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Articles

The Counter-Majoritarian Difficulty and the South African Constitutional Court

Reynaud N. Daniels* and Jason Brickhill**

[W]hen the Supreme Court declares unconstitutional a legislative act[,] . . . it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.¹

I. Introduction

The South African 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

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1. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (2d ed., Yale Univ. Press 1986) (1962).

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 ten years.

Part II of this article briefly looks at the establishment of a constitutional democracy in South Africa. Part III broadly surveys scholarly views on the counter-majoritarian difficulty. Part IV scrutinizes a few judgments of the Constitutional Court facing counter-majoritarian hurdles. Although other rulings impact the debate, as would a discussion on the role of the Constitutional Court in the development of the common law,² this does not prevent the examination of the judicial philosophy that has flowed through some of the more significant decisions of the Constitutional Court. In Part V, the following issues are explored: (a) the extent of the counter-majoritarian difficulty in South Africa; (b) the stance of the judiciary toward the counter-majoritarian difficulty; and (c) the methods used by or available to the judiciary to minimize potential conflict with the political branches. Part VI concludes that, although the Constitutional Court has gone to great pains to position itself as an unbiased mediator, it has been faced with a difficult challenge in upholding the constitution without treading too heavily on the toes of the new, democratic parliament. The court has done so largely on a case-by-case basis, and the real challenge for the future is to develop 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.

II. Establishment of South Africa as a Constitutional Democracy

In 1948, the Nationalist Party (NP) rose to power through an electoral system that enfranchised only white citizens. 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.”³ The apartheid government was

2. In *Carmichele v Minister of Safety & Security & Another*, 2001 (10) BCLR 995 (CC) (S. Afr.), and *Du Plessis & Others v De Klerk & Another*, 1996 (5) BCLR 658 (CC) (S. Afr.), the court considered the development of the common law in accordance with the South African 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. Compare Michael Osborne & Chris Sprigman, *Behold: Angry Native Becomes Post Modernist Prophet of Judicial Messiah*, 118 S. AFRICAN L.J. 693, 694 (2001) (arguing “the model of indirect horizontality [favored] by the majority in *Du Plessis v De Klerk*[.] . . . with respect to the interim [c]onstitution, should and would continue to apply in cases decided under the final [c]onstitution”) with DENNIS DAVIS, *DEMOCRACY AND DELIBERATION* 106-07 (1999).

3. See *In re Certification of the Constitution of the Republic of S. Afr.* 1996 (10)

characterized by a strong centralized government operating under the banner of parliamentary sovereignty and domination by the executive.⁴ The system of apartheid was composed of a vast network of legislation, regulations, and policies and 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.⁵

However, apartheid efforts at disenfranchisement of black people were met, in addition to political protest, with some legal challenges. Some of the most well-known judgments to emerge from apartheid South Africa were delivered during this period. In *Ndlwana v Hofmeyr*,⁶ a challenge to the Representation of Natives Act failed,⁷ the Appellate Division basing its decision on the notion of parliamentary supremacy. However, in the famous pair of *Harris* cases, the Appellate Division twice struck down legislative attempts to disenfranchise blacks. In *Harris I*,⁸ the Appellate Division struck down the Separate Representation of Voters Act,⁹ which provided for “the separate representation of European and non-European voters in the Province of the Cape of Good Hope.”¹⁰ Outraged, the government sought to circumvent the judgment by passing the High Court of Parliament Act,¹¹ which purported to turn Parliament itself into the highest court in constitutional matters, with the power to review and set aside, by simple majority vote, any Appellate Division decision declaring an act of parliament invalid. The “High Court of Parliament” then declared *Harris I* wrongly decided.¹² Thus followed *Harris II*,¹³ in which a unanimous Appellate Division struck down the High Court of Parliament

BCLR 1253, 1265-66 (CC) (S. Afr.).

4. Until the introduction of the interim constitution in April 1994, there was no constitutional review of legislation. Laws could only be reviewed on limited technical and procedural grounds, such as legality.

5. See Makau wa Matua, *Hope and Despair for a New South Africa*, 10 Harv. HUM. RTS. J. 63, 104 (1997); see also generally JASON BRICKHILL & RYAN BABIUCH, POLITICAL RIGHTS, IN CONSTITUTIONAL LAW OF SOUTH AFRICA ch. 45 (2d ed., S. Woolman, T. Roux, J. Klaaren, A. Stein, M. Chaskalson & M. Bishop eds., 2002).

6. *Ndlwana v Hofmeyr*, 1937 A.D. 229 (S. Afr.).

7. Representation of Natives Act 12 of 1936 (S. Afr.).

8. *Harris v Minister of the Interior*, 1952 (2) SA 428 (A).

9. Separate Representation of Voters Act 46 of 1951 (S. Afr.).

10. The basis of the decision was that the Act was not passed in conformity with the provisions of the South Africa Act of 1909, the constitution of the day, which required more than a two-thirds parliamentary majority, and special procedures, when legislating to disqualify any person as a voter on the ground of race.

11. High Court of Parliament Act 35 of 1952 (S. Afr.).

12. See Erwin N. Griswold, *The Demise of the High Court of Parliament in South Africa*, 66 HARV. L. REV. 864, 866 n.9 (1953).

13. *Minister of the Interior v Harris*, 1952 (4) SA 769 (A).

Act.¹⁴

The government then went back to the drawing board and used a two-step legislative strategy, passing two acts by ordinary majority, in order, first, to restructure parliament to give it the majority necessary to amend the constitution;¹⁵ and, secondly, to amend the constitution by removing the constitutional protection of black voting rights.¹⁶ These steps allowed it to re-enact the Separate Representation of Voters Act.¹⁷ At the same time, the government passed legislation to increase the quorum of the Appellate Division bench for cases concerning the validity of legislation. The majority of the enlarged bench of the Appellate Division then dismissed the challenge to these new statutes in the *Collins* case.¹⁸ The only judge to dissent was Justice Schreiner.¹⁹

So subsided this brief period of judicial activism and opposition to apartheid laws. Not surprisingly in light of this history, both judicial legitimacy and judicial independence are fundamental issues in the new democratic South Africa.

During the late 1980s, 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*,²⁰ which reflected popular aspirations for political and social transformation. At the same time, the NP also began drafting a bill of rights for a new constitutional dispensation. Its purpose, however, was the protection of elite minority interests.²¹

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 resolved to play a major role in designing the constitutional structure and normative principles regulating the future

14. See Griswold, *supra* note 12, at 866.

15. The Senate Act 53 of 1955 effectively enlarged and restructured the upper house of Parliament (the Senate) so as to give the government the two-thirds parliamentary majority necessary to amend the entrenched provisions of the South Africa Act.

16. The South Africa Act Amendment Act 9 of 1956, passed with a two-thirds majority, repealed § 35 of the South Africa Act, which protected black voting rights.

17. See Separate Representation of Voters Act 9 of 1956.

18. *Collins v Minister of the Interior*, 1957 (1) SA 552 (A).

19. In the view of many in the legal profession at the time, Justice Oliver Schreiner was subsequently passed over for appointment as Chief Justice on the basis of his dissenting views in cases such as *Collins*.

20. *African National Congress, Constitutional Guidelines for a New South Africa* (1989), reprinted in 21 COLUM. HUM. RTS. L. REV. 235 app. A (1989-90).

21. E. Van Huysteen, *In Search of Hercules: Democracy, Constitutionalism and the South African Constitutional Court* (Advanced Soc. Research, Univ. of Witwatersrand, Seminar Paper No. 410, 1996).

government.²²

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

The NP ensured they would have a say in the final constitution by persuading the CODESA delegates to agree to a set of mandatory Constitutional Principles (CPs) with which the final constitution would have to comply.²³ 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 certified that it complied with the CPs. Thus, the NP, who had a firm hold on power during the negotiations of the CPs, ensured that its primary concerns were safeguarded in the final constitution.

The interim constitution, 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 was negotiated by unelected delegates with no popular mandate. It required that the final constitution be adopted by a two-thirds majority of the members of an elected South African Constitutional Assembly.²⁴

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 accomplished through educational communications via internet, radio, television, and newspaper and solicitation of written comments and verbal submissions

22. *In re Certification of the Constitution*, 1996 (10) BCLR at 1268.

