

**JUDICIAL ACTIVISM IN SOUTH AFRICA'S CONSTITUTIONAL COURT:  
MINORITY PROTECTION OR JUDICIAL ILLEGITIMACY?**

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**By**

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## DECLARATION

I, **DIALA Anthony Chima**, declare that the work presented in this dissertation is original. It has never been presented to any other University or organisation. Other people's works used here have been properly acknowledged.

Diala Anthony C.

Signed.....

Date.....

Supervisor: Associate Professor Tamale Sylvia

Signature.....

Date.....

## DEDICATION

To my late beloved mother, Comfort Akuchukwu Diala, (nee Maduka)

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## LIST OF ABBREVIATIONS

ANC	African National Congress
ALRAESA	Association of Law Reform Agencies of Eastern and Southern Africa
AJ	Acting judge
BBC	British Broadcasting Corporation
CC	Constitutional Court
CJ	Chief Justice
CCT	Constitutional Court
CIA	Central Intelligence Agency
CODESA	Conference for a Democratic South Africa
DPP	Director of Public Prosecutions
ECOSOC	Economic, Social and Cultural Rights Committee
ECtHR	European Court of Human Rights
ESCR	Economic, Social and Cultural Rights
Ed	Edition
FN	Footnote
ICESCR	International Covenant on Economic, Social and Cultural Rights
HIV	Human Immunodeficiency Virus
MEC	Member of Executive Council
MTCT	Mother – to – child transmission
NGOs	Non Governmental Organisations
Para	Paragraph
PIL	Public interest litigation
SA	South Africa
SAIFAC	South African Institute for Advanced Constitutional, Public, Human Rights and International Law
TAC	Treatment Action Campaign
US	United States of America

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## CHAPTER 1: INTRODUCTION

### 1.1 Background

From time immemorial, humankind has struggled to achieve better standards of living. Accordingly, 'the advent of a world in which human beings shall enjoy freedom of speech and belief, and freedom from fear and want' has been acknowledged as 'the highest aspiration' of humanity.<sup>1</sup> To effectively realise this aspiration, which I broadly classify as protection of human rights, governmental functions are divided between the executive, legislature and judiciary, in line with principles enunciated by Montesquieu.<sup>2</sup> The legislative arm makes laws, the executive implements them and the judiciary interprets laws and adjudicates over disputes. According to Montesquieu:

Political liberty is to be found ... only when there is no abuse of power. .. There is no liberty if the judicial power is not separated from the legislative and the executive power... There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all the three powers.

This doctrine of separation of powers requires that the judiciary refrain from unnecessary intrusion into the legislative realm. On the other hand, the judiciary is mandated to protect fundamental human rights enshrined in the Constitution. In exercising its adjudicatory and interpretative powers, the judiciary sometimes arrives at unpopular decisions often termed 'judicial activism.'

Judicial activism has been defined as 'a philosophy of judicial decision-making, whereby judges allow their personal views about public policy, among other factors, to guide their decisions.'<sup>4</sup> As a concept, it has fascinated scholars since the turn of the twentieth century.<sup>5</sup> Inherent in this fascination is the paradox of unelected individuals determining the intention of an elected legislature in a manner sometimes contrary to the desires of the majority.<sup>6</sup> This paradox is heightened by perception that

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<sup>1</sup> Universal Declaration of Human Rights 1948, para 2

<sup>2</sup> *L'Esprit des Lois* (1748) xi, 4. The English version is *Montesquieu: The Spirit of the Laws* (1989)

<sup>3</sup> As above; see also J. Locke, *Second Treatise of Civil Government* (1690) Ch xii, 143

<sup>4</sup> Blacks Law Dictionary (8<sup>th</sup> ed 2004)

<sup>5</sup> In deed, a scholar wrote over half a century ago that he lived in 'a day that hears much talk of judicial activism.' See K. D. Kmiec, 'The Origin and Current Meanings of Judicial Activism,' (2004) *California Law Review*, 1464-1477; citing J.D. Hyman, 'Segregation and the Fourteenth Amendment', 4 *Vanderbilt Law Review*, (1950) 555, 555. This fascination is shrouded in histrionics. See for examples, T. Campbell 'Judicial Activism – Justice or Treason?' (2003) 10 *Otago Law Review* 307; T. L. Jipping, 'Legislating from the Bench: The Greatest Threat to Judicial Independence,' (2001) 43 *South Texas Law Review*, 141, 152; P Schlafly, *The Supremacists: The Tyranny of Judges And How to Stop It*, (2004)

<sup>6</sup> A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2<sup>nd</sup> ed, 1986) 21



judicial review is an implicit expression of distrust for elected representatives and a precaution against elected representatives' abuse of the electorates' trust.<sup>7</sup>

Together with the above paradox, criticisms of judicial activism have made courts ultra-sensitive to the fine line between executing their constitutional mandate and 'legislating from the bench.'<sup>8</sup> In the words of Lord Steyn:

(I)n construing statutes, courts have no law-making role. On the other hand, in the exposition of the Common Law, the courts have a creative role ... it is necessary for courts, when developing the Common Law, to proceed with caution lest they undermine confidence in their judgments.<sup>9</sup>

Underlying the above sensitivity is the judiciary's desire to maintain legitimacy by refraining from excessive unpopular pronouncements. This desire requires a balancing act voiced by Justice Albie Sachs thus: '[u]ndue judicial adventurism can be as damaging as excessive judicial timidity.'<sup>10</sup> On the other side of the divide, scholars like Peabody<sup>11</sup> and Sathe<sup>12</sup> argue for robust judicial creativity.

On 1 December 2005, the South African Constitutional Court ruled section 30(1) of the South African *Marriage Act*<sup>13</sup> unconstitutional, for non-recognition of gay couples' right to marry.<sup>14</sup> It ordered Parliament to remedy the Common Law before 1 December 2006, to avoid an automatic inclusion of the words 'or spouse' after the words 'or husband' in section 30(1) of the *Marriage Act*. On 30 November 2006, Parliament enacted the *Civil Union Act*, which basically accorded legal recognition to gay unions. The Act was greeted with hostility by many South African citizens.<sup>15</sup>

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<sup>7</sup> As above

<sup>8</sup> B. G. Peabody, 'Legislating From the Bench: A Definition and A Defence,' (2007) 11 *Lewis & Clark Law Review* 185

<sup>9</sup> 'Deference: A Tangled Story,' *Judicial Studies Board Lecture* (2004); in C Howie, 'Judges and Law Reform: Judicial Creativity or judicial activism?' *ALRAESA Law Reform Conference* (2005); at [www.doj.gov.za/alraesa/conferences/papers/s3A\\_howie.pdf](http://www.doj.gov.za/alraesa/conferences/papers/s3A_howie.pdf) (accessed 16 May 2007)

<sup>10</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 156

<sup>11</sup> Peabody (n 8 above)

<sup>12</sup> S. P Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, (2002)

<sup>13</sup> No 25, 1991

<sup>14</sup> *Minister of Home Affairs & Anor v Fourie & ors; Lesbian and Gay Equality Project & ors v Minister of Home Affairs & ors*, 2006 (3) BCLR 355 (CC)

<sup>15</sup> *Cape Times*, 'Same-sex Union Bill Gets Passions Going,' 10 October 2006; at [http://www.int.iol.co.za/index.php?click\\_id=13&set\\_id=1&art\\_id=vn20061010080909957C477007](http://www.int.iol.co.za/index.php?click_id=13&set_id=1&art_id=vn20061010080909957C477007) (accessed 18 September 2007)

## 1.2 Statement of the research problem

This study examines the effect of judicial protection of minority rights<sup>16</sup> on the Constitutional Court's legitimacy. The framing of the *Marriage Act* shows that Parliament intended marriage to be between a man and a woman. By nullifying section 30(1) of the Act and making the order above, the Court fulfilled its constitutional mandate of upholding fundamental human rights. At the same time, it negated the intention of Parliament which represents *majoritarian* interests.

The Constitutional Court is, in contra-distinction with Parliament, unelected. By voiding section 30(1) of the *Marriage Act* and arousing public opposition to legal recognition of same-sex unions, it raised a 'countermajoritarian difficulty.' This 'countermajoritarian difficulty' has elicited intense scholarly debate.<sup>17</sup> The study examines how the Court's negation of majoritarian interests in order to protect minority rights affects its legitimacy.

## 1.3 Significance of the study

Protection of human rights is a core aspect of the judiciary's mandate. However, when the Court interprets the Constitution in a manner that contradicts majority interests, it is sometimes accused of judicial activism. In light of deep scars inflicted on the psyche of South African society by apartheid,<sup>18</sup> an examination of judicial activism aimed at protecting the rights of 'minorities' is very important. This is especially useful to the majority who are affected by such activism. Resolution of questions raised in this study would shed light on the Court's role in sustenance of democracy and protection of human rights. It would also assist in improved knowledge of controversies likely to arise from the Court's future decisions.

## 1.4 Objectives of the study

The overall purpose of the study is to assess the effect of judicial activism on protection of minority rights and the Constitutional Court's legitimacy. This includes the basis of judicial protection of minority rights, difficulty raised by decisions that

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<sup>16</sup> By minorities, I do not merely refer to numerically inferior segments of the population. I use the term broadly to also include disadvantaged or marginalised social groups such as same-sex couples, women, children, prisoners, sex workers and physically challenged persons. In fact, as Sachs J. pointed out in *The Gauteng Provincial Legislature in re: Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995*: 'there is no clear majority population in South Africa against which minorities need to be protected. Linguistically and culturally speaking, there are only minorities in our country;' in K. Henrard, *Minority Protection in Post- Apartheid South Africa: Human Rights, Minority Rights, and Self Determination* (2002), 39

<sup>17</sup> See B. Friedman, 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty,' (2002) 112 *Yale Law Journal*

<sup>18</sup> These scars were recreated in colourful language by Mahomed J. in *S v Makwanyane* 1995 (3) SA 391 (CC) para 262

contradict majority opinion and how these affect public perception of the Constitutional Court. Specifically, the study aims to answer these questions:

1. To what extent does judicial activism in the Constitutional Court protect minority rights?
2. How does judicial activism affect the Constitutional Court's legitimacy?

### **1.5 Assumptions**

To achieve its objectives, the study makes two assumptions:

- (a) That judicial activism protects minority rights.
- (b) That judicial activism aimed at upholding human dignity has no negative effect on judicial legitimacy.

### **1.6 Methodology**

The study employs a critical, non-empirical research method. Primary and secondary materials from libraries and the internet are used to assess the effect of judicial protection of minority rights on the Constitutional Court's legitimacy.

### **1.7 Limitations of the study**

The study isolates three forms of judicial activism. They are activism in reform of procedural rules, socio-political activism and activism in human rights. Space constraint limits the scope of this study to human rights judicial activism in South Africa and its affect on the Constitutional Court's legitimacy. The cases discussed here are restricted to the Constitutional Court.

### **1.8 Overview of chapters**

The study consists of four chapters. Chapter one establishes the background, objectives, significance, methodology and scope of the study.

Chapter two clarifies the meaning of judicial activism, its classifications and distinction from judicial review, as well as the meaning of judicial legitimacy. It also reviews literature on judicial activism and adopts a position on the subject.

Chapter three examines judicial activism in post-apartheid South Africa. It begins with an overview of the historical origins of post-1994 constitutionalism, proceeds to jurisprudence of the Constitutional Court regarding judicial activism and ends by assessing the Court's countermajoritarian difficulty.

Chapter four examines the effect of judicial activism on judicial legitimacy and ends with a conclusion on the research questions of the study.

