather than resolve disputes" By intervening, the Court merely created a credibility deficit for itself. The nascent constitutional order must be considered fragile until it is evident that "the people" have fully embraced it. We are reminded of the comment that "courts, in so-called rifted democracies, should opt for a role as

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<sup>98</sup> R Mattes *et al* "Democratic Governance in South Africa: The People's view" Afrobarometer Paper No. 24 (2003) at 2-3

<sup>24 (2005)</sup> at 2-.

<sup>99</sup> Id at 2

<sup>100</sup> Par 111

<sup>101</sup> Note 15 at 798

an applier of the law and not seek a role as an equal player in the articulation of societal values." <sup>102</sup>

Although the adjudicative process is ill-suited to finally determining 'polycentric' issues (i.e. issues which cannot be determined separately to other matters not before the court 103) this is not an invitation to create false pretexts to avoid granting appropriate relief that is just and equitable. The denial of relief in *Fourie* presents an image of weak and inconsistent court. Furthermore, there is an air of fragility in the *Makwanyane* ruling. Even if the Court could not avoid ruling on the death penalty issue, its political role, apparent to the public, should have been conceded. This would have allowed for greater dialogue with public opinion on the death penalty. The court, regrettably, took refuge behind its institutional legal position. A fragmented jurisprudence, reflected by both the *Fourie* and *Makwanyane* rulings does not engage the public and is unlikely to inspire its confidence.

In respect of socio-economic rights, one may make a compelling argument that the court has been excessively deferential to the political branches. This deference is apparent from the Court's refusal to entertain the minimum core approach to enforcement of socio-economic rights as well as its refusal to use exercise supervisory jurisdiction<sup>105</sup>. *TAC* seems to mark a change in direction, with the court

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<sup>102</sup> R Gavison in V. Jackson & M. Tushnet Comparative Constitutional Law (2nd Ed) (NY Foundation Press, 2006) at 703-707

<sup>103</sup> Hoexter New Constitutional & Administrative Law Vol 11 pg 82

<sup>104</sup> M du Plessis "Between Apology and Utopia-The Constitutional Court and Public Opinion" 18 S. Afr. J. on Hum. Rts 1 2002

<sup>105</sup> Through such jurisdiction the court monitors the implementation of its own orders. In TAC, the Court stated that it may make both declaratory and mandatory orders, and exercise supervisory jurisdiction.

showing that it will not shy away from shaping policy L ess deference in this area is called for. Activism in this area is unlikely to harm the credibility of the Court among the indigent and is entirely justifiable given that "those who would benefit

from them [socio-economic rights] lack political power." <sup>106</sup>

Socio-economic rights may call on the judiciary to intrude into the traditional

legislative domain but protection of socio-economic rights is essential for popular

political participation. 107 From this perspective, effective judicial remedies for socio-

economic rights are not counter majoritarian.

The function of the Constitutional Court, albeit counter-majoritarian at times, is

ultimately supportive of democracy. It upholds protections that ensure democratic

process and protects minority rights against the will of the majority. In sum, no better

exposition of South African constitutionalism exists but to describe it as "mutually

supportive and in tension with democracy", 108.

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106 C Sunstein "Social and Economic Rights-Lessons from South Africa" (2001) 12 Constitutional Forum

107 D. Moellendorf "Reasoning about Resources: Soobramoney and the Future of Socio-Economic Rights Claims" (1998) 14 SA J. Hum Rts 332; N. Haysom "Constitutionalism, Majoritarian Democracy & Socio-Economic Rights" (1992) SAJHR 451 at 461

108 See Osborne & Sprigman, note 1 at 700