23. The CPs constituted a "solemn pact" incorporated into the interim constitution. See S. AFR. (INTERIM) CONST. 1993 pmbl. ("[I]n order to secure the achievement of [a new democratic order], elected representatives of all the people of South Africa should be mandated to adopt a new [c]onstitution in accordance with a solemn pact recorded as Constitutional Principles."); see also *id.* at sched. IV (listing thirty-four CPs).

24. *Id.* § 73(2). Section 73(5), when read together with sections 73(6) and 73(8), provides that in the absence of a two-thirds vote of approval by the Constitutional Assembly, the draft constitution could nevertheless become law by receiving fifty percent approval in the Constitutional Assembly and sixty 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 Christina Murray, *Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court*, in POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW 103, 118 (Penelope Andrews & Stephen Ellmann eds., 2001).

through a constitutional radio talk line.²⁵ A nationwide survey concluded that the media campaign conducted by the Constitutional Assembly reached more than seventy-three percent of all South African adults and that more than 2,000,000 submissions were made to the Constitutional Assembly.²⁶ However, the drafting of the final constitution was formally limited by the CPs, such as the recognition and protection of "collective rights of self-determination."²⁷ 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 regarded by some as founded upon pacts between adversarial elites.²⁸

The final constitution establishes South Africa as a constitutional state and provides that "[t]he Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."²⁹ Guardianship of the constitution vests finally in Constitutional Court: the final constitution provides that the "Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional."³⁰

Unlike the American constitutional system, therefore, where the courts' judicial review power was judicially discovered, the South African Constitution establishes firmly the power of the courts to review legislation against the constitution. In light of this, the counter-majoritarian dilemma facing South African courts is somewhat attenuated. However, given the concerns around whether the constitution itself reflects the popular will, the legitimacy of judicial review remains a live issue in South Africa, both as a jurisprudential question and a political reality.

III. Nature of the Counter-Majoritarian Difficulty

The counter-majoritarian difficulty relates to the tension between the democratically elected legislature (which premises its authority on the consent of the governed) and an unelected judiciary with the power to

25. However, the process remained at all times under the control of the negotiating parties.

26. See Murray, *supra* note 24, at 107.

27. Carmel Rickard, *The Certification of the Constitution of South Africa*, in POST-APARTHEID CONSTITUTIONS, *supra* note 24, at 224, 226.

28. Glenn Adler & Eddie Webster, *Challenging Transition Theory: The Labor Movement, Radical Reform, and Transition to Democracy in South Africa*, 23 POL. & SOC'Y 75, 99 (1995).

29. S. AFR. CONST. 1996 § 2.

30. *Id.* § 167(5).

nullify the conduct of that legislature. As Bickel points out, it is difficult to comprehend why the judiciary is better placed than the legislature or executive to monitor their conduct.³¹

Before discussing the counter-majoritarian difficulty, a few brief comments are necessary. First, legislatures do not inevitably neglect minority concerns or make policy choices at the dictate of the majority. Elections happen at regular intervals and only broad policy issues may be debated at that time. It is said that the “insecurity of elective office discourages nonjudicial officials from ignoring minority interests.”³²

In any event, the judiciary is not obstinately counter-majoritarian, especially since judicial appointments are never completely insulated from political control and influence.³³ Views held by judges are often fashioned by the same changes in public mood and judges experience the same shifts in political and social circumstances that impact public officials.³⁴ Accordingly, defending a constitution reflective of the peoples’ fundamental values against legislation enacted in the heat of the moment may be considered majoritarian.³⁵

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.³⁶ 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 or judicial overruling.³⁷ From this standpoint, constitutionalism is portrayed as being fundamentally anti-democratic.

Justifying the counter-majoritarian role of a 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.³⁸ However, this argument struggles to escape the charge that it is fundamentally paternalistic

31. BICKEL, *supra* note 1, at 4.

32. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 835 (2002).

33. Federal judges in the United States hold life tenure, but frequent judicial vacancies give current majorities the gap to influence the composition of the bench. *Id.* at 832.

34. *Id.*

35. BICKEL, *supra* note 1, at 25.

36. Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 195 (Jon Elster & Rune Slagstad eds., 1993).

37. Harry H. Wellington, *Foreword* to BICKEL, *supra* note 1, at xii.

38. See Whittington, *supra* note 32, at 833; BICKEL, *supra* note 1, at 25.

(especially where the court fails to engage in dialogue with the public). 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 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.”³⁹

Constitutionalism finds its best justification in the adoption of a broader notion of democracy. This is entirely justified since democracy is “never simply the rule of the people but always the rule of the people within certain predetermined channels, according to certain prearranged procedures.”⁴⁰ 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, “whose structural design is untested,”⁴¹ judicial monitoring of separation of powers is essential.⁴² Parliament cannot easily regulate itself and control its own powers. As the Court stated in *City of Boerne v. Flores*,⁴³ “If 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.’”⁴⁴

History teaches us that “[i]t is popular government and the ‘people themselves’”⁴⁵ that may endanger and threaten rights and notions of justice.⁴⁶ Religious, racial or ethnic minorities inevitably require protection from the will of the majority. The very nature of democracy

39. *Id.* at 829 (quoting 2 SAMUEL CHASE, TRIAL OF SAMUEL CHASE 20 (Da Capo Press 1970) (1805)).

40. Holmes, *supra* note 36, at 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 Keith E. Whittington, *An “Indispensable Feature”? Constitutionalism and Judicial Review*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 21, 22-27, 30-32 (2002-2003).

41. Stephen Ellman, *Separation of Powers in Post Apartheid South Africa*, 8 AM. U. J. INT’L L. & POL’Y 455, 481 (1992-1993).

42. *Id.*

43. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

44. *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

45. Whittington, *supra* note 32, at 829 (quoting THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

46. *See id.*

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.⁴⁷

Finally, it is worth noting that while the legislature may consider the consequences of its legislation, it is inclined to do so only in the abstract. The judiciary, however, is uniquely placed to consider the actual impact and consequence of a statute in the context of an actual case before it.

IV. Jurisprudence of the Constitutional Court

A. Makwanyane

Not long after its establishment, the death penalty, an enormously controversial issue, presented itself to the Constitutional Court.⁴⁸ As the court stated, the question arose in the context of violent crime that had “reached alarming proportions”⁴⁹ and “pose[d] a threat to the transition to democracy.”⁵⁰ In *State v Makwanyane*,⁵¹ the court determined the constitutionality of section 277(1)(a) of the Criminal Procedure Act of 1977,⁵² which permitted the imposition of the death penalty for murder.⁵³ At the time, the interim constitution was applicable.

The Constitutional Court was acutely aware the interim constitution had not been democratically adopted,⁵⁴ 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) ought to have dealt with the issue.

The South African government argued the death penalty was cruel, inhuman, and degrading punishment and that it should be declared unconstitutional.⁵⁵ However, the Attorney General, an independent State institution, argued the death penalty was necessary and did not constitute cruel, inhuman, or degrading treatment.⁵⁶ The Constitutional Court

47. See Whittington, *supra* note 40, at 31-32.

48. See *State v Makwanyane* 1995 (6) BCLR 665 (CC) (S. Afr.).

49. *Id.* at 713-14.

50. *Id.*

51. *Id.*

52. Criminal Procedure Act 51 of 1977 (S. Afr.).

53. *Id.* s. 277(1)(a) (repealed 1997).

54. As the court noted, the interim constitution was “the product of negotiations conducted at the Multi-Party Negotiating Process. The final draft adopted by the forum of the Multi Party Negotiating Process was, with few changes, adopted by Parliament.” *Makwanyane*, 1995 (6) BCLR at 679.