## CHAPTER 2: CONCEPTUAL FRAMEWORK AND LITERATURE REVIEW

### 2.1 Introduction

The implications of judicial activism on separation of powers and legitimacy of courts require a framework to structure the complex issues analysed in this study. This chapter discusses the meaning and origin of judicial activism, its distinction from judicial review and the meaning of judicial legitimacy. As judicial activism is imprecise, the chapter examines its various forms. Finally, it reviews the extensive literature on judicial activism. Because the past provides clues to the future, it begins by exploring the history of the concept of judicial activism. It aims to lay a foundation for the ensuing discourse on how judicial activism affects the Constitutional Court's legitimacy.

### 2.2 Origin and meaning of judicial activism

#### 2.2.1 Origin of judicial activism

As an idea, judicial activism may be traced to the 19<sup>th</sup> century jurisprudential clash between the positivist and naturalist schools of law regarding the proper place of judicial legislation. Judicial legislation has been described by a scholar as 'the growth of the law at the hands of judges.'<sup>19</sup> In this clash, Jeremy Bentham was the most vociferous. He described judicial legislation as not only 'usurpation of the legislative function,' but also 'miserable sophistry.'<sup>20</sup>

Although there is no consensus on the first use of the term 'judicial activism,' Arthur Schlesinger Jr. is given this credit for a January 1947 article in *Fortune* magazine titled 'The Supreme Court.'<sup>21</sup> Following his article, a host of works on the topic, mostly focussed on the United States (US) Supreme Court, were published in the 1950s and 1960s.<sup>22</sup>

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<sup>19</sup> E. R. Thayer, 'Judicial Legislation: It's Legitimate Function in the Growth of the Common Law,' (1891) 5 *Harvard Law Review* 172; cited by K. D. Kmiec, 'The Origin and Current Meanings of Judicial Activism,' (2004) *California Law Review*, 1444

<sup>20</sup> R. A. Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (1996), 56-57; in K. D. Kmiec, (as above)

<sup>21</sup> At p 202, 208. For early works that attribute the first use of judicial activism to him, see 'Mr. Justice Reed--Swing Man or Not?' (1949), 1 *Stanford Law Review*, 714, 718; A. S. Goldstein, 'Eugene v. Rostow as Dean: 1955 -1965,' (1985), 94 *Yale Law Journal*, 1323, 1323, and C. H. Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values: 1937-1947*, (1948), upon which a host of other works that mentioned judicial activism were based

<sup>22</sup> See for e.g., E. McWhinney, 'The Supreme Court and the Dilemma of Judicial Policy-Making,' (1955), 39 *Minnesota Law Review*, and E. McWhinney, *Judicial Review in the English-Speaking World*, (1956)

Judge Hutcheson of the US Appeals Court unquestionably penned the first recorded judicial opinion use of 'judicial activism' through a footnote in the case of *Theriot v. Mercer*.<sup>23</sup>

### **2.2.2 Meaning of judicial activism**

*'Everyone scorns judicial activism, that notoriously slippery term.'*<sup>24</sup>  
Judge Easterbrook

It is easy to understand why there is no agreement regarding the meaning of judicial activism. First, because of individual perceptions, there is scarcely a concept with a consensus definition and judicial activism is not exempted. Second, and more importantly, due to its often political colourations, judicial activism evokes strong passions that threaten dispassionate intellectual scholarship. Such passions have led writers to describe the term from the perspective in which they view the particular judicial decision they criticise. This perhaps prompted Justice Scalia to observe that the term, in its current usage, is 'totally imprecise' and 'nothing but fluff'.<sup>25</sup>

The Black's Law Dictionary defines judicial activism as a:

(j)udicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions in the legislative and executive matters.<sup>26</sup>

After analysing usage of judicial activism in judicial opinions, books and articles in law journals, Kmiec<sup>27</sup> reached 'five core meanings' of the term. These core meanings require brief exposition.

#### **a) Invalidation of arguably constitutional actions of other branches**

According to Kmiec, scholars often describe judicial activism as 'judicial invalidation of legislative enactment'.<sup>28</sup> His assertion is supported by Jones, who offered this description of the subject: 'at the broadest level, judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation'.<sup>29</sup>

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<sup>23</sup> 262 F. 2d 754, at 760, FN. 5 (1959); cited in K. D. Kmiec (n 19 above) 1455

<sup>24</sup> F. H. Easterbrook, 'Do Liberals and Conservatives Differ in Judicial Activism?' (2002) 73 *University of Columbia Law Review*, 1401

<sup>25</sup> *Republican Party of Minnesota v. White* (01-521) 536 U.S. 765 (2002), Oral arguments

<sup>26</sup> Black's Law Dictionary, (1999), 7th edition

<sup>27</sup> Kmiec, (n 19)

<sup>28</sup> As above, 1464

<sup>29</sup> G. Jones, 'Proper Judicial Activism,' (2002), 14 *Regent University Law Review*, 141, 143

However, recognising the deficiency of the above definition in cases of unconstitutional pieces of legislation, Kmiec quickly turned to a refined definition offered by Professor Graglia who posited:

By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit.<sup>30</sup>

### ***b) Ignoring precedent***

Judicial activism is also defined in terms of judges ignoring precedents. Kmiec shows two distinctions of judicial activism related to the source of judicial precedents. The first distinction depends on whether the particular precedent is vertical or horizontal, and the other depends on whether the precedent flows from constitutional, statutory, or common law.

#### *i. Vertical and horizontal precedents*

Vertical precedent requires lower courts to abide by the decisions of higher or appellate courts and appears to be settled law.<sup>31</sup> Judges therefore engage in judicial activism when they flout the vertical precedent rule.<sup>32</sup>

On the other hand, horizontal precedent holds that a court should 'follow its own prior decisions in similar cases.'<sup>33</sup> Opinions are divided as to whether a court's refusal to follow this aspect of the *stare decisis* principle constitutes judicial activism. A scholar has argued that rigid adherence to the horizontal precedent principle 'itself may be unconstitutional if it requires the court to adhere to an erroneous reading of the Constitution.'<sup>34</sup>

#### *ii. Constitutional versus statutory versus common law precedents*

Kmiec explains that a definition of judicial activism as disregarding precedent must be juxtaposed with the fact that 'courts treat different kinds of law differently.'<sup>35</sup> Regarding the common law, courts are inclined to overturn precedents because, as

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<sup>30</sup> L. A. Graglia, 'It's Not Constitutionalism, It's Judicial Activism,' (1996), 19 *Harvard Journal of Law and Public Policy*, 293, 296

<sup>31</sup> E. H. Caminker, 'Why Must Inferior Courts Obey Superior Court Precedents?' (1994), 46 *Stanford Law Review*, 817

<sup>32</sup> In *Rodriguez de Quijas v. Shearson/Am. Exp, Inc.*, 490 U.S. 477 at 486, Justice Stevens held that a circuit court 'engaged in an indefensible brand of judicial activism' when it 'refused to follow' a 'controlling precedent' of the US Supreme Court. See E. H. Caminker (as above)

<sup>33</sup> R. G. Kopf, 'An Essay on Precedent, Standing Bear, Partial-Birth Abortion and Word Games – A Response to Steve Grasz and Other Conservatives,' (2001), 35 *Creighton Law Review*, 11-12, (FN. 5)

<sup>34</sup> See D. A. Farber, 'The Rule of Law and the Law of Precedents' (2006) 90 *Minnesota Law Review*, 1175

<sup>35</sup> Kmiec (n 19) 1469

one scholar put it, common law judges are 'akin to lawmakers.'<sup>36</sup> Similarly, constitutional law precedents are entitled to little reverence from courts 'because the difficulty of amending the Constitution makes the Court the only effective resort for changing obsolete constitutional doctrine.'<sup>37</sup> It is only non-adherence to statutory precedents that may constitute judicial activism. This is because as Professor Eskridge put it, they 'often enjoy a super-strong presumption of correctness.'<sup>38</sup> However, statutory precedents are not watertight as they may sometimes resemble constitutional precedents, thus giving rise to difficulties in determining what constitutes judicial activism. Judge Posner of the US Appeals Court captured this difficulty thus: 'some statutes, indeed, are so general that they merely provide an initial impetus to the creation of frankly judge-made law.'<sup>39</sup>

### **c) Judicial legislation**

Critics of judicial activism sometimes accuse judges of 'legislating from the Bench.'<sup>40</sup> In expressing the difficulty in defining legislating from the Bench, Professor Peabody, in his seminal work on the subject, cited US Chief Justice Rehnquist, who described the concept as 'a teasing imprecision that makes it a coat of many colours.'<sup>41</sup> Peabody succeeded in isolating six categories of *legislating from the Bench*. They include policy interference, approach to rendering decisions, decision content, scope and responsiveness to interests.<sup>42</sup> Judicial legislation within the meaning of judicial activism therefore connotes statutory interpretation in a manner that expands or gives birth to new rules of law.

### **d) Departure from accepted interpretive methodology**

Kmiec explains that wrong use, or failure to use the 'tools' of the trade can be branded judicial activism.<sup>43</sup> This is akin to adherence to the principle of *stare decisis*. Thus, where a judge chooses to follow rules of interpretation different from established rules, she may be accused of judicial activism. Kentridge AJ in *S v*

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<sup>36</sup> B. C. Kalt, 'Three Levels of Stare Decisis: Distinguishing Common Law, Constitutional, and Statutory Cases,' (2004), 8 *Texas Review of Law and Policy*, 277, 278

<sup>37</sup> As above

<sup>38</sup> W. Eskridge, 'Overruling Statutory Precedents,' (1988), 76 *Georgetown Law Journal*, 1362

<sup>39</sup> R. A. Posner, 'The Meaning of Judicial Self-Restraint,' (1984), 59 *Indiana Law Journal*, 1, 5-6

<sup>40</sup> Peabody (n 8) 186

<sup>41</sup> W. H. Rehnquist, 'The Notion of a Living Constitution,' (1976), 54 *Texas Law Review*, 693

<sup>42</sup> Peabody (n 8) 197-208. I deliberately omitted the last one – judicial activism – which shows how confusing and intermingling the subject is.

<sup>43</sup> Kmiec (n 19) 1474

*Zuma*<sup>44</sup> captured the difficulty of accepted rules of interpretation when he stated that it is not

(e)asy to avoid the influence of one's personal intellectual and moral preconceptions...the Constitution does not mean whatever we might wish it to mean...If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.

### **e) Result-oriented judging**

The last category of Kmiec's core meanings of judicial activism is, unlike the previous four, endowed with reasonable precision. It involves judicial decisions aimed at achieving specific purposes. According to Judge O'Scannlain of the US Ninth Circuit Court:

Judicial activism means not the mere failure to defer to political branches or to vindicate norms of predictability and uniformity; it means only the failure to do so in order to advance another, unofficial objective.<sup>45</sup>

Before embarking on a detailed review of the literature on judicial activism, it is fitting to end this examination of its meaning by citing Judge O'Scannlain again: 'Judicial activism is not always easily detected, because the critical elements of judicial activism either are subjective or defy clear and concrete definition.'<sup>46</sup>

## **2.3 Review of the literature**

That judicial activism is a fascinating subject is reflected by the obsessive literature on it.<sup>47</sup> Its meaning was analysed extensively by Kmiec.<sup>48</sup> The major theories of judicial activism are based on *judicial overreach* and *judicial restraint* or *minimalism*.