55. See *id.* at 677.

56. See *id.* Such treatment was prohibited by section 11(2) of the interim constitution. See S. AFR. (INTERIM) CONST. 1993 § 11(2) (“No person shall be subject to

unanimously found that the statutory provisions that permitted the imposition of the death penalty were unconstitutional.⁵⁷

The main judgment was written by the President of the Constitutional Court, Justice Chaskalson,⁵⁸ however, each justice wrote a separate judgment 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, Justice Chaskalson accepted that the majority of South Africans believed the death penalty ought to be imposed in extreme cases of murder.⁵⁹ He accepted that public opinion may hold some degree of relevance,⁶⁰ but stated that, by itself, public opinion is no replacement for the duty vested in the judiciary "to interpret the [c]onstitution and to uphold its provisions without fear or [favor]."⁶¹ As he explained, "If public opinion were to be decisive there would be no need for constitutional adjudication."⁶² Justice Chaskalson pointed out the negotiating parties at CODESA had debated the death penalty but reached no resolution, and this amounted to a delegation of power to the judiciary.⁶³ He contended 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."⁶⁴

Justice Ackermann stressed, "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."⁶⁵ In his judgment, Justice Didcott emphasized that while "great attention [must be paid] to public opinion,"⁶⁶ it should be borne in mind that public opinion was based on the fallacious assumption the death penalty had a significant deterrent effect.⁶⁷ Justice Kentridge declared that the Constitutional Court does not determine the constitutionality of the death penalty because it can "claim a superior wisdom,"⁶⁸ but because the framers of the interim constitution imposed a

torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.").

57. See *Makwanyane*, 1995 (6) BCLR at 724.

58. *Id.* at 674.

59. *See id.* at 703.

60. *See id.*

61. *Id.*

62. *Makwanyane*, 1995 (6) BCLR at 703.

63. *See id.* at 680-82.

64. *Id.* at 703.

65. *Id.* at 732 (Ackermann, J., concurring).

66. *Id.* at 739-40 (Didcott, J., concurring).

67. *See Makwanyane*, 1995 (6) BCLR at 739-40 (Didcott, J., concurring).

68. *Id.* at 741 (Kentridge, J., concurring).

duty on the Constitutional Court.⁶⁹ Justice Kentridge maintained that if public opinion on the death penalty was clear, it could not be ignored, but, in the present case, it was not expressed in a referendum and was, therefore, unclear.⁷⁰ Justice Mahomed declared that while public opinion plays a significant role in the determination of policy and political issues, the judicial process is different, and the court could not avoid the constitution makers' intention to leave the issue to the judiciary.⁷¹ Thus, the approach taken by the Constitutional Court was anything but consistent. Although some members of the court implicitly recognized the dispute as a political issue best addressed by the legislature,⁷² others simply treated the matter as purely judicial.⁷³

Makwanyane provoked an outcry. Opposition leaders criticized the judgment as out of touch with public opinion, and even some senior members of the ANC called for a referendum.⁷⁴ However, despite some hesitation, the ANC stood firmly against the death penalty and did not rework the final constitution to permit its reintroduction.⁷⁵

B. Constitutional Certification

After the drafting and approval of the final constitution by the first elected South African Constitutional Assembly,⁷⁶ the Constitutional Court faced the daunting task of determining the validity of the final constitution.⁷⁷ Indeed, *In re Certification of the Constitution of the Republic of South Africa* had no precedent of its kind anywhere in the world.

Interestingly, although the draft text submitted for ratification was

69. *See id.*

70. *See id.* at 745-46 (Kentridge, J., concurring).

71. *See id.* at 759 (Mahomed, J., concurring).

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

73. Justice Krieger stated the incumbents of the court "are judges, not sages: their discipline is the law, not ethics or philosophy and certainly not politics." *Makwanyane*, 1995 (6) BCLR at 747-48 (Krieger, J., concurring). The court quoted *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943): "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. . . ." *Makwanyane*, 1995 (6) BCLR at 704 (quoting *Barnette*, 319 U.S. at 638).

74. *See* Heinz Klug, *Participation in the Design: Constitution-Making in South Africa*, in POST-APARTHEID CONSTITUTIONS, *supra* note 24, at 128, 148-49.

75. *Id.* at 149.

76. *See id.* at 151; *see also* Constitution of the Republic of South Africa Act 108 of 1996.

77. *See In re Certification of the Constitution of the Republic of S. Afr.* 1996 (10) BCLR 1253 (CC) (S. Afr.). The task of the court was to weigh the final constitution against the CPs adopted as part of the interim constitution. *Id.* at 1264.

unanimously passed in the Constitutional Assembly,⁷⁸ several of its supporting parties opposed its certification by the court.⁷⁹ 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.⁸⁰

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.⁸¹ The Constitutional Court found the constitutional text largely complied with the CPs,⁸² but nevertheless refused certification because some provisions conflicted with the CPs.⁸³ However, the Constitutional Court quickly pointed out that none of the reasons for its refusal of certification constituted significant obstacles to the transition process.⁸⁴

In addressing the issue, the Constitutional Court stated, a little superficially, it did not exercise a political role by determining the certification of the constitution.⁸⁵ In its words, “[T]he [c]ourt has a judicial and not a political mandate.”⁸⁶ To bolster this argument and justify its role, the Constitutional Court stated it “has no power, no mandate[,] and no right to express any view on the political choices made by the [Constitutional Assembly] in drafting the [final

78. See Rickard, *supra* note 27, at 229. On May 8, 1996, eighty-seven percent of the Constitutional Assembly voted in favor of the new constitutional text. *Id.* at 226; Matthew Chaskalson & Dennis Davis, *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, 433 n.14 (1997).

79. Rickard, *supra* note 27, at 299.

80. See *id.* at 229.

81. See *id.* at 228.

82. See *In re Certification of the Constitution*, 1996 (10) BCLR at 1399.

83. The court found certain provisions were inconsistent with the CPs, including (a) the failure to grant individual employers the right to collective bargaining; (b) various provisions which shielded legislation from constitutional review; (c) the failure to sufficiently protect the independence and impartiality of the Public Protector and Auditor General; (d) the failure to adequately safeguard the independence and impartiality of the Public Service Commission (PSC); (e) the failure to specify the powers and functions of the PSC; (f) the failure to set up a framework for structures of local government; (g) the failure to require formal legislative procedures in local government; (h) the failure to allocate appropriate fiscal powers to provincial government and categories of local government; and (i) the failure to provide provincial powers and functions not substantially less than or inferior to those in the interim constitution. See *id.* at 1283, 1308-09, 1312-13, 1317, 1349-50, 1396-98.

84. See *id.* at 1399.

85. See *id.* at 1273.

86. *Id.*

constitution], save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs.⁸⁷

The judgment, divided into two parts,⁸⁸ reflects a tension in the Constitutional Court's attitude toward counter-majoritarianism.⁸⁹ Initially, the court recognized the difficulty of exercising judicial review over a constitution drafted by democratically elected representatives.⁹⁰ Chaskalson and Davis term this "the political price which had to be paid for the introduction of democracy into South Africa."⁹¹ Deference to the democratic process is evident from the court's interpretive stance: "an interpretative policy which was designed to facilitate certification."⁹² Where the constitutional text was capable of more than one reasonable meaning, one inconsistent and one consistent with the CPs, the court determined that it would adopt the interpretation consistent with the CPs.⁹³ However, the Constitutional Court later adopted a strong defense of constitutionalism. This approach ultimately won the day and outweighed its earlier deferential approach. The Constitutional Court held the constitutional text did not comply with the CPs in nine respects, although only two violations were clearly necessary to the outcome of the judgment.⁹⁴ 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."⁹⁵

Commentators suggest the Constitutional Court's approach reflected its institutional confidence in,⁹⁶ as well as the general public acceptance of,⁹⁷ its role in the certification process. The role of the judiciary was linked to the extent of freedom accorded to it by the public, and as some scholars suggest, this is the norm.⁹⁸ Although certification is a striking instance of the counter-majoritarian dilemma, it arose directly from a

87. *In re Certification of the Constitution*, 1996 (10) BCLR at 1273.

88. The first part, chapters I and II, considered the role of the court in the certification process and the second part, chapters III to IV, determined whether each of the constitutional provisions comply with the CPs. See Chaskalson & Davis, *supra* note 78, at 432.

89. *Id.*

90. See *In re Certification of the Constitution*, 1996 (10) BCLR at 1274.

91. Chaskalson & Davis, *supra* note 78, at 433.

92. *Id.* at 434.

93. See *In re Certification of the Constitution*, 1996 (10) BCLR at 1276.

94. Chaskalson & Davis, *supra* note 78, at 436-39.

95. *Id.* at 444.

96. Heinz Klug, *Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review*, 13 S. AFR. J. ON HUM. RTS. 185, 195 (1997).

97. Rickard, *supra* note 27, at 229-30.

98. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 977 (2000).

compromise between political actors, several of whom held a significant degree of public confidence.⁹⁹

Some commentators suggest the Constitutional Court overstepped its mandate in its disparaging remarks concerning derogations of rights during a state of emergency because the particular provision was not strictly up for scrutiny.¹⁰⁰ However, the comments have been welcomed by others because they reflect the court's firm commitment to act as the guardian of fundamental rights and liberties.¹⁰¹

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 with the second chance to negotiate the text.¹⁰² The public understood that the court was merely playing a necessary political role and viewed the decision as credible.¹⁰³

Following the judgment, the text was amended by the Constitutional Assembly with little difficulty and resubmitted to the Constitutional Court, who heard the matter and certified the amended text as compliant with the CPs. Thereafter, the amended text was signed into law and became the final constitution.¹⁰⁴

C. Grootboom

The right of access to housing came before the Constitutional Court in *Government of the Republic of South Africa v Grootboom*.¹⁰⁵ The case raised several issues concerning the role of the court and the difficulties in enforcing socio-economic rights.¹⁰⁶ Specifically, the government argued the judiciary, as an unelected body, lacks legitimacy to determine the distribution of State resources because such action requires the exercise of political discretion over policy matters in which it has little expertise or institutional support.¹⁰⁷

In *Grootboom*, the Constitutional Court considered the right of access to adequate housing and the nature of the duty on the State.¹⁰⁸ Section 26 of the South African Constitution provides: "Everyone has the right to have access to adequate housing. . . . The [S]tate must take

99. See *In re Certification of the Constitution*, 1996 (10) BCLR at 1268-69.

100. See Robin Palmer, *Declaration of a State of Emergency: Section 37 of the Constitution of South Africa*, 6 HUM. RTS. & CONST. L.J. S. AFR. 24 (1997).

101. Rickard, *supra* note 27, at 265-66.

102. *Id.* at 288.

103. *Id.* at 288-89.

104. See Constitution of the Republic of South Africa Amendment Act 35 of 1997.

105. *Gov't of the Republic of S. Afr. & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) (S. Afr.).

106. See *id.* at 1183.

107. See *id.*

108. See *id.* at 1181-82.

reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”¹⁰⁹ Further, section 28 guarantees children the right to shelter,¹¹⁰ a right not limited by internal qualifiers, such as progressive realization, or subject to available State resources.¹¹¹

The case arose after a desperately poor community in the Wallacedene informal settlement,¹¹² consisting of 390 adults and 510 children,¹¹³ left the appalling conditions and illegally occupied a site earmarked for low cost housing.¹¹⁴ Following their eviction from the site, the community settled on a sports field and an adjacent community hall and applied to the High Court for an order requiring the State to provide adequate shelter or housing until they obtained permanent accommodation.¹¹⁵

Although the High Court refused to grant relief under section 26, it ordered the State to provide the children and parents (relief was therefore granted only to some of the applicants) with “bare minimum” shelter in the form of tents and potable water pursuant to section 28.¹¹⁶ The judgment concentrated on the differences between the two sections and uncritically adopted the approach taken by the United Nations Committee on Economic, Social, and Cultural Rights (ESCR) based on the International Covenant on Economic, Social, and Cultural Rights.¹¹⁷ The ESCR defined the substance of the right to adequate housing by reference to its “minimum core.”¹¹⁸

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.¹¹⁹ The court held that socio-economic

109. S. Afr. Const. 1996 § 26(1-2).

110. *Id.* § 28.

111. *Id.*

112. *See Grootboom*, 2000 (11) BCLR at 1177.

113. *See id.* at 1176 n.2.

114. *See id.*

115. *See id.* at 1178.

116. *See Grootboom v Oostenberg Municipality & Others* 2000 (3) BCLR 227 (C) at 293-95 (S116. See Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 S. Afr. on J. Hum. Rts. 206, 223 n.41 (2000).
. Afr.).

117. *See Craig Scott & Philip Alston, Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 S. Afr. ON J. HUM. RTS. 206, 223 n.41 (2000).

118. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *The Nature of States Parties Obligations (Art. 2, par. 1): General Comment 3*, ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990).

119. *See Gov't of the Republic of S. Afr. & Others v Grootboom & Others* 2000 (11)

rights are enforceable in a negative manner, preventing government from impairing the right to adequate housing.¹²⁰

The Constitutional Court noted that, although the ESCR had approached the enforcement of socio-economic rights with reference to a “minimum core” of rights, it did not define the “minimum core.”¹²¹ Thus, 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 measures to progressively achieve the right of access to adequate housing.¹²²

The Constitutional Court noted the reasonableness standard did not require consideration of whether the State could have used more desirable or efficient measures or whether the measure was an appropriate use of public funds.¹²³ The court concluded the only question is whether the State’s adopted measures are reasonable.¹²⁴ As the Constitutional Court pointed out, “It is necessary to recogni[z]e that a wide range of possible measures could be adopted by the State to meet its obligations.”¹²⁵

The court declared the State had breached its obligation to devise and implement, within its available resources, a “*comprehensive and coordinated program*”¹²⁶ to progressively realize the right of access to adequate housing.¹²⁷ 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.¹²⁸

BCLR 1169, 1190-91 (CC) (S. Afr.).

120. *See id.* at 1088-89.

121. *See id.* at 1187.

122. *See id.* at 1188.

123. *See id.* at 1190-91.

124. *Grootboom*, 2000 (11) BCLR 1169 at 1190-91.

125. *Id.*

126. *Id.* at 1209 (emphasis added).

127. *See id.* (referring to requirements of section 26(2)).

128. *Grootboom* marked a radical shift from *Soobramoney v Minister of Health, KwaZulu-Natal*, 1997 (12) BCLR 1696 (CC) (S. Afr.), where the South African Constitutional Court was extremely deferential to State action. In *Soobramoney*, the court refused to require the State to provide life-saving dialysis treatment because of budgetary constraints. *Id.* at 1706. The court determined the treatment did not constitute “emergency medical treatment” as contemplated by section 27(3) of the constitution, which, according to the court, requires a “sudden catastrophe.” *Id.* at 1703-04. The State argued the hospital resources only permitted it to provide dialysis to a limited number of individuals. *Id.* at 1699. Additionally, the court noted the hospital had excluded

Commentators praised the court's move from its earlier decision of *Soobramoney v Minister of Health, Kwa-Zulu Natal*¹²⁹ and its enforcement of socio-economic rights.¹³⁰ However, there was also disappointment with the court's failure to adopt the "minimum core" approach or grant more than declaratory relief.¹³¹

D. Treatment Action Campaign

In *Minister of Health v Treatment Action Campaign*,¹³² the Constitutional Court was saddled with yet another hot potato. In July 2000, the State decided to implement a program to prevent mother-to-child transmission (MTCT) of HIV.¹³³ The South African government began a limited program to provide nevirapine to a limited number of pilot sites, numbering two in each province, for a period of two years.¹³⁴ The government intended to use the information gathered from the sites to "develop[] a national policy for the extension of the program[] to other public facilities outside the pilot sites."¹³⁵ However, during the two year period, State doctors were not permitted to prescribe nevirapine outside of the pilot sites.¹³⁶

The Treatment Action Campaign (TAC), a non-governmental organization, challenged the constitutionality of the government program in the High Court.¹³⁷ The High Court ordered the government to extend its MTCT program and make nevirapine available to pregnant women with HIV who give birth in the public sector, and their children, where the woman had received appropriate HIV testing and counseling.¹³⁸ Further, the High Court ordered the State to develop a comprehensive national program to prevent or reduce MTCT of HIV.¹³⁹

Soobramoney according to rationally and objectively fair criteria. *Id.* at 1704-05. Thus, the court concluded it would be "slow to interfere with rational decisions taken in good faith by the political organs." *Id.* at 1705-06.

129. *Id.*

130. See Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. CONSTITUTIONNEL 123, 123 (2000-2001).

131. See Thomas J. Bollyk, *R IF C > P + B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations*, 18 S. AFR. J. ON HUM. RTS. 161, 169 n.46 (2002). Scholars argue the court should have exercised supervisory jurisdiction and issued an injunction. See *id.* at 169.