### **2.3.1 Divergent opinions**

For justification of judicial activism, the pioneer work belongs to Professor Bickel's *Least Dangerous Branch*.<sup>49</sup> Although he preferred to use the term 'judicial review,' he articulated, for the first time, the 'countermajoritarian' difficulty posed by judicial activism. He argued that even at the risk of imposing principles outside the Constitution, courts should apply doctrine drawn from the 'evolving morality' of society. Bickel finds varying support in modern liberals like Dworkin,<sup>50</sup> Rawls,<sup>51</sup>

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<sup>44</sup> *S v Zuma* 1995 (2) SA 642 (CC), para 17-18

<sup>45</sup> F. O'Scannlain, 'On Judicial Activism,' *Open Spaces Q.*, (29 Feb. 2004). Available at <http://www.openspaces.com/article-v3n1-oscannlain.php> (accessed 28 July 2007)

<sup>46</sup> As above

<sup>47</sup> See B. Friedman, (n 17)

<sup>48</sup> K. D. Kmiec (n 19)

<sup>49</sup> A. Bickel (n 6)

<sup>50</sup> Ronald Dworkin, *Taking Rights Seriously* (1977), *Law's Empire* (1986)



Roosevelt,<sup>52</sup> and Sathe.<sup>53</sup> Dworkin and Rawls view judicial activism as a necessary check on legislative discretion. Although they differ in approach,<sup>54</sup> they support vigorous constitutional scrutiny whenever infringement of rights is alleged. This check on the legislature, while not necessarily a creature of Montesquieu's concept of checks and balances, flows from an implicit distrust of elected representatives' preoccupation with re-election and therefore a precaution against abuse of the electorate's initial investment of trust.<sup>55</sup>

On the other side of the divide, Wolfe,<sup>56</sup> Powers and Rothman<sup>57</sup> and Allan<sup>58</sup> argue against judicial activism based on what they perceive as judicial imperfections, political manipulations and 'the crucial role of the political process (represented by the legislature) in determining the common good,' respectively. Even amongst these apostles of judicial restraint, there is no unanimous approach. Justice Scalia's above description of judicial activism as fluffy imprecision<sup>59</sup> is prompted by this divergence in the perception of judicial restraint or *minimalism*.<sup>60</sup>

The primary argument of judicial restraint is mainly employed to confine judges to a strict application of laid-down rules. In other words, judges should minimise the exercise of their discretion by more reliance on procedural rules.<sup>61</sup> The opponents<sup>62</sup> of judicial activism premise this argument on the ground that judicial activism rests on a moral reading of the Constitution which is not mandated by its text. Such positivist

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<sup>51</sup> J. Rawls, *Political Liberalism* (1993)

<sup>52</sup> K. Roosevelt, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (2006)

<sup>53</sup> S. P Sathe (n 12)

<sup>54</sup> Dworkin advocates decisions based on precedent and integrity (*Taking Rights Seriously*, p 137-49), while Rawls prefers principles of justice founded on common reason

<sup>55</sup> A. Bickel (n 6); R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (1996) p 1-35

<sup>56</sup> C. Wolfe, *Judicial Activism – Bulwark of Liberty or Precarious Security?* (1997)

<sup>57</sup> S. Powers & S. Rothman, *The Least Dangerous Branch? Consequences of Judicial Activism* (2002)

<sup>58</sup> T. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2003)

<sup>59</sup> N 25 above

<sup>60</sup> C. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1998), 3-23

<sup>61</sup> These include *ripeness* (refusal to hear a matter until the applicant has exhausted other remedies); *standing* (refusal to proceed with a matter unless the applicant has a vested interest in its outcome); strict adherence to precedent; presumption of constitutional validity of statutes and restricted interpretation of constitutional rights, among others. See J. Daley, 'Defining Judicial Restraint,' in T. Campbell & J. Goldsworthy (Eds) *Judicial Power, Democracy and Legal Positivism* (2000), 279-314

<sup>62</sup> The most radical view appears to belong to Campbell who likens judicial activism to treason: T. Campbell, (n 5)

understanding of judicial restraint as a judge's refusal to allow his or her conception of justice to influence a judicial decision fails to explain differentiations between conflicting judicial approaches within the vortex of constitutional adjudication.<sup>63</sup> Put differently, a judge interpreting a particular section of a Bill of Rights cannot construe it independently of what she understands that law to be *vis-à-vis* the intention of Parliament. Indeed, this is why judges give dissenting opinions. This misconception of judicial activism is not limited to so-called positivists alone.<sup>64</sup>

Furthermore, a simplistic use of judicial restraint suggests a rigid dichotomy between law and politics.<sup>65</sup> Like positivist understanding of judicial restraint, this also fails to explain the fact that legal principles and legislative policy are more often than not entwined in the intricate processes that engulf the adjudicative process. As shall be shown later in the Constitutional Court's jurisprudence, there is a thin line between judicial leverage and legislative space when adjudicating constitutional rights that border on government's socio-economic obligations.

Perhaps, recognising the difficulty of generalising judicial restraint, Posner distilled three types. He termed these 'judicial deference,' 'separation of powers judicial self-restraint' and 'prudential self-restraint.' According to him, judicial deference refers to situations where judges should exercise caution when articulating their views in the adjudicative process and limit their discretion as much as they can. 'Separation of powers judicial self-restraint' requires judges to limit the court's power over other arms of government by deferring to the decisions of these arms, especially the legislature, while prudential self-restraint estopps judges from making decisions that might negatively affect judicial legitimacy.<sup>66</sup>

### **2.3.2 Integrated approach**

The study integrates the conflicting theories of judicial activism and restraint to assess the effect of judicial activism on minority protection and the Constitutional

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<sup>63</sup> Kentridge AJ (n 44)

<sup>64</sup> For instance, although Dworkin rejects judicial restraint because he believes judicial review exists to protect minorities against the oppression of the majority and judges should not defer to the will of the legislature, (*Taking Rights Seriously*, 137-49), he too misconceives judicial activism. He expresses his rejection of activism by stating that 'an activist justice would ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and longstanding traditions of our political culture. He would ignore all these in order to impose on other branches of government his own view of what justice demands.' See R. Dworkin, *Law's Empire*, p 378). It is inconceivable that any judge would act the way described by Dworkin. See P Lenta, 'Judicial Restraint and Overreach' (2004) 20 *South African Journal on Human Rights*, 550

<sup>65</sup> P Lenta (n 64 above) 547

<sup>66</sup> R. Posner *The Federal Courts: Challenge and Reform*, (1996) 310-318

Court's legitimacy. In doing this, it utilises Justice D. A. Ipp's work<sup>67</sup> to expand the classifications of judicial activism. The study's hypothesis that judicial activism aimed at protecting human rights does not harm judicial legitimacy traces its basis to jurisprudential theories of the morality of law articulated by authors such as Dworkin<sup>68</sup> and Perry.<sup>69</sup> The 'countermajoritarian' difficulty inherent in arguing for robust judicial defence of human rights is eased by reliance on the works of Bickel<sup>70</sup>, Daniels<sup>71</sup> and Friedman.<sup>72</sup> While it makes no pretence of evolving a new theory of law, the study draws on existing theories to produce a unique assessment of the effect of judicial protection of minority rights on the Constitutional Court's legitimacy.

## **2.4 Judicial activism versus judicial review**

Judicial review means the court's exercise of its power to evaluate actions of public agencies or organs in order to determine their constitutionality.<sup>73</sup> It differs from judicial activism because, as seen above, the latter mostly takes place within the judicial review process and involves departure from precedent and evolution of new 'law.' I deem it fit to make this clarification because some scholars use judicial activism and judicial review interchangeably.<sup>74</sup> I do not wish to toe this line because my conception of judicial activism is narrower than the view held by many scholars and is founded on two platforms.

### **2.4.1 Two broad categories**

First, I categorise judicial activism into two. The first falls under regressive judicial activism. This category, later expounded in this study, mainly comprises decisions that fall within socio-political judicial activism. Because they are politically motivated, such decisions are inherently capable of eroding judicial legitimacy. Conversely, progressive judicial activism is activism aimed at protecting 'minorities' from

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<sup>67</sup> D. A. Ipp, 'Ethical Problems with Judicial Activism,' Conference Paper; available at [http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_ipp12\\_191004](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_ipp12_191004) (accessed 12 July 2007)

<sup>68</sup> R. Dworkin, *Law's Empire* (1986)

<sup>69</sup> M. J. Perry, *Toward a Theory of Human Rights: Religion, Law, and Courts*, (2006)

<sup>70</sup> A. Bickel (n 6)

<sup>71</sup> R. N. Daniels, 'Countermajoritarian Difficulty in South African Constitutional Law,' (2006) *Berkeley Electronic Press*. Available at <http://law.bepress.com/expresso/eps/1363> (accessed 12 July 2007)

<sup>72</sup> B. Friedman (n 17)

<sup>73</sup> Black's Law Dictionary, 7th edition

<sup>74</sup> See for example A. Bickel and C. Wolfe (n 6 and 56 respectively)

majoritarian politics. Unlike the first category, this form of judicial activism has little negative effect on judicial legitimacy.<sup>75</sup>

Second, under the common law tripartite system of government, all three arms of government derive their legitimacy from the Constitution. The Constitution also delineates their functions and empowers the judiciary to interpret the Constitution and also review the actions and policies of other branches of government. Bearing in mind the evolving nature of society, the Constitution should be interpreted as a *living thing*<sup>76</sup> capable of adapting to new situations unforeseen by its framers, but nevertheless contemplated within the ambit of its protection. It is from this perspective that judicial activism should be perceived. The most common accusation regarding judicial activism is that judges impose their own views of the concept of justice.<sup>77</sup> This argument is unhelpful. Judges, being trained jurists, interpret the law *according to their legal understanding of it*, and in line with their life experiences.<sup>78</sup> The primary issue should be whether they impose views contrary to the letters of the Constitution and not whether they impose their own views about justice. This is because few judges would deliberately depart from the spirit of the Constitution to impose their understanding of justice. While not advocating desertion of the phrase 'judicial activism,' I confine it to *departure from judicial precedents and evolution of new law* in order to accommodate the complex and fast-changing realities of contemporary society. My argument, refined later in this study, flows from the nature of the judicial function and the place of the judiciary in a constitutional democracy.

## **2.5 Classifications of judicial activism**

As hinted in the preceding chapter, the study distils three forms of judicial activism.<sup>79</sup> They shall be treated *seriatim*.

### **2.5.1 Procedural judicial activism**

Judges in common law jurisdictions are increasingly intervening in pre-trial and trial processes.<sup>80</sup> Ordinarily, judges are to be impartial umpires who should not descend

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<sup>75</sup> J. McLean, 'Legislative Invalidity, Human Rights Protection and S. 4 of the New Zealand Bill of Rights Act,' (2001) *New Zealand Law Report*, 447

<sup>76</sup> W. H. Rehnquist (n 41)

<sup>77</sup> C. Wolfe, (n 56)

<sup>78</sup> *President of the Rep of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 42

<sup>79</sup> For similar three forms of judicial activism, see D. A. Ipp, (n 67)

<sup>80</sup> D. A. Ipp, 'Judicial Intervention in the Trial Process,' (1995) 69 *Australian Law Journal*, 365

into the arena of judicial conflict. However, due to the injustice which might, and often does arise from protracted litigation and unequal power relations between litigants, judges often step in to prevent and remedy injustice. Thus, they assist in determination of the facts in issue, fixing of time limits for particular procedural steps, restriction of witnesses' examination, number of expert witnesses who may be called, and length of addresses.<sup>81</sup> These interventions or case management constitute procedural judicial activism.

### **2.5.2 Socio-political judicial activism**

The second classification of judicial activism relates to activism in social and political reforms. In my opinion, this is the most difficult form of judicial activism. Its difficulty stems from the inevitable conflict between the demands of justice flowing from societal evolution, and the age-old conception of justice as 'blind' and therefore impartial.<sup>82</sup> This is buttressed by the fact that the most frequent accusations of judicial activism occur in socio-political judicial reforms. Judicial ethics demand that judges remain impartial throughout the adjudicatory process. This impartiality must however be distinguished from neutrality. Impartiality does not demand that judges 'close their eyes to the reality of the society in which legal disputes occur.'<sup>83</sup> In this vein, there is no such thing as neutral justice, because judges, as human beings, cannot completely divest their daily experiences from the courtroom. As noted by the South African Constitutional Court,

(a)bsolute neutrality on the part of a judicial officer can hardly ever, if ever be achieved . . . Judges . . . bring their own life experience to the adjudicative process.<sup>84</sup>

Judges' impartiality is called into question when they engage in socio-political judicial activism. Such activism could arise when social, political or ethical outlooks alter so radically that they no longer conform to established norms. It might also arise when new situations not provided by existing laws evolve, or such situations need streamlining with existing laws. In deed, to hold that judges merely apply existing rules is more or less a belief in 'fairy tales.'<sup>85</sup> In striving to strike a balance between impartiality, societal evolution and the demands of justice, judges are ever mindful of maintaining judicial legitimacy. This awareness and its implications shall later be contrasted with judicial activism in human rights.

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<sup>81</sup> As above, 369-372

<sup>82</sup> This dilemma was aptly captured by a Canadian judge: 'the classical image of justice - the goddess blindfolded - is a deficient icon in a complex, multicultural society.' See C. L'Heureux-Dubé, 'Reflections on Judicial Independence, Impartiality and the Foundations of Equality,' *CJLJ Yearbook*, vol vii p 106

<sup>83</sup> As above

<sup>84</sup> *President v Rugby Union* (n 78)

<sup>85</sup> Lord Reid, 'The Judge as Lawmaker,' (1972) 12 *Journal of the Public Society of Teachers of Law*, 22

### **2.5.3 Human rights judicial activism**

Judicial activism in human rights simply means judicial protection of human rights by giving legislation a humanitarian interpretation.<sup>86</sup> This form of activism is the bulwark of this study and is discussed in detail in subsequent chapters. However, it is proper to clarify human rights judicial activism.

### **2.5.4 Progressive versus regressive judicial activism**

Progressive judicial activism is activism aimed at advancing the values underlying the Constitution. It involves an evaluation of state policies and actions not merely in terms of their compatibility with specific constitutional provisions, but in terms of their 'compatibility with the broad principles of constitutionalism.'<sup>87</sup> Under progressive judicial activism, courts relax procedural rules to allow disadvantaged masses to, directly or by public interest litigation (PIL), seek relief for violated rights. Its aim is to bring justice closer to disadvantaged groups and individuals. Regressive judicial activism, on the other hand is activism engaged in outside the purposes of progressive judicial activism. It largely occurs in the realm of politics when judges allow their political beliefs to influence their judgments.

It should be noted however that the three forms of judicial activism identified above overlap in certain cases, as later shown in this study.

## **2.6 Meaning of judicial legitimacy**

*Legitimacy, so peculiar to legal thinking, is as much phenomenon in the world as problem. It is a force in the world.*<sup>88</sup>

According to the *Webster's New Twentieth Century Dictionary*, 'legitimacy' means 'the quality or state of being legitimate.' The word 'legitimate,' in turn, means 'sanctioned by law or custom; lawful; allowed.'<sup>89</sup> This definition is unsatisfactory because legitimacy is a difficult concept that evokes notions of authority, power, legality and respect. In this light, it is sometimes used to describe in general terms,

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<sup>86</sup> I use human rights in *claimatory* and *protectory* senses. A scholar has rightly identified that rights may be considered in differing senses: Rights as boundary, and as access; rights as markers of power, and as masking lack; rights as claims, and protection; rights as organisation of social space, and as a defence against incursion; rights as articulation, and mystification; rights as disciplinary, and interdisciplinary; rights as a mark of one's humanity, and as reduction of one's humanity; rights as expression of desire, and as foreclosure of desire. See Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (1995) 96, FN 2

<sup>87</sup> S. P Sathe, (n 12) Ch 1

<sup>88</sup> J. Vining, *From Newton's Sleep*, (1995) 279

<sup>89</sup> Webster's New Twentieth Century Dictionary of English Language (1979) (2<sup>nd</sup> ed)1035

criteria for the 'validity' of power.<sup>90</sup> It therefore connotes 'belief in legality,' and 'readiness to conform with rules' recognised as correct and imposed though 'accepted procedures.'<sup>91</sup> In this sense, legitimacy presupposes legality, as well as existence of a legal system in which a constituted body issues orders according to established rules. Paradoxically, legitimacy also provides justification of legality by 'surrounding power with an aura of authority.'<sup>92</sup> The implication is that rules which do not proceed from accepted procedures would not be adhered to and would therefore lack legitimacy.

In the above light, legitimacy of the judiciary may be described as recognition or acceptance of the authority of the judiciary and its decisions. This however sounds too simplistic. The reason is that legitimacy often depends on the eyes of the *beholder*. In other words, individual values shape legitimacy. For example, legitimacy of a court decision might be questioned because it runs contrary to public opinion.<sup>93</sup> In this situation, the authority and legitimacy attributed to the judiciary by citizens might differ from that of jurists. Whose legitimacy ought to determine such court decision? It appears that the standard of the reasonable person should apply.

Judicial legitimacy is important because of courts' special role in the tripartite common law system as the last hope of the common person. 'As guarantor(s) of justice', courts must 'enjoy public confidence' if they are to be 'successful in carrying out' their duties.<sup>94</sup> Since authority connotes legitimate power, the judiciary has to imbibe principles like consistency, coherence, legal certainty, predictability, justice and objectivity. These are essential ingredients that contribute to legitimacy of the judiciary.<sup>95</sup> They are also basic foundations upon which constitutional interpretation is founded. Because courts derive their authority from the Constitution, legitimacy of the judiciary is closely connected to constitutional legitimacy.

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<sup>90</sup> P d'Entrèves, *The Notion of the State: An Introduction to Political Theory* (1967) 141

<sup>91</sup> M. Weber, *Wirtschaft und Gesellschaft* (1972), in J. L. Gribnau, 'Legitimacy of The Judiciary,' (2002), *Electronic Journal of Comparative Law*, vol 6, p 8

<sup>92</sup> J. L. Gribnau, (above) 6

<sup>93</sup> M. Du Plessis, 'Between Apology and Utopia - The Constitutional Court and Public Opinion' (2002) *South African Journal on Human Rights*, vol 18, part 1

<sup>94</sup> *Prager / Oberschlick v. Austria*, ECtHR 26 April 1995, Series A , No 313, p 18 & 34

<sup>95</sup> *Sunday Times v. UK*, ECtHR 26 April 1979, Series A, No 30, para 55-57, 63

## **2.7 Conclusion**

This chapter has traced the origin of judicial activism, its contested meaning and its distinction from judicial review. It equally reviewed the meaning of judicial legitimacy. These concepts are vital to a proper scrutiny of the objectives of this study. As shown above, judicial activism is criticised for trespassing on the doctrine of separation of powers. However, judicial activism is a political concept that varies with individual or group perceptions of particular judicial decisions. Accusations of judicial activism thus affect the manner in which judicial legitimacy is perceived. Review of the meanings of judicial activism, judicial review and judicial legitimacy is therefore important in the study's investigation of the effect of human rights judicial activism on the Constitutional Court's legitimacy.



## Chapter 3: JUDICIAL ACTIVISM IN POST – APARTHEID SOUTH AFRICA

### 3.1 Introduction

From 1948 to 1994, South Africa's legal system laboured under the yoke of apartheid.<sup>96</sup> Because of the repressive nature of the apartheid regime, the judiciary mainly kowtowed to the executive, a situation which has drawn criticism from many commentators.<sup>97</sup> This chapter analyses key post – apartheid cases in which the Constitutional Court was accused of engaging in either judicial activism or judicial deference. It also examines reactions to the South African *Civil Union Act*, a product of the Court's activism jurisprudence. The chapter begins by giving a brief historical overview of judicial activism in post-apartheid South Africa, an overview vital for the ensuing discourse.

### 3.2 Overview of historical origins of constitutionalism in post-apartheid South Africa

#### 3.2.1 Background

In order to understand constitutionalism and the role of the Constitutional Court in the post-apartheid legal order, it is necessary to establish a brief background. Prior to 1994, constitutional law in South Africa operated under the doctrine of parliamentary sovereignty.<sup>98</sup> This doctrine grievously hindered protection of human rights by the courts.<sup>99</sup> The only 'check' wielded by the judiciary against Parliament during this period were procedural as opposed to substantive law-making. In other words, a court could only nullify an Act of Parliament if it was not passed in accordance with procedures laid down by the Constitution. It could not do so on the merits or substance of the Act.<sup>100</sup> Furthermore, the three apartheid Constitutions<sup>101</sup> were little more than appendages of Parliament, as Parliament could amend them at will and with little difficulty.<sup>102</sup>

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<sup>96</sup> D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order*, (2003)

<sup>97</sup> As above, chapter two

<sup>98</sup> Under this doctrine, no person or institution (including courts) could challenge a law made by Parliament. See A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, (1959), (10<sup>th</sup> ed) xxxiv

<sup>99</sup> For a detailed treatise on human rights and constitutionalism under parliamentary sovereignty in apartheid South Africa, see J. Dugard, *Human Rights and the South African Legal Order* (1978)

<sup>100</sup> *Harris v Minister of the Interior* 1952 (2) SA 428 (A)

<sup>101</sup> These include the *Union Constitution* (SA Act 1909), the *Republic Constitution* (Constitution of the Republic of South Africa Act 32 of 1961) and the *Tricameral Constitution* (Constitution of the Republic of South Africa Act 110 of 1983)

<sup>102</sup> See L. Currie & J. de Waal, *The Bill of Rights Handbook*, (2005) 3

The South African Constitutional Court is a creature of the interim Constitution of 1994.<sup>103</sup> Following a series of events which include the release from detention of the icon of the apartheid struggle, Nelson Mandela in 1990, opening of political space to the principal liberation movements<sup>104</sup> and the Conference for a Democratic South Africa (CODESA) in 1991, the interim Constitution was adopted by Parliament on 22 December 1993. These events have been described as a negotiated revolution.<sup>105</sup>

The Constitutional Court aptly describes constitutionalism in 1994 South Africa:

Instead of an outright transmission of power from the old order to the new, there would be a programmed two-stage transition. An interim government, established and functioning under an interim Constitution agreed to by the negotiating parties, would govern the country on a coalition basis while a final Constitution was being drafted. A national legislature, elected by universal adult suffrage, would double as the constitution-making body and would draft the new Constitution within a given time.<sup>106</sup>

The 'given time' turned out to be two years. Within this period, a Constitutional Assembly deliberated upon, and eventually adopted a final constitutional text on 8 May 1996.<sup>107</sup> This text was subsequently submitted to the Constitutional Court for certification. This, then, forms an important part of the background for the forthcoming arguments in this study. Here was a country exiting parliamentary supremacy and entrusting the work of an elected Constitutional Assembly to an unelected Constitutional Court, using a set of 'Principles' formulated by unelected negotiators. The paradox created by the Court's task has been described as an 'unprecedented and extraordinary exercise of judicial review.'<sup>108</sup> To end this historical sketch, the Constitutional Court declined to certify the draft Constitution on the ground of non-compliance with the Constitutional Principles.<sup>109</sup> The Constitutional Assembly returned to the drawing board and finally submitted an amended text which