132. *Minister of Health & Others v Treatment Action Campaign & Others* (1) 2002 (10) BCLR 1033 (CC) (S. Afr.).

133. *Id.* at 1048.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Treatment Action Campaign & Others v Minister of Health & Others* 2002 (4) BCLR 356 (T) (S. Afr.).

138. *Id.* at 386-87.

139. *Id.* at 387.

The State was not thrilled with the decision of the High Court. In a statement made soon after the judgment, the Minister of Health stated:

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. . . . hat happens to public policy if it begins to be formulated piecemeal fashion through unrelated court judgments?¹⁴⁰

On appeal to the Constitutional Court, TAC argued the government's HIV policy was irrational,¹⁴¹ while the State argued the High Court order infringed the doctrine of separation of powers.¹⁴² The State argued its MTCT program was rational and consistent with its obligations under the constitution. The State put forward a myriad of policy arguments,¹⁴³ which the court concluded were unsupported by the facts.¹⁴⁴ Most importantly, the court determined the State could not argue scarce resources prevented the public distribution of nevirapine because drug companies had offered the government nevirapine free of charge for five years.¹⁴⁵

The Constitutional Court noted the constitution expressed the right of access to health care services separately from the State's obligation to implement the right progressively through reasonable legislative and

140. See Saras Jagwanth, *Democracy, Civil Society and the South African Constitution: Some Challenges* 17 (U.N. Educ., Scientific & Cultural Org., Mgmt. of Soc. Transformations, Discussion Paper No. 65, 2003).

141. Treatment Action Campaign, 2002 (10) BCLR 1033 at 1042. TAC arguments focused on several issues including the following: (1) the government endorsed nevirapine and the Medicines Control Council registered nevirapine for use to reduce the risk of MTCT of HIV; (2) the drug companies offered to supply nevirapine free of charge for five years; (3) the restriction of nevirapine to the pilot sites discriminated against women who could not travel to the pilot sites; (4) the restriction allowed doctors in the private sector to prescribe nevirapine, but prohibited most doctors in the public sector from doing so. *Id.* at 1041-42.

142. *Id.* at 1042-43.

143. See *id.* at 1050-51.

144. See *id.* at 1051-54.

145. *Id.* at 1050. The government argued it designed the pilot project to research the cost and efficacy of nevirapine. *Id.* at 1050-51. It was concerned the program could not effectively prevent the spread of HIV without a provision of substitute breast milk to prevent the spread of HIV through breastfeeding. *Id.* Further, the government considered counseling necessary to overcome the cultural stigma attached to bottle feeding. *Id.* Additionally, the government believed 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." *Id.* at 1051. Thus, the effective use of nevirapine required a "comprehensive package," including HIV testing, counseling, breast milk substitutes, progress monitoring, clean water supplies, and vitamin supplements. *Id.* at 1050-51. Therefore, the government claimed the "comprehensive package" was too costly and could not immediately be realized. *Id.* at 1051.

other measures within available resources.¹⁴⁶ However, consistent with *Grootboom*, it held that the provisions should be read together.¹⁴⁷ Further, the court rejected the argument that the right of access to health care had a “minimum core,” stating it would be impossible to give everyone access to a “core” service immediately.¹⁴⁸ The Constitutional Court stated it was not institutionally equipped to make wide ranging factual and political enquiries necessary for determining the “minimum core” standards.¹⁴⁹ 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. The [c]onstitution contemplates rather a restrained and focused role for the courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.¹⁵⁰

The Constitutional Court held it was required to determine whether the MTCT policy constituted a *reasonable* legislative or other measure.¹⁵¹ Decisions about the “reasonableness” of State action may have budgetary implications, but are not aimed at rearranging the budget.¹⁵² In considering the policy’s discriminatory effect on women without access to pilot sites, the court found the policy failed to meet constitutional standards because it excluded individuals the State could have reasonably included in the treatment program.¹⁵³ The issue was not whether the *best policy* was immediately realizable, but whether the government reasonably excluded nevirapine at public health facilities.¹⁵⁴ The court concluded it was unreasonable to deny mothers and children nevirapine in public health facilities outside of the pilot sites because there was no significant cost to administer the drug in facilities where testing and counseling procedures were in place.¹⁵⁵

In response, the State contended the Constitutional Court could not grant more than a declaratory judgment, stating the policy failed to meet constitutional standards.¹⁵⁶ It claimed separation of powers gave the executive a free hand to adapt its policies without interference from the

146. *Treatment Action Campaign*, 2002 (10) BCLR 1033 at 1045.

147. *Id.* at 1046.

148. *Id.* at 1046-47.

149. *Id.* at 1047.

150. *Id.*

151. *Treatment Action Campaign*, 2002 (10) BCLR 1033 at 1047.

152. *Id.* at 1055.

153. *Id.* at 1054.

154. *Id.* at 1054-55.

155. *Id.* at 1055.

156. *Treatment Action Campaign*, 2002 (10) BCLR 1033 at 1061.

judiciary.¹⁵⁷ The court rejected the argument, stating the exceptional and urgent nature of the medical treatment required intervention by the courts.¹⁵⁸ However, the Constitutional Court carefully noted that orders concerning policy choices must be formulated to not preclude political branches from making other legitimate policy decisions.¹⁵⁹

The Constitutional Court ordered, among other things, the State to remove restrictions that prevented nevirapine from being made available at public health facilities that were not research or training sites.¹⁶⁰ The court determined the evidence did not support an order for the provision of formula feed and considered the issue rather complex, with potentially significant budgetary implications.¹⁶¹ Most importantly, the court framed the order in a specific manner that did not “preclude government from adapting its policy in a manner consistent with the [c]onstitution if equally appropriate or better methods become available to it for reducing [MTCT] of HIV.”¹⁶²

Reconciling the policy decision inherent in the court’s 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 the legislature and the executive should be the primary formulator of policy, but stated this did not mean the “courts cannot or should not make orders that have an impact on policy” when mandated by the constitution.¹⁶³ 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.”¹⁶⁴

The court was acutely aware nevirapine was a potentially life saving drug and South Africa had one of the highest HIV infection rates in the world.¹⁶⁵ The case was exceptional in another way: the victims of State policy were children with no access to the democratic process.¹⁶⁶ These

157. *Id.*

158. *Id.* at 1063-64.

159. *Id.* at 1066.

160. *Id.* at 1072. The State was also ordered to (a) permit and facilitate the use of nevirapine in public hospitals to HIV-positive mothers who had been prescribed the medication and counseled, (b) provide counselors trained in the use of the drug to public hospitals and clinics other than research sites, and (c) take reasonable measures to extend the testing and counseling facilities at public hospitals and clinics to expedite the use of nevirapine. *Id.*

161. *Treatment Action Campaign*, 2002 (10) BCLR 1033 at 1069-70.

162. *Id.* at 1072.

163. *Id.* at 1061-62.

164. *Id.* at 1065-66.

165. *Id.* at 1055.

166. Kevin Hopkins, *Democracy in a Post-TAC Society*, DE REBUS (S. Afr.), Nov.

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.

Treatment Action Campaign was hailed as a victory for the sufferers of HIV in South Africa.¹⁶⁷ It was subsequently said that judgment reflects that "the [c]onstitution 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."¹⁶⁸

E. Fourie

Subsequently, in *Minister of Home Affairs v Fourie*,¹⁶⁹ the court tackled the vexed question of same-sex marriages.¹⁷⁰ There, the Constitutional Court determined the constitutionality of the South African common law definition of marriage and the Marriage Act of 1961.¹⁷¹ The common law defines marriage as "a union of one man with one woman, to the exclusion, while it lasts, of all others,"¹⁷² and the Marriage Act requires an explicit reference to the words "lawful wife" and "lawful husband" during the exchange of vows.¹⁷³

The State argued it would be inappropriate for the judiciary to significantly change the institution of marriage and that such changes should be addressed by the parliament.¹⁷⁴ In its argument, the State drew on several threads: a) the recognition of same-sex marriages is an inappropriate solution to discrimination against homosexuals in light of

2002, at 14, 17.