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<sup>103</sup> Entered into force on 27/4/1994. The interim Constitution was a creature of compromise between the National Party government and its anti-apartheid opponents. For a historical account of the negotiation process, see H. Ebrahim, *The Soul of a Nation: Constitution-making in South Africa*, (1998)

<sup>104</sup> These were the African National Congress, the Pan-Africanist Congress and the South African Communist Party

<sup>105</sup> A. Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution*, (1994)

<sup>106</sup> *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Rep of South Africa* 1996 (First Certification Judgment) 1996 (4) SA 744 (CC) para 13

<sup>107</sup> The Constitutional Assembly was effectively the Parliament elected in the 1994 general elections, as provided in s. 68(1) of the Interim Constitution. Being the Parliament, it represented the pinnacle of the prevailing democratic institutions of that era. The Assembly was guided by a list of 34 Constitutional Principles agreed upon by political negotiations between government and the liberation movements from 1991 to 1993. The operation of the Principles was regulated by chapter 5 of the Interim Constitution

<sup>108</sup> L. Currie & J. de Waal (n 102)

<sup>109</sup> *First Certification Judgment* (n 106)

the Court approved on 4 December 1996.<sup>110</sup> President Mandela signed the Constitution into law on 10 December 1996 and it entered into force on 4 February 1997.<sup>111</sup>

### **3.2.2 Post-apartheid constitutional order**

Post-apartheid constitutionalism in South Africa is founded on a supreme constitution with a justiciable Bill of Rights, whose enforcement is entrusted to a Constitutional Court. The Constitution outlines platforms upon which the country's new constitutionalism is built upon. Section 1 provides:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters' roll, regular elections and multi-party system of democratic government, to ensure accountability, responsiveness and openness.

In addition to the values above, section 7(1) provides that the 'Bill of Rights is a cornerstone of democracy in South Africa,' which 'enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.' Section 7(2) imposes an obligation on the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights.'

Post-apartheid constitutionalism in South Africa is haunted by the spectre of the injustice perpetrated by apartheid era regimes. There is perhaps no better way to capture the influence of apartheid on South Africa's constitutionalism than to reproduce Mahomed J's rich language in *S v Makwanyane*:

All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation ... The South African Constitution ... retains from the past only what is defensible, and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of, and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.<sup>112</sup>

As guardian of the new South Africa, through powers vested in it by the Constitution,<sup>113</sup> the Constitutional Court has, through a series of cases, managed to

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<sup>110</sup> *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification Judgment)* 1997 (2) SA 97 (CC)

<sup>111</sup> For a comprehensive account of the Constitution-making process, see H. Ebrahim, *The Soul of a Nation* (n 103)

<sup>112</sup> 1995 (3) SA 391 (CC) para 262. The preamble to the 1996 Constitution also 'recognises the injustices of (the) past' and lays 'the foundations for a democratic and open society.'

<sup>113</sup> See sections 165 and 167

carve for itself, a role as *legitimator* of the country's 'social transformation project'.<sup>114</sup> In doing this, it has moved from a 'formal, to a substantive vision of law.'<sup>115</sup> The study proceeds to show, through a number of decided cases, how the Court has performed its transformative role in post-apartheid South Africa.

### **3.3 The jurisprudential foundation of the Constitutional Court's judicial activism**

#### **3.3.1 Introduction**

It would be almost impossible to analyse all decisions of the Constitutional Court in order to determine cases in which it engaged in judicial activism. Accordingly, this segment of the study focuses on 'controversial' decisions of the Court. These are discussed broadly under civil/political rights and socio-economic rights. The views of the Court, other arms of government and the public are likewise analysed to explore how the Court's protection of minority rights, or lack of it, has affected its legitimacy.

#### **3.3.2 Death Penalty**

Two years after it came into existence, the Court faced a major judicial hurdle in the case of *State v Makwanyane*.<sup>116</sup> It was asked to determine the constitutionality of section 277(1) (a) of the *Criminal Procedure Act*, 1977, which permitted imposition of the death penalty for the crime of murder. The government argued that the death penalty violates the right to life, and constituted cruel, inhuman and degrading punishment which contravenes sections 9, 10 and 11(2) respectively, of the 1994 Interim Constitution. Representing prevailing public opinion, the Attorney General, an independent institution, argued that the death penalty was necessary to curtail violent crimes and did not constitute cruel, inhuman or degrading treatment.

It is necessary to point out that *S v Makwanyane* was decided at an era of high crime rate in South Africa. Arising under an 'undemocratic Constitution',<sup>117</sup> the Court was acutely mindful of its legitimacy, should its ruling prove unpopular.<sup>118</sup> Accordingly, while generally agreeing that the death penalty constituted cruel and degrading punishment, the Court was split on whether the death penalty debate was

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<sup>114</sup> T. Roux, 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court,' (2003) Seminar paper available at [www.law.wits.ac.za/cals/lt/pdf/norway\\_paper.pdf](http://www.law.wits.ac.za/cals/lt/pdf/norway_paper.pdf) (accessed 11 September 2007)

<sup>115</sup> A. Cockerell, 'Rainbow Jurisprudence' (1996), 12 *South African Journal on Human Rights*, 1-10

<sup>116</sup> 1995 (3) SA 391 (CC)

<sup>117</sup> See explanations in N 107

<sup>118</sup> R. N. Daniels (n 71 above) 10

political or judicial. To underscore the importance and difficulty of the case, each of the 11 justices of the Court wrote a separate judgment expounding different aspects of the debate. On the implicit admission of the political nature of the issue, Ackermann J argued that even with abolition of the death penalty, the state could still protect citizens from a 'convicted, unreformed, recidivist killer or rapist.'<sup>119</sup> Didcott J, while recognising the importance of public opinion, believed that public opinion in this case was based on erroneous assumption that the death penalty had a significant deterrent effect.<sup>120</sup> Aligning themselves with the purely judicial position of the debate, Mahomed DJP, O'Regan J, Kriegler J, Kentridge AJ, Madala J, Mokgoro J and Mahomed J<sup>121</sup> were convinced that the Constitution's makers intended the issue to be decided by the judiciary. Langa J and Sachs J based their judgments on the constitutional value of human dignity.

Delivering the lead judgment, Chaskalson P admitted that majority of South Africans were convinced the death penalty ought to be imposed in extreme cases of murder. He nevertheless held that public opinion should not deter the judiciary from interpreting and upholding constitutional provisions without fear or favour. According to him, 'if public opinion were to be decisive, there would be no need for constitutional adjudication.'<sup>122</sup> In his words:

(T)he very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.<sup>123</sup>

The *Makwanyane* judgment was greeted with public outcry and calls for a referendum.<sup>124</sup> It was also criticised in legal circles. As pointed out by a scholar:

'In the wake of a rising crime rate ... the Court's judgment has become a political football, compromising the credibility of (not only) the Constitutional Court itself, but also of the administration of justice as such.'<sup>125</sup>

However, the *Makwanyane* decision appears to have had no negative impact on the Court's legitimacy. The final draft of the 1996 Constitution did not retain the death

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<sup>119</sup> Paragraph 171

<sup>120</sup> Paragraph 181-184

<sup>121</sup> Madala J expressly ruled out the influence of public opinion in the death penalty debate – para 256. Mohamed J rejects it at para 266 and Mokgoro J at para 305

<sup>122</sup> Paragraph 88

<sup>123</sup> As above

<sup>124</sup> P Maduna, 'The Death Penalty and Human Rights' (1996) 12 *South African Journal on Human Rights*, 193, 210

<sup>125</sup> L. du Plessis, 'The South African Constitution as Memory,' (2000) 3 *Stellenbosch Law Review*, 385, 390

penalty. Again, following the judgement, and in keeping with the abolitionist policy of the *African National Congress* (ANC), Parliament moved quickly to abolish the death penalty by the *Criminal Law Amendment Act* 105 of 1997.

### **3.3.3 Right to health**

In *Minister of Health v Treatment Action Campaign*,<sup>126</sup> the Treatment Action Campaign (TAC), a non-governmental organisation, challenged the constitutionality of government's prevention programme of mother to child transmission (MTCT) of HIV in the High Court. The programme, inaugurated in July 2000, was confined to two selected sites in each South African province for a period of two years. One site was rural while the other was urban. Government's aim was to extend the programme to other public facilities outside the pilot sites by developing a national policy in the pilot phase. During the test phase of two years, state doctors outside the pilot sites were not given access to the preferred anti-retroviral drug, *Nevirapine*. The High Court ordered the state to extend its MTCT programme and make *Nevirapine* available to all HIV positive pregnant women (and their children) after childbirth, wherever medically recommended and where such women had undergone HIV counselling and testing. The High Court also ordered the state to develop a comprehensive national programme to prevent or reduce MTCT of HIV.

Unimpressed by the judgment, the state appealed the decision on the ground, *inter alia*, that it violated the doctrine of separation of powers.<sup>127</sup> The TAC countered by arguing that government's policy was irrational.<sup>128</sup> In its judgment, the Constitutional Court acknowledged that the legislature and the executive should be the primary formulators of policy; but this does not mean that where mandated by the Constitution, the 'courts cannot, or should not make orders that have an impact on policy.'<sup>129</sup> It ordered the state to *inter alia*, remove restrictions placed upon *Nevirapine* outside public health facilities that do not fall within the research sites and to facilitate availability and use of the drug at public hospitals whenever medically prescribed.

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<sup>126</sup> 2002 (5) SA 721 (CC)

<sup>127</sup> In a statement released 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...What happens to public policy if it begins to be formulated in a piecemeal fashion through unrelated court judgments?

<sup>128</sup> The TAC's argument was based on these facts: Government's policy discriminated against women who could not travel to the pilot research sites, *Nevirapine* was offered free (for five years) by drug companies and had been approved as safe by relevant health agencies

<sup>129</sup> Paragraph 98

While the Constitutional Court's judgment in the *TAC* case was resented by government as an intrusion in policy matters, it was welcomed by civil society as a victory for sufferers of HIV in South Africa.<sup>130</sup>

### 3.3.4 *Right to housing*

The right of access to adequate housing and the nature of the state's duty in that regard came before the Constitutional Court in the *Grootboom* case.<sup>131</sup> Here, an extremely poor community of 390 adults and 510 children had lived in an informal settlement, Wallacedene, in very appalling circumstances. Their horrible living conditions eventually forced them to illegally occupy a site earmarked for low cost housing. Following their eviction from that site, and having nowhere else to go, they occupied a sports field and an adjacent community hall. Sometime after this, they applied to the High Court for an order requiring the state to provide them with adequate basic shelter or housing until they obtained permanent accommodation.

Section 26 of the 1996 Constitution provides that:

- (1) Everyone has the right of access to adequate housing.
- (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right.

Section 28 gives children right to shelter which is not limited by restraints like progressive realisation nor available resources.

The High Court declined to grant relief to the applicants under section 26, but granted relief (to some of them) under section 28 by ordering the state to provide children and accompanying parents with 'bare minimum' shelter in form of tents and potable water. In doing this, the High Court adopted the approach of the Committee on Economic, Social and Cultural Rights (ESCR Committee) in relation to the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ESCR Committee had defined the substance of the right to adequate housing by reference to its 'minimum core.'<sup>132</sup>

The state appealed to the Constitutional Court, which chose to approach the issue from the angle of the *reasonableness* of measures taken by the state to fulfil its obligations under section 26 of the Constitution. It noted that the ESCR Committee did not define the 'minimum core' obligation of states in reference to the enforcement

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<sup>130</sup> G. Budlender, 'A Paper Dog with Real Teeth,' 12 July 2002, *The Mail and Guardian*, in R. N. Daniels (n 71) 25

<sup>131</sup> *Government of the Rep of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC)

<sup>132</sup> ECOSOC Committee General Comment 3 (1990), para 10

of socio-economic rights, and further that the minimum core is only one consideration in determining whether the State has met its constitutional duty to implement reasonable legislative and other measures to progressively achieve the right of access to adequate housing. In determining the question of whether the measures adopted by the state were reasonable, the Court held that the existing programme was inadequate because it failed to cater for homeless and desperately poor communities such as the respondents. It therefore ruled that the state had breached its obligation to devise and implement within its available resources, a *comprehensive and coordinated programme* to realise progressively the right of access to adequate housing.<sup>133</sup> In arriving at this decision, the Court departed from its precedent in the *Soobramoney* case<sup>134</sup> and accorded judicial recognition to enforcement of socio-economic rights in South Africa.<sup>135</sup>

*Grootboom* was hailed for its departure from *Soobramoney*, but criticised for failure to adopt the 'minimum core' approach of the ESCR Committee and granting only declaratory, rather than injunctive relief, which would have given the Court supervisory jurisdiction over the judgment.<sup>136</sup>

### **3.3.5 Definition of rape**

The Court was faced with the constitutional validity of the common law definition of rape in *Masiya v DPP*.<sup>137</sup> The case arose from the judgment of the Pretoria High Court, confirming that of the Regional Court.<sup>138</sup> The Regional Court had convicted one Fanuel Masiya of unlawful, non-consensual sexual intercourse with a nine-year old girl. The evidence had established that the complainant was penetrated anally. The state had accordingly applied that the applicant be convicted of 'indecent

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<sup>133</sup> Paragraph 99

<sup>134</sup> *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 (1) SA 765 (CC)

<sup>135</sup> In *Soobramoney*, the Court refused life saving dialysis treatment to the applicant because of budgetary constraints. It held that the applicant's treatment did not qualify as emergency medical treatment under section 27(3) of the Constitution. It declared that it would be slow to 'interfere with rational decisions taken in good faith by the political organs ...' (para 29)

<sup>136</sup> See D. Bilchitz 'Giving Socio-economic Rights Teeth: The Minimum Core and Its Importance,' (2002) 118 *South African Law Journal*, 484. A critic commented: 'Ever since the case of Thiagraj Soobramoney, in which the Constitutional Court said it could not help a man unable to afford the kidney treatment he needed to stay alive, poor people have wondered what the rights in the Constitution were really worth.' See Rickard Carmel, 'Testing Time for the Poor,' (2000) *Sunday Times* 7 May 2000; quoted in J. L. Gibson and G. A. Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court,' (2003) *Journal of Politics*, vol 65

<sup>137</sup> Yet to be reported, CCT Case 54/06 (decided on 10 May 2007)

<sup>138</sup> *S v Masiya*, case no SHG 94/04 11 July 2005, unreported



assault' rather than rape. The common law<sup>139</sup> defines rape in a gender-specific manner that excludes anal penetration. In its judgment, the High Court upheld the definition of rape to include acts of non-consensual sexual penetration of the male penis into the vagina or anus of 'another person.' It struck down certain provisions of the Criminal Law Amendment Act and its schedules, and section 261(1) (e) and (f) and (2) (c) of the Criminal Procedure Act. It ordered a *reading in* of the word 'person' wherever reference is made to a gender-specific provision.

In a majority judgment read by Nkabinde J, to which Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, O'Regan J, Van der Westhuizen J, Van Heerden AJ and Yacoob J. concurred to, the Constitutional Court admitted the patriarchal origin of the common law definition of rape and the fact that it falls short of the spirit and provisions of the Bill of Rights. Despite this admission, it argued that because the victim of the rape was female, it could not consider the question of whether non-consensual male-on-male penetrative sex would constitute rape. The Court argued that to extend the definition of rape to include men would infringe on the legislative terrain.<sup>140</sup> However, it extended the definition to include non-consensual anal penetration of women.<sup>141</sup>

In a dissenting opinion concurred to by Sachs J, Langa CJ held that the 'anal penetration of a male should be treated in the same manner as that of a female' for 'to do otherwise fails to give full effect to the constitutional values of dignity, equality and freedom.'<sup>142</sup>

The *Masiya* judgment has drawn criticism for declining to develop the common law to include non-consensual male-on-male sexual penetration in a 'gender-neutral fashion.'<sup>143</sup>

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<sup>139</sup> *Criminal Procedure Act 1977 No 51 of 1977* and the *Criminal Law Amendment Act 1997 No 105 of 1997*

<sup>140</sup> Paragraph 30

<sup>141</sup> Paragraph 74

<sup>142</sup> Paragraph 80

<sup>143</sup> See A. Dersso, 'The Role of Courts in the Development of the Common Law under S. 39(2): *Masiya v Director of Public Prosecutions Pretoria (The State)* and another, SAIFAC Paper; available at [www.saifac.org.za/docs/2007/Masiya%20Case%20note.pdf](http://www.saifac.org.za/docs/2007/Masiya%20Case%20note.pdf) (accessed 18 September 2007). See also Constitutionally Speaking, 'Male Rape: What Were the Judges Smoking?' <http://constitutionallyspeaking.blogspot.com/2007/05/male-rape-what-were-judges-smoking.html> (accessed 18 September 2007) and Rape Outcry, 'SA Men's Forum Disappointed by Rape Ruling,' <http://www.rapeoutcry.co.za/events/sabc.html> (accessed 18 September 2007)

### 3.3.6 Gay rights

In the *Fourie* case,<sup>144</sup> the Constitutional Court dealt with one of its most divisive decisions: same-sex marriages. It was asked to determine the constitutionality of the common law definition of marriage as being between a man and woman, and section 30(1) of the *Marriage Act* (which required the words 'lawful wife' and 'lawful husband' during exchange of marriage vows). The state opposed the applicants on the ground that it was inappropriate for the judiciary to cause such significant changes to the institution of marriage. It argued that such change should be addressed by Parliament and relied on the following for its argument:

- (a) Recognition of same sex marriages was not an appropriate solution to discrimination against homosexuals;
- (b) The Constitution did not protect the right to marry, and
- (c) International human rights law recognised only heterosexual marriages.

In rejecting the state's contentions, the Court acknowledged religious opposition to same-sex marriages by ruling that ministers of religion were not legally obliged to solemnise a same-sex marriage if it would contradict their religious belief. The Court described gays and lesbians as a 'permanent minority in society' who are exclusively reliant on the Bill of Rights for their protection. It declared that the mere fact that the legal system might embody 'conventional majoritarian beliefs on homosexuality does not by itself lessen the discriminatory effect of those laws.'<sup>145</sup> It therefore easily found that section 30(1) of the *Marriage Act* violated the right to equality and prohibition of unfair discrimination<sup>146</sup> in a manner that did not satisfy the reasonableness requirements of section 36 of the Constitution's limitation clause.

The Court was however divided over the issue of an appropriate remedy for the applicants. It was faced with two options: to *read in* the words 'or spouse,' into section 30(1) of the *Marriage Act*, so as to accommodate same-sex partners, or suspend the declaration of invalidity of section 30(1) to enable Parliament find an appropriate remedy. The state argued for the second option on these grounds:

- (a) The public should be allowed to debate the issue;
- (b) The judiciary was not competent to alter the institution of marriage in such a significant manner;
- (c) Only Parliament had the power to alter the institution of marriage in such a dramatic fashion.

The minority judgment, drafted by O' Regan J, held that a *reading in* of the words 'or spouse' into section 30(1) of the *Marriage Act* would not create great uncertainty when the legislation is eventually amended in favour of same-sex marriages, nor would *reading in* obstruct the legislature in its policy choices. The majority reasoned

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<sup>144</sup> Minister of Home Affairs (n 14). The two cases were consolidated

<sup>145</sup> Paragraph 74

that it was appropriate for Parliament, in light of its 'democratic and legitimating role,' to determine an appropriate remedy to encourage greater stability in the institution of marriage and greater acceptance of same-sex marriages. The Court therefore suspended section 30(1) of the *Marriage Act* for one year, to give Parliament time to remedy the defect invalidated by the Court's judgment. The result of Parliament's compliance with the decision in the *Fourie* case is the South African *Civil Union Act*, which is discussed below.

### **3.3.7 The Civil Union Act**

The *Civil Union Act*, 2006 (Act) is undoubtedly a child of progressive judicial activism. Notwithstanding that the *Fourie* judgment perpetuated unfair discrimination for 12 months by refusing to grant interim relief<sup>147</sup> to the applicants, it overruled common law precedents that discriminated against same-sex couples and succeeded in according them legal protection through the Act. Regarding its reception by the South African public, never since *State v Makwanyane* had there been such public hostility towards the Constitutional Court.<sup>148</sup> This much was evident during the public hearings of the Civil Union Bill in Parliament and eventually prompted the Minister of Home Affairs to make a 'pacifying' speech explaining the rationale for the Act:

Fellow South Africans, our country has come from a painful past of discrimination under apartheid where the state sanctioned and promoted inequality in society. It was for this reason that the battle cry for our struggle for freedom was for 'all people to be equal before the law.' Our Constitution is the result of this struggle, and reflects our vision of society where we can be different and diverse, yet equal and protected. The recent public debates on the Civil Union Bill have demonstrated a real test of our commitment to the Constitution and all that it stands for.<sup>149</sup>

Did public hostility to the *Fourie* and *Masiya* judgments erode the Court's legitimacy? This question shall be answered after examining the 'countermajoritarian difficulty.'

## **3.4 Revisiting the countermajoritarian difficulty**

### **3.4.1 Introduction**

When the Supreme Court declares unconstitutional a legislative act...it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.

*Alexander Bickel*<sup>150</sup>

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<sup>146</sup> Sections 9(1) and 9(3) of the Constitution respectively

<sup>147</sup> Through an immediate reading in of the words 'or spouse' into s. 30(1) of the *Marriage Act*

<sup>148</sup> *Cape Times*, 'Same-sex Union Bill Gets Passions Going,' (n 15)

<sup>149</sup> Minister's statement on the Civil Union Bill, 19 October 2006; available at <http://www.home-affairs.gov.za/speeches.asp?id=179> (accessed 18 September 2007)

<sup>150</sup> A. Bickel, (n 6) 16-17

The countermajoritarian difficulty flows from friction between democracy and constitutionalism.<sup>151</sup> On one hand is an elected executive and legislature representing the electorate or 'people of the here and now' referred to by Bickel in *The Least Dangerous Branch*; on the other is an unelected court constitutionally empowered to review, and where necessary, strike down laws and policies by the legislature and executive. Such invalidations often clash with the views of majority of the electorate whom the legislature and executive expressly or impliedly represent. As aptly captured by Friedman, the countermajoritarian difficulty

(r)efers to a challenge to the legitimacy or propriety of judicial review, on the grounds that it is inconsistent with the will of the people, or a majority of the people, whose will, it is implied, should be sovereign in a democracy.<sup>152</sup>

This section of the study examines the anti-majoritarian difficulty in the context of South Africa's Constitutional Court.