167. See, e.g., Jaspreet Kindra, *HIV/AIDS Drugs for All*, MAIL & GUARDIAN (S. Afr.), Oct. 11, 2002 ("After the TAC's Constitutional Court victory forcing the government to provide anti-retrovirals to HIV-positive pregnant women, the Cabinet in April announced that it would also extend the treatment to survivors of sexual assault.").

168. Geoff Budlender, *A Paper Dog with Real Teeth*, MAIL & GUARDIAN (S. Afr.), July 12, 2002.

169. *Minister of Home Affairs & Another v Fourie & Others* 2006 (3) BCLR 355 (CC) (S. Afr.).

170. See *id.* at 360.

171. See *id.*

172. *Id.*

173. See Marriage Act 25 of 1961 § 30(1) (S. Afr.). A marriage officer, by default, must ask the parties the following question:

"Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?" and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: "I declare that A.B. and C.D. here present have been lawfully married."

Id.

174. *Fourie*, 2006 (3) BCLR 355 at 402.

less dramatic alternatives;¹⁷⁵ (b) the constitution does not protect the right to marry;¹⁷⁶ and (c) international human rights law recognizes only heterosexual marriages.¹⁷⁷

In the majority judgment drafted by Justice Sachs, the Constitutional Court described gays and lesbians as a “permanent minority in society” who are exclusively reliant on the Bill of Rights for their protection.¹⁷⁸ Further, the court noted the parliament had, through recent legislation, reflected an awareness of the shifting notion of family in society.¹⁷⁹ The court declared that the mere fact that the legal system “embodies conventional majoritarian views [on homosexuality] in no way mitigates its discriminatory impact.”¹⁸⁰

The Constitutional Court refused to dismiss religious opposition to homosexuality lightly, warning that it must not be seen simply as chauvinism.¹⁸¹ Nevertheless, the court found that religious sentiment should not obstruct the upholding of fundamental rights.¹⁸² The court stated that no minister of religion was legally obliged to solemnize a same-sex marriage if that marriage would contradict religious doctrine.¹⁸³ Accordingly, the Constitutional Court had little difficulty in finding that the common law and statutory obstacles to same-sex marriage were unconstitutional because they breached, among other things, the right to equality and the prohibition against unfair discrimination in a manner that did not pass constitutional scrutiny under the limitation clause.¹⁸⁴

However, shaping an appropriate remedy proved more challenging to the court.¹⁸⁵ The State argued reading in the words “or spouse” into section 30(1) of the Marriage Act would be inappropriate.¹⁸⁶ It argued:

175. *See id.* at 388.

176. *See id.* at 372.

177. *See id.* at 393. In support of its argument, the State relied on article 16 of the Universal Declaration of Human Rights, which provides:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Universal Declaration of Human Rights, G.A. Res. 217A, art. 16, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

178. *Fourie*, 2006 (3) BCLR 355 at 363.

179. *See id.* at 367.

180. *Id.* at 385.

181. *See id.* at 390-91.

182. *See id.* at 392.

183. *See Fourie*, 2006 (3) BCLR 355 at 392.

184. *See id.* at 398-99.

185. *See id.* at 399-414.

186. *See id.* at 402.

(a) the public should be allowed to debate the issue; (b) the judiciary is not competent to alter the institution of marriage in such a significant manner; (c) only the parliament has the power to alter the institution of marriage in such a dramatic fashion.¹⁸⁷ It claimed a declaration of invalidity of section 30(1) of the Marriage Act should be suspended to enable the parliament to find an appropriate remedy.¹⁸⁸

Disagreement among the members of the court regarding an appropriate remedy led to a split.¹⁸⁹ The majority refused interim relief and suspended its declaration of invalidity for twelve months to allow the parliament to remedy the constitutional defect in the Marriage Act.¹⁹⁰ Only if the parliament failed to correct the defect would the words “or spouse” be read into the statute.¹⁹¹ The majority noted the South African Law Commission had proposed at least two different ways to remedy the problem.¹⁹² The majority reasoned that it was appropriate for the 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.¹⁹³ However, the minority judgment, drafted by Justice O’Regan, held that reading the words “or spouse” into the Marriage Act would not create great uncertainty regarding the status of same-sex marriages or obstruct the legislature in its policy choices.¹⁹⁴

Fourie received a mixed response. It was criticized by some gay rights organizations for failing to make same-sex marriages immediately effective and by deferring equality.¹⁹⁵ The ANC welcomed the decision, calling it “an important step forward,”¹⁹⁶ but many other political parties were not as enthusiastic.¹⁹⁷ Furthermore, churches, including the Anglican Church, voiced their disappointment with the decision.¹⁹⁸ On the whole, the public response has not been positive.

Following a heated debate in parliament on November 15, 2006, the Civil Union Act was passed into law¹⁹⁹ after the ruling ANC applied a

187. *See id.*

188. *See Fourie*, 2006 (3) BCLR 355 at 402.

189. *See id.* at 416.

190. *See id.* at 412-13.

191. *See id.* at 413.

192. *See id.* at 408.

193. *See Fourie*, 2006 (3) BCLR 355 at 416 (O’Regan, J., dissenting).

194. *Id.* at 417.

195. Jenni Evans, *Govt to Respect Gay Marriage Ruling*, MAIL & GUARDIAN (S. Afr.), Dec. 1, 2005, http://www.mg.co.za/articlePage.aspx?articleid=258227&area=/breaking_news/breaking_news__national/.

196. *Id.*

197. *Id.*

198. *Id.*

199. Civil Union Act 17 of 2006 (S. Afr.).

significant amount of pressure on its parliamentary representatives for support.²⁰⁰ The Act has been strongly criticized by both conservatives and liberals alike. Conservatives argue that the law lends itself to support of sexual perversion. Liberals argue that the Civil Union Act discriminates against homosexuals because it permits clerics to refuse to solemnize homosexual marriages, creates a separate and parallel marriage regime for homosexuals, and requires marriage officers to inquire whether homosexual couples wish to call their union a marriage or a civil partnership.²⁰¹

F. United Democratic Movement²⁰²

In *United Democratic Movement v President of the Republic of South Africa & Others*,²⁰³ the Constitutional Court adopted a strongly deferential approach in considering a constitutional challenge to legislation allowing “floor-crossing” by members of Parliament. The court set the tone for its consideration of the merits of the challenge by noting that “[t]his case is not about the merits or demerits of the disputed legislation, [which] is a political question and is of no concern to this Court.”²⁰⁴ The court held that if defection is permissible, the details must be left to parliament.²⁰⁵ The court further held that the frustration of the will of the electorate (by allowing floor-crossing) does not infringe section 19 of the constitution because all the rights in this section “are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives.”²⁰⁶ In addition, the *United Democratic Movement* court held, multi-party democracy is not undermined because section 1(d) of the constitution does not prescribe a particular form of electoral system and the commitment to multi-party democracy is not incompatible with a system of proportional representation that allows floor-crossing between elections.²⁰⁷ When it considered the question of remedy, the court stated further that, in making orders in constitutional

200. *Green Light for Gay Marriages*, 1AFRICA (S. Afr.), Nov. 15, 2006, http://iafrica.com/pls/cms/iac.page?p_t1=2&p_t2=1&p_t3=0&p_t4=0&p_dynamic=YP&p_content_id=416904&p_site_id=2.

201. South African Council of Churches, Submission to the Portfolio Committee on Home Affairs (Oct. 9, 2006), available at <http://www.sacc-ct.org.za/civiluns.html> (last visited Apr. 20, 2007).

202. See generally Brickhill & Babiuch, *supra* note 5, ch. 45.

203. *United Democratic Movement v President of the Republic of S. Afr. & Others* (No 2) 2002 (11) BCLR 1179 (CC) (S. Afr.).

204. *Id.* ¶ 11.

205. *Id.* ¶ 47.

206. *Id.* ¶ 49.