### **3.4.2 Two schools of thought**

In *Countermajoritarian Difficulty in South African Constitutional Law*,<sup>153</sup> Daniels identified two views regarding the democratic legitimacy of *anti-majoritarianism* in South Africa. The first view is based on 'alleged existence of popular consent to constitutional review and the deliberate allocation of an activist role to the judiciary.'<sup>154</sup> This argument is tied to the democratic credentials of the Constitution and forms the departure point of the second view. The second school holds that the 34 Constitutional Principles were merely products of political compromise negotiated between unelected and un-mandated delegates. Having found their way into the final Constitution therefore, and in the absence of a referendum, they dilute the democratic credentials of the final Constitution.<sup>155</sup> This conception of the democratic legitimacy of the *anti-majoritarian* difficulty is difficult to swallow for these reasons:

First, the fact that the Constitutional Principles were formulated by unelected politicians does not reduce their legitimacy. This is because the Constitutional

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<sup>151</sup> For an exposition of this tension, see D. Davis, *Democracy and Deliberation: Transformation and the South African Legal Order*, (1999)

<sup>152</sup> B. Friedman, 'The History of the Countermajoritarian Difficulty, Part One: the Road to Judicial Supremacy,' (1998) *New York University Law Review*, 354

<sup>153</sup> N 71

<sup>154</sup> Daniels cites Sarkin-Hughes J, 'The Political Role of the Constitutional Court,' (1997) 114 *South African Law Journal*, 138, and D. Davis, (n 151). For the implication of the 'deliberate allocation of an activist role to the judiciary,' refer to the discussion in 3.2.1: *Overview of historical origins of constitutionalism in post-apartheid South Africa*, particularly the observation in note 104

<sup>155</sup> This view finds support in M. Osborne and C. Sprigman, 'Behold: Angry Native Becomes Post Modernist Prophet of Judicial Messiah,' (2001)118 *South African Law Journal*, 702 and M. Matua, 'Hope and Despair for a New South Africa,' (1997), 10 *Harvard Human Rights Journal*, 63, 81, 92 and 112

Assembly that reviewed and adopted the final Constitution was effectively the Parliament elected in the 1994 general elections.<sup>156</sup> Being an elected legislature, their approval and adoption of the Principles amounted to a democratic endorsement of their provisions. Second, there is no evidence of public disapproval of the final Constitution.<sup>157</sup> It is therefore incorrect to argue that the 1996 Constitution's legitimacy is defective or questionable.

Turning to the Constitutional Court's attitude towards the countermajoritarian difficulty, Daniels opined that the Court has not been significantly swayed by legislative or public opinion.<sup>158</sup> He linked legitimacy of the Constitutional Court to legitimacy of the Constitution itself and claimed that the *Makwanyane* judgment diminished the credibility of the Court.<sup>159</sup> He concluded by stating that the Court's role, 'albeit countermajoritarian at times, is ultimately supportive of democracy' since 'it protects minority rights against the will of the majority.'<sup>160</sup> I concur with Daniels' conclusion and do not dispute, at this point, the empirical evidence which he relied on to assert that the *Makwanyane* judgment diminished the credibility of the Court. Suffice it to state that the *Makwanyane* decision, being over ten years old, and a mere part of the Constitutional Court's relatively long jurisprudence, is a selective basis to judge the Court's legitimacy. Nevertheless, assuming, but not conceding that the *Makwanyane* judgement is regressive judicial activism, a peculiar argument may be made.

It may be safely said that human dignity is the *grundnorm* of the South African Constitution.<sup>161</sup> Thus, even if Parliament were to enact legislation amending the Constitution to reintroduce the death penalty, such amendment would be null and void because it would violate the foundation of the Constitution as embodied in its *grundnorm*, human dignity.

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<sup>156</sup> See explanations in N 107

<sup>157</sup> R. N. Daniels, (n 71) 29

<sup>158</sup> As above

<sup>159</sup> P 35

<sup>160</sup> P 39

<sup>161</sup> Art 1 (a) – the foundational values of the state are based on 'human dignity, the achievement of equality and the protection of human rights and freedoms;' art 7(1) – the Constitution is founded on 'democratic values of human dignity, equality and freedom,' and art 36(1) – limitations of constitutional rights should be 'justifiable in an open and democratic society based on human dignity, equality and freedom.' See also *MEC for Education: Kwazulu-Natal & ors v Navaneethum Pillay & ors*, CCT 51/06, para 156 (decided 3 October 2007), where the Court described human dignity as a 'lodestar.'

As Friedman points out, the primary question is what determines legitimacy of judicial review by a constitutional court.<sup>162</sup> Is it public acceptance of court decisions? Is it consistent judicial application of legal principles, or is it something else? It is difficult to give an affirmative answer to the first two questions. If, as Daniels agrees, legitimacy of the Constitutional Court is intrinsically linked to legitimacy of the Constitution, then public acceptance of the Court's decisions should not be the sole basis of assessing judicial legitimacy in South Africa. Put differently, having confined their sovereignty to the Constitution and assigned the task of interpreting it to the Constitutional Court, the public should leave the Court to do just that. The Court does not stray beyond the Constitution; to do that would amount to 'divination.'<sup>163</sup> It is equally unhelpful to judge judicial legitimacy through the lens of precedence or consistent judicial application of legal principles. This is because so long as society is not static, the law would remain a living thing incompatible with rigid adherence to precedents. There are several arguments against rigid adherence to precedents.

The first relates to portrayal of precedents or principle of *stare decisis* as betrayal of judges' duty to uphold the rule of law. As Justice Douglas puts it:

A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it.<sup>164</sup>

Second, while I concede that precedents seek to preserve legal stability, I believe they must also 'leave room for innovation and correction of error.'<sup>165</sup> In other words, precedents must not tie the hands of judges or 'constrain' their discretion and wisdom.<sup>166</sup> As a scholar has put it, 'history counts; the only significant question is how.'<sup>167</sup> The reason is that a court which believes a precedent is correct can explain the rightness of its ruling without reliance on its *precedential* status. The force of the argument against the doctrine of *stare decisis* consequently lies in its power to perpetuate judicial error or forestall inquiry into possibility of legal error.<sup>168</sup> I am

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<sup>162</sup> B. Friedman, 'The History of the Countermajoritarian Difficulty, Part Three: The Lesson of *Lochner*,' (2001) *New York University Law Review*. vol 76, p 1384

<sup>163</sup> Kentridge AJ (n 44)

<sup>164</sup> *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989), per Justice Scalia, quoting Justice Douglas; cited in D. A. Farber, (n 34) 1174

<sup>165</sup> D. A. Farber (above) 1175

<sup>166</sup> L. Alexander, 'Constrained by Precedents,' (1989) 63 *South California Law Review*, 1

<sup>167</sup> H. P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Columbia Law Review*, 723, 745 (1988); cited by H. Fallon, 'Legitimacy and the Constitution,' (2005) *Harvard Law Review*, vol 118, No 6, p 1818 -1820

<sup>168</sup> M.S. Paulsen, 'Abrogating *Stare Decisis* by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?' (2000) 109 *Yale Law Journal*, 1535, 1538, FN. 8

therefore inclined to concur with the view that the deliberate allocation of an activist role to the judiciary cloaks *anti-majoritarianism* in South Africa with democratic legitimacy.

### 3.5 Conclusion

Judicial activism by South Africa's Constitutional Court is influenced by injustices perpetrated by apartheid era regimes.<sup>169</sup> Remarkably, this influence has not deterred the Court from considerable deference to the executive and Parliament.<sup>170</sup> This deference was manifest in *Grootboom*. The Court's failure to adopt the 'minimum core' approach in determining state compliance with right of access to adequate housing diluted its authentication of justiciability of socio-economic rights.

Similarly, in the *Fourie* case, excessive deference to the legislature resulted in deferring equality rights of same-sex couples for 12 months. While the Court's approach to the minimum core obligation of government in realising socio-economic rights may be explained on the ground of budgetary implications, its deference to Parliament in the *Fourie* case is inexcusable. Finally, the decision in *Masiya v DPP* shows that the Court's deference to Parliament tends to defeat its mandate of minority protection. As Langa CJ pointed out in his dissenting opinion in the *Masiya* case, groups of men like 'young boys, prisoners and homosexuals,' who are 'most often the survivors of rape, are, like women, also vulnerable groups in our society.'<sup>171</sup> How then does the Constitutional Court's mandate to protect minority rights mix with deference to Parliament and preservation of its legitimacy? This forms the crux of the remainder of this study.

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<sup>169</sup> P de Vos, 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution,' (2001) 17 *South African Journal on Human Rights*

<sup>170</sup> Lenta ('Judicial Restraint and Overreach,' n 64), agrees with this deference

<sup>171</sup> Paragraph 86

## Chapter 4: MINORITY PROTECTION OR JUDICIAL ILLEGITIMACY?

### 4.1 Introduction

This chapter examines the delicate thread between judicial activism, protection of minority rights and judicial legitimacy. It adopts a position on judicial activism in light of its classifications in chapter two and advances arguments for minority protection based on South Africa's historical context. It proceeds to critically examine effects of activism on judicial legitimacy using opinions in preceding chapters and studies conducted on the Constitutional Court. It then analyses these studies and makes appropriate remarks in relevant issues. The chapter concludes that progressive judicial activism is not inherently harmful to the Court's legitimacy.

### 4.2 Judicial activism as transformative tool for minority protection

#### 4.2.1 *An opening remark*

As stated in chapter two, the study's conception of judicial activism is limited to evolution of new law and overruling of precedents. Given the contested meaning of judicial activism, I am constrained to borrow John Rawls' theory of 'reflective equilibrium' in offering a brief justification of this position.<sup>172</sup> Accordingly, I proceed from common, to contested grounds. Few people would dispute that the endowment of constitutional courts with power to review the executive and legislative branches of government is not an important element of the democratic process. However, where disagreement would result is the form this review takes. This is where accusations of judicial activism usually arise. It is therefore worthwhile to address the question: activism against what or for whom? Is judicial activism targeted at the majority, their representative (legislature), the court itself (judicial precedents), or the Constitution?

To resolve these questions, I employ what I term *extrinsic* and *intrinsic* principles of constitutional interpretation.<sup>173</sup> Intrinsic interpretation occurs where constitutional

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<sup>172</sup> According to Rawls, 'justification is argument addressed to those who disagree with us or to ourselves when we are of two minds. It presumes a clash of views between persons or within one person, and seeks to convince others, or ourselves, of the reasonableness of the principles upon which our claims and judgments are founded. Being designed to reconcile by reason, justification proceeds from what all parties to the discussion hold in common.' [J. Rawls, *A Theory of Justice* (1974) 580-81]

<sup>173</sup> Credit for these principles goes to Thomas Sowell, *Judicial Activism Reconsidered (Essays in Public Policy No 13)*, (1989). There are of course other principles of constitutional interpretation. Blackstone for example identifies four steps in his cognitive theory of interpretation: (1) words are 'to be understood in their usual and most known signification.' (2) Their meaning is to be established 'from the context' if the words are 'dubious.' (3) Failing this, the intention of the draftsman should be discovered. (4) Finally, 'the reason and spirit' of the legislation should be considered. See W. Blackstone, *Commentaries on the Laws of England, (1765-1769)* (1979) 59-61. Blackstone finds support in Wendell Holmes [*Collected Legal Papers* (1920)]. Other theories of interpretation include Dworkin's *purposive moralism/constructivism* [*Taking Rights Seriously* (1977); *Freedom's Law* (1996) and Rawls' *justification approach* [*A Theory of Justice* (1974)]



provisions are clear and unambiguous. Accordingly, it involves construction of statutes as their ordinary meaning dictates. On its part, extrinsic interpretation is resorted to where 'considerations deemed to be of equal (or superior) value to the Constitution' are imported to decipher and give effect to the intention of the Constitution's drafters.<sup>174</sup> It is this importation of extrinsic values that is problematic. This is because the crux of the furore over judicial activism is grievance that judges impose their own personal preferences in their decisions, 'to such an extent as to ultimately negate the very meaning of law as a body of known rules to guide individual and social conduct.'<sup>175</sup> When judges employ extrinsic considerations, precedents are abandoned, new laws arise, public opinion is affected and cries of judicial activism surface. Who then is the target of this activism? The answer appears to be a combination of precedents, statutes, policies and individuals or groups affected by such activism. However, the target seems less important than the aim. The question ought to be: whose values do judges import? Do these values belong to judges or the Constitution and what motivates them?