207. *Id.* ¶ 35.

matters, courts are required to bear in mind the principle of the separation of powers and, flowing from it, the deference that they owe to the legislature in devising a remedy.²⁰⁸

Separation of powers and deference are effectively the central themes of *United Democratic Movement*. In this respect, the case provides an excellent example of a judicial approach that, on the face of it, is highly deferential to Parliament, but the outcome of which nevertheless arguably fails to promote or protect democratic principles. While the Court emphasizes that it is for Parliament to design the detail of the electoral system, the reasoning in *United Democratic Movement* reflects a shallow, pluralist conception of the principle of democracy under the final constitution. It is also at odds with the Court's other dicta on the nature of South African democracy and the importance of democratic rights. However, paradoxically, while the decision of the Court is, in substance, arguably at odds with the democratic commitments in the constitution, the Court in *United Democratic Movement* adopted an approach that was highly deferential to parliament's democratically superior position.

G. Doctors for Life²⁰⁹

The applicant in *Doctors for Life*²¹⁰ challenged a cluster of abortion-related statutes on the grounds that, during the legislative process leading to their enactment, the National Council of Provinces (NCOP) and provincial legislatures had not complied with their constitutional obligations under sections 72(1)(a) and 118(1)(a) of the constitution. In terms of section 72(1)(a), the NCOP "must . . . facilitate public involvement in [its] legislative and other processes . . . and [those of] its committees."²¹¹ Section 118(1)(a) imposes a similar obligation on the provincial legislatures.²¹²

At the outset, Justice Ngcobo, writing for the majority, addressed the issue of separation of powers, noting that this principle is one of the essential features of South African democracy.²¹³ While the courts must observe the constitutional limits of their authority, and not interfere in the processes of other branches of government unless so mandated by the

208. *United Democratic Movement*, 2002 (11) BCLR 1179 ¶ 115.

209. See generally Brickhill & Babiuch, *supra* note 5, ch. 45.

210. *Doctors for Life Int'l v Speaker of the Nat'l Assembly & Others* 2006 (12) BCLR 1399 (CC) (S. Afr.).

211. S. AFR. CONST. 1996 § 72(a)(1).

212. Justice Ngcobo delivered the judgment of the majority. Justice Sachs filed a separate concurring judgment, and Justice Yacoob (with the concurrence of Justice Skweyiya) and Justice Van der Westhuizen filed dissenting judgments.

213. *Doctors for Life Int'l*, 2006 (12) BCLR 1399 ¶ 36.

constitution,²¹⁴ the constitution is the supreme law and binds all branches of government, including parliament.²¹⁵ Accordingly, the court has the power and responsibility to ensure that parliament fulfils its constitutional obligations: it would require clear language in the constitution to deprive the court of this power.²¹⁶

In relation to the right to vote, a particular version of the counter-majoritarian argument has been advanced by some judges of the Constitutional Court. The argument is that, by interfering in the legislative process or invalidating legislation adopted by democratically elected legislative bodies (even if doing so in order to enforce the right to vote), the court is undermining the right to vote itself.²¹⁷ The court has found its answer to this concern in the supremacy of the final constitution. In *Doctors for Life*, Justice Ngcobo explained:

This Court has emphasiz[ed] on more than one occasion that although there are no bright lines that separate its role from those of the other branches of government, “there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.” But at the same time, it has made clear that this does not mean that courts cannot or should not make orders that have an impact on the domain of the other branches of government. When legislation is challenged on the grounds that Parliament did not adopt it in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament has given effect to its constitutional obligations. If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may—and if need be must—use their powers to make orders that affect the legislative process.²¹⁸

Like *United Democratic Movement*, *Doctors for Life* is a case that concerns, substantively, the powers of parliament and principles of democracy to which the constitution is committed. However, in *Doctors for Life*, the court effectively concluded that the right of public participation in the law-making process weighs more heavily in the

214. *Id.* ¶ 37.

215. *Id.* ¶ 38.

216. *Id.*

217. *Id.* ¶ 339 (Yacoob, J., dissenting); *id.* ¶ 239 (Sachs, J., concurring).

218. *Doctors for Life Int'l*, 2006 (12) BCLR 1399 ¶ 199 (citing *Minister of Health & Others v Treatment Action Campaign & Others* (1) 2002 (10) BCLR 1033 ¶ 98 (CC) (S. Afr.)) (footnotes omitted).

South African democracy than the need for the court to defer to a democratically elected parliament on such issues.

V. Constitutional Court & Counter-Majoritarianism

This part will explore the following issues: (a) the extent of the counter-majoritarian difficulty in South Africa; (b) the court's approach to the counter-majoritarian difficulty; and (c) the methods 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.²¹⁹ These scholars would claim that "[t]he [c]onstitution has a greater democratic pedigree than ordinary legislation."²²⁰ However, the CPs, as a product of political compromise and negotiation between unelected and unmandated delegates, bound the drafting of the final constitution and accordingly diminished its democratic credentials.²²¹ In the absence of a referendum, it is hard to say whether the political compromises reflected the will of 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 Constitutional 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 the 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 several of the cases and faced strong public opposition in *Fourie* and *Makwanyane*. There was also a measure of public opposition to the decision in *Doctors for Life*.

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

219. See Jeremy Sarkin, *The Political Role of the South African Constitutional Court*, 114 S. AFR. L.J. 134, 138 (1997); see also Davis, *supra* note 2, at 11-14.

220. Christopher J. Roederer, *Dennis the Menace: Post-Structuralist Dabbler or Constructive Interpreter?*, 118 S. AFR. L.J. 177, 191 (2001) (reviewing DENNIS DAVIS, *DEMOCRACY AND DELIBERATION* (1999)).

221. See Osborne & Sprigman, *supra* note 2, at 701-02; Matua, *supra* note 5, at 81, 92, 112.

appropriate degree of deference that should be accorded to the 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 the parliament whereas refusing the relief perpetuated unfair discrimination for twelve months.

Makwanyane in retrospect represents a missed opportunity to work out a consistent view on the institutional role of the judiciary. Despite the authors' 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.²²² Furthermore, there was no express constitutional requirement that the court determine the issue.²²³ The public was therefore entitled to input in the resolution of the death penalty issue²²⁴ through a referendum or a 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 the 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 *Treatment Action Campaign* as counter-majoritarian. Both generally received a warm public reception. In *Grootboom*, the court carefully minimized its potential conflict with the 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 satisfy the "minimum core content" of the socio-economic right regardless of resources.²²⁵ The court avoided an interpretive approach that would, almost inevitably, have placed it at odds with the political branches. However, its stance also means that individuals have no constitutionally enforceable right to

222. See *State v Makwanyane & Another* 1995 (6) BCLR 665, 739-40, 745-46, 757 (CC) (S. Afr.) (Didcott, Kentridge & Mahomed, JJ., concurring).

223. The court may have found ways to defer any decision on the death penalty to the parliament through the constitution or other restrictive techniques.

224. Indeed, as the court pointed out, the public has traded its right to self-help in exchange for protection from the State. See *id.* at 731 (Ackermann, J., concurring).

225. See *Gov't of the Republic of S. Afr. & Others v Grootboom & Others* 2000 (11) BCLR 1169, 1187-88 (CC) (S. Afr.).

adequate housing.

Treatment Action Campaign was based primarily on equal protection reasoning because the State made nevirapine available at some sites but not others.²²⁶ 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 the parliament.²²⁷ 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.²²⁸ 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.²²⁹

United Democratic Movement and *Doctors for Life* provide a compelling illustration of cases in which a substantive commitment to democracy can justify (anti-democratic) judicial intrusion into the legislative sphere. In both cases, arguably the threat to democracy posed by state action (in *United Democratic Movement*, by floor-crossing legislation and in *Doctors for Life* by legislative neglect for public participation in the law-making process) is far greater than the threat to democracy posed by the court’s intervention.

How can the court minimize the counter-majoritarian difficulty? There are numerous mechanisms at the court’s disposal to avoid unnecessary intrusions into the policy and political arena. For instance, the court could expand the use of the courtroom as a forum for democratic deliberation by extending rules of standing. Further, the court may fashion remedies in restrictive terms,²³⁰ continuing to set out

226. See *Minister of Health & Others v Treatment Action Campaign & Others* (1) 2002 (10) BCLR 1033, 1048 (CC) (S. Afr.).

227. See *id.* at 1066.

228. See Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights in South Africa*, ESR REV. (S. Afr.), Nov. 2005, at 3, 6.

229. *Id.* In *Rail Commuters Action Group & Others v Transnet Ltd.*, 2005 (4) BCLR 301 (CC) (S. Afr.), 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 any threat to fundamental rights[,] . . . [and] the intensity of the harm that may result.” *Id.* at 337.

230. Section 172 provides, among other things, that courts “must declare that any law

only the required *reasonable* standards 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.²³¹

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.²³² But this does not eliminate the problem as explained by Justice Kentridge in *State v Zuma*:

While we must always be conscious of the values underlying the [c]onstitution . . . 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 [favor] of a general resort to "values" the result is not interpretation but divination.²³³

The limitation clause,²³⁴ which ought to guide interpretation of appropriate limitations on rights, is not always of assistance. It has been

or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency." S. AFR. CONST. 1996 § 172(1)(a). Courts may issue any order that is just and equitable, including those that limit the retrospective effect of a declaration of invalidity or suspend a declaration to allow any competent authority to correct the defect. *Id.* § 172(1)(b).

231. See *Minister of Home Affairs & Another v Fourie & Others* 2006 (3) BCLR 355, 417-18 (CC) (S. Afr.).

232. See S. AFR. CONST. 1996 § 39. As Roederer puts it, the approach assumes that "the legislators' intention is captured by the plain meaning of the words they chose to enact. Since the legislators are democratically accountable and the judges are not, judges should yield to these democratic choices." Roederer, *supra* note 220, at 184.

233. *State v Zuma & Others* 1995 (4) BCLR 401, 412 (CC) (S. Afr.).

234. 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. S. AFR. CONST. 1996 § 36(1).

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.²³⁵

VI. Conclusion

The Constitutional Court may be the highest court of appeal in constitutional matters, but we must not forget the special constitutional role of the democratically elected parliament among the three branches of government. Besides, the constitution entrenches democratic norms and the doctrine of separation of powers.²³⁶ 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.²³⁷ Corporations are sometimes so powerful that they may threaten governments.²³⁸ 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.”²³⁹ Furthermore, in recent times the influence of the legislature has declined relative to the executive.²⁴⁰ However, in the face of all this uncertainty, we do know 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.²⁴¹ A study done in 1996 and 1997 found that South Africans have an ambivalent attitude toward the Constitutional Court, that only a narrow majority believe the Constitutional Court could generally be trusted, and that, if the court makes unpopular decisions, many believe the court should be abandoned.²⁴² Accordingly, in spite of widespread academic acclaim

235. Dennis Davis, *Democracy and Integrity: Making Sense of the Constitution*, 14 S. AFR. J. ON HUM. RTS. 127, 132 (1998) (citing DENISE MEYERSON, *READING THE CONSTITUTION THROUGH THE LENS OF PHILOSOPHY* (1998)).

236. Section 7(2) requires the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. S. AFR. CONST. 1996 § 7(2).

237. 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 funding, self interest, careerism, and racism. See Robert Mattes, *The Myths of Majoritarianism: Understanding Democracy in a New South Africa* (Inst. for Democracy in S. Afr., Occasional Paper No. 43, 1992).

238. Stephen 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. 21, 62 (2001-2002).

239. BICKEL, *supra* note 1, at 25.

240. Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights* 11 (Ctr. for Human Rights and Global Justice, Working Paper No. 8, 2005).

241. Van Huysteen, *supra* note 21, at 1.

242. James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, J. POL., Feb. 2003, at 1,

(locally and internationally), 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.”²⁴³ A study in 2002 concluded that sixty percent of South Africans agree that the “constitution expresses the values and aspirations of the South African people.”²⁴⁴ Furthermore, the study concludes that belief in the legitimacy of the constitution is statistically no different than it was four years earlier. While the results of the study arguably reflect a need for popular education on the role of the constitution and the Constitutional Court, regardless of their underlying cause, the opinions reflected in the study should not be lightly disregarded.

Many argue that the efficacy of courts lies in their institutional legitimacy and the achievement of moral authority that permits them to make unpopular decisions.²⁴⁵ It may be also argued that the legitimacy of the Constitutional Court flows from the fact that it seeks to implement the constitution. The legitimacy of the Constitutional Court is intrinsically linked to the legitimacy of the constitution and neither should be taken for granted. The relatively low popular 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 in reality 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.”²⁴⁶ 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 an applier of the law and not seek a role as an equal player in the articulation of societal values.”²⁴⁷

Although the adjudicative process is ill-suited to finally determining

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243. *Id.* at 3.

244. Robert Mattes et al, *Democratic Governance in South Africa: The People's View* 2-3 (Afrobarometer, Paper No. 24, 2003).

245. *Id.* at 2.

246. Whittington, *supra* note 32, at 798.

247. R. Gavison, in *COMPARATIVE CONSTITUTIONAL LAW 703-07* (Vicki C. Jackson & Mark V. Tushnet eds., 2006).

“polycentric” issues (i.e. issues which cannot be determined separately to other matters not before the court),²⁴⁸ it is not an invitation to create false pretexts to avoid granting appropriate relief that is just and equitable. The denial of relief in *United Democratic Movement* presents an image of a court that relies on the counter-majoritarian argument to come to a substantive conclusion that is itself, arguably, contrary to democratic principles. 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.²⁴⁹ The current jurisprudence, reflected by the *United Democratic Movement*, *Fourie*, and *Makwanyane* rulings does not engage the public and is unlikely to win its confidence. Perhaps, in these highly contested areas of public opinion, entering the arena of public debate would not have assisted the Court in deciding the cases, but greater engagement with the popular dialogue was possible. Arguably, the court in *United Democratic Movement* and *Fourie* was excessively deferential to parliament.

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.²⁵⁰ *Treatment Action Campaign* marks a change in direction with the court showing that it will not shy away from shaping policy. There must be less deference in this area. 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 [socio-economic rights] lack political power.”²⁵¹

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.²⁵² From this perspective,

248. 2 THE NEW CONSTITUTIONAL AND ADMINISTRATIVE LAW 82 (Rosemary Lyster & Cora Hoexter eds., 2002).

249. Max du Plessis, *Between Apology and Utopia—The Constitutional Court and Public Opinion*, 18 S. AFR. J. ON HUM. RTS. 1, 14 (2002).

250. Through such jurisdiction the court monitors the implementation of its own orders. In *Treatment Action Campaign*, the court stated it may make both declaratory and mandatory orders and exercise supervisory jurisdiction. See *Minister of Health & Others v Treatment Action Campaign & Others* (1) 2002 (10) BCLR 1033, 1066 (CC) (S. Afr.).

251. Sunstein, *supra* note 130, at 124.

252. See Darrel Moellendorf, *Reasoning About Resources: Soobramoney and the Future of Socio-Economic Rights Claims*, 14 S. AFR. J. ON HUM. RTS. 327, 332 (1998);

effective judicial remedies for socio-economic rights are not counter-majoritarian.

In cases that turn on substantive principles related to democracy, such as *United Democratic Movement* and *Doctors for Life*, the Constitutional Court has to walk a seemingly paradoxical tightrope and adopt an approach, on the one hand, reflecting appropriate deference and respect for legislation made by a democratic parliament; while, on the other hand, giving sufficient weight and protection to substantive democratic principles and rights such as the right to vote. In a sense, in such cases the court may have to “act counter-majoritarian” in order to protect the majoritarian democracy that the constitution creates by striking down laws that threaten that democracy. In our view, when the court does so, it is *not* biting off its nose to spite its face—quite the opposite, its intrusions are generally supportive of democracy!

The function of the Constitutional Court, although ostensibly counter-majoritarian at times, is ultimately supportive of democracy and seeks to legitimate the constitution (and, by implication, the role of the court itself). The court has striven to establish a body of principles setting out its institutional role in relation to the legislature and to reconcile that role with counter-majoritarian objections—this process continues. However, the court’s role as upholder of the constitution (including the upholder of constitutional democratic principles) often requires its intrusion into legislative terrain. It upholds protections that ensure democratic process and protects minority rights against the will of the majority. When doing so, however, the court has been alive to the tension between its intervention to protect democracy and the potential (at least in public opinion) threat to democracy that its intrusion presents. In sum, no better exposition of South African constitutionalism exists but to describe it as “mutually supportive and in tension with democracy.”²⁵³

Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, 8 S. AFR. J. ON HUM. RTS. 451, 461 (1992).

253. See Osborne & Sprigman, *supra* note 2, at 700.