Some scholars have argued that the judicial function is intricately tied to politics.<sup>176</sup> According to Davis, '(c)onstitutionalism is about moral and political reasoning. When judges go about the business of constitutional adjudication, they are involved in a form of politics.'<sup>177</sup> Davis' view, while true to a certain extent, is nevertheless a blanket assertion. It merely relates to judicial activism in the political arena. In other words, when judges resolve issues bordering on political questions, they may fairly be regarded as engaging in politics. This was the principal accusation against the US Supreme Court during the George Bush versus Al Gore 2000 electoral dispute.<sup>178</sup> Politically motivated judgments and judgments bearing political consequences are two different things. Since they bear budgetary and policy implications, decisions like the *Grootboom* and *TAC* cases are examples of politically consequential judgments. While judges cannot objectively avoid the latter because of the interrelated nature of rights, a politically motivated judgment is influenced or determined by 'subjective predispositions' of judges.<sup>179</sup> Activism motivated by such subjective predispositions

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<sup>174</sup> T. Sowell (as above) 3

<sup>175</sup> As above

<sup>176</sup> D. Davis, (n 151); F. Venter, 'The Politics of Constitutional Adjudication,' (2005) 130; Max Planck Institute; at [www.zaerv.de/65\\_2005/65\\_2005\\_1\\_a\\_129\\_166.pdf](http://www.zaerv.de/65_2005/65_2005_1_a_129_166.pdf) (accessed 5 September 2007)

<sup>177</sup> D. Davis, (n 151) 47

<sup>178</sup> See J. Rosen, 'Disgrace: The Supreme Court Commits Suicide,' *The New Republic*, Dec. 25, 2000, at 16-18; in J. W. Nowlin, 'The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis,' (2001) 89 *Kentucky Law Journal*, FN 10. See also B. Ackerman, *Bush v. Gore: The Question of Legitimacy* (2002)

<sup>179</sup> F. Venter (n 176)

might amount to regressive judicial activism. But there is another type of judicial activism – one that protects minorities by enforcing values entrenched in the Constitution despite judges' personal beliefs. This is progressive judicial activism and it is a safeguard for minority rights.

#### **4.2.2 A shield for minorities**

An argument for judicial protection of minority rights invites the spectre of the countermajoritarian difficulty. It is therefore worthwhile to briefly consider the democratic credentials of minority protection. I concede that simply because the Constitutional Court was established by the majority (through the Constitution) does not, *ipso facto*, confer it with democratic credentials. This is because such an argument begs the question.<sup>180</sup> Similarly, it is insufficient to argue that judicial protection of minority rights is democratic simply because the Constitution authorises it. This concession is borne from criticisms of the democratic legitimacy of the South African Constitution, although it is by no means an endorsement of such views.<sup>181</sup> I rather justify the democratic credentials of judicial protection of minority rights on the principle of *complementarity*. According to this principle, which I draw from diverse justifications of the countermajoritarian difficulty, minority protection is simply part of the democratic process.<sup>182</sup> This requires brief explanation.

In order for democracy to thrive, there is need for substantive conditions under which collective democratic decisions accord individuals equal respect and benefits. These conditions must guarantee freedom and equality of persons and ensure that majorities do not oppress minorities. Only the judiciary can ensure such conditions. This is because it is doubtful if representative democracy promotes 'substantive equality,' in contra-distinction with 'formal equality.'<sup>183</sup> Scholars like Waldron and Walzer have argued that judicial activism is inconsistent with citizens' right to participate on an equal basis in public decision-making.<sup>184</sup> They believe, rather oddly, that since right of participation is the 'right of rights,' if people decide to confine decisions about principles solely to the judiciary, this amounts to a refusal of 'self-

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<sup>180</sup> J. Waldron, *Law and Disagreement* (1999) 255

<sup>181</sup> See M. Osborne and C. Sprigman, and M. Matua (n 152) and FN 103 referred to in my counter arguments in 3.4.1

<sup>182</sup> These justifications belong to H. Ely, *Democracy and Distrust* (1980); F. Michelman, 'Brennan and Democracy,' (1998) 86 *California Law Review*; Dworkin, *Freedom's Law* (1996); and S. Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review,' (1990), 9 *Law & Philosophy* 327

<sup>183</sup> Dworkin (n 182) 27

<sup>184</sup> J. Waldron, *Law and Disagreement* (1999) and M. Walzer, 'Philosophy and Democracy,' (1981) 9 *Journal of Political Theory*

government.<sup>185</sup> The question this view fails to address is who regulates disputes concerning the right of participation. Waldron attempts to glorify the morality of 'ordinary men and women' over judges' views. He believes that because citizens' conception of justice in political decisions impact on their rights and interests, the majority are capable of protecting minorities' constitutional rights without judicial interference.<sup>186</sup> Contrary to Waldron's arguments, the capacity of 'ordinary men and women' in the political process to protect minority rights is suspect. The majority did not protect the minority during the Rwandan genocide; they felt it was better to exterminate them. Hitler's Nazist ideology did the same.

Politics, within which democratic representation is practiced, and the electoral process, within which it is determined, are fraught with numerous difficulties. These include representative ratios, intrigues surrounding party politics, time lapse between elections (including its implications on timely accountability), and the corruptive tendencies of unbridled political power.<sup>187</sup> There is therefore more merit in arguing that the judiciary's institutional structure, in contra-distinction with that of Parliament, makes it more likely that judicial review protects rights and thereby complements democratic principles of equality.<sup>188</sup> In South Africa, the ANC enjoys an overwhelming political dominance which has practically neutralised significant parliamentary opposition. In the absence of strong opposition, the duty of protecting 'discrete and insular minorities'<sup>189</sup> falls on the Constitutional Court. To do otherwise in a country with a remarkable history of injustice might make such minorities not only 'perpetual losers,' but also 'scapegoats in political struggles.'<sup>190</sup>

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<sup>185</sup> As above: J. Waldron at 254; M. Walzer at 379, 384-86. For criticism, see A. Kavanagh 'Participation and Judicial Review: A Reply to Jeremy Waldron,' (2003) 22 *Law & Philosophy* 451, 477

<sup>186</sup> Above, p 250. See also J. Waldron, 'A Rights-Based Critique of Constitutional Rights,' (1993) 13 *Oxford Journal of Legal Studies* 18, 36-39

<sup>187</sup> F. Venter (n 176) 144-145. See also *United States v. Carolene Products Co.* 304 U.S. 144, 152-53 (1938), FN 4, para 2; discussed in R. M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, (1982), *Yale Law Journal*, vol 91, No 7, p 1287-1316

<sup>188</sup> Support for this view is found in J. Raz, 'Disagreement in Politics' (1998) 43 *American Journal of Jurisprudence*, p 46, and M. Moore 'Natural Rights, Judicial Review and Constitutional Interpretation'; in J. Goldworthy & T. Campbell (eds), *Legal Interpretation in Democratic States* (2002) 207. Rejecting *countermajoritarianism*, a scholar has argued that judicial review is *extramajoritarian*: 'the majority agrees that supervision of its fundamental values should be removed from direct majority control.' See G. A. Spann, 'Expository Justice' (1983), 131 *University of Pennsylvania Law Review*, 606

<sup>189</sup> *Carolene Products* case, FN 4, para 4

<sup>190</sup> R. M. Cover (n 187) 1287. It has been noted that: '(w)ith little meaningful institutional separation of powers between the executive and legislative branches, South Africa's judiciary is central to prospects for accountable government.' See R. Alence, 'South Africa after Apartheid: The First Decade' (2004), *Journal of Democracy*, vol 15, No 3, p 87-89

### **4.3 Effects of activism on judicial legitimacy**

#### **4.3.1 Introduction**

Does judicial activism harm judicial legitimacy? This is a question that has never been fully addressed by scholars.<sup>191</sup> Without solid empirical evidence, I cannot claim to provide a concrete answer. However, based on existing studies, legal theories and reactions to the Constitutional Court's jurisprudence, I can validly assess the effect of judicial activism on the Court's legitimacy. I begin by tracing the source of judges' authority; I proceed to analyse studies conducted on the legitimacy of the Constitutional Court. Finally, I reconcile these studies with reactions to the Court's jurisprudence before drawing a conclusion.

#### **4.3.2 Institutional versus functional legitimacy**

The sources of judicial legitimacy are institutional and functional. Institutional legitimacy or 'legitimacy from below' refers to pre-established 'legitimising' processes which govern selection of judges.<sup>192</sup> These processes include qualifications, mode of appointment, tenure and removal of judges. Such process-oriented legitimacy is derived from the Constitution, which in turn derives its legitimacy from the people as expressed in its preamble.

On the other hand, functional legitimacy, or 'legitimacy from above',<sup>193</sup> flows from the judicial role of judges. In other words, functional legitimacy is derived from the manner judges carry out their duties of statutory interpretation. Accordingly, it is tied to judicial approach to interpretation of the content and meaning of laws. Functional legitimacy of the judiciary is thus correlative to legitimacy of law. Flowing from law therefore, it makes judges 'oracles of the law' and suppliers of justice.<sup>194</sup> This form of judicial legitimacy is conferred by entrustment to a third 'non-political, permanent, and independent authority,' the task of keeping the other arms of government within constitutional boundaries of their respective powers.<sup>195</sup> The study utilises functional legitimacy in assessing how judicial activism affects the Constitutional Court's legitimacy.

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<sup>191</sup> J. C. Yoo, 'In Defence of the Court's Legitimacy,' (2001) 68 *University of Chicago Law Review* 2

<sup>192</sup> A. Levasseur, 'Legitimacy of Judges,' (2001), 50 *American Journal of Comparative Law*, 44

<sup>193</sup> As above

<sup>194</sup> J. P Dawson, *Oracles of the Law* (1978)

<sup>195</sup> A. Levasseur (n 192); citing A. Hamilton, *The Federalist*, No 78

### 4.3.3 *Judicial activism and the Constitutional Court's legitimacy*

Before assessing the influence of judicial activism on the Constitutional Court's legitimacy, it is necessary to make a cautionary remark. In their most common usages, the term 'legitimate' is employed as synonym for what is 'lawful,' and 'illegitimate' for what is 'unlawful.'<sup>196</sup> In a legal setting however, these usages become unhelpful. For example, I may regard a judicial decision as legally legitimate even though I disagree with it. Used *sensu stricto*, there is no 'illegitimate' judgment because, in one way or the other, such judgment finds a basis in written law. Thus, when legitimacy is applied to judicial decisions, it is often an assessment resulting in less than full endorsement of such decisions, as judgments are legally legitimate whenever they are supported by 'existing sources and understandings of law.'<sup>197</sup> If the legal legitimacy of judicial decisions is such a fluid concept, why is there a fuss over certain court judgments? In other words, why are there sometimes accusations of judicial illegitimacy, or put differently, judicial activism?

Professor Fallon uses the concepts of *discretion* and *jurisdiction*<sup>198</sup> to proffer answers to this question.<sup>199</sup> Discretion implies leverage or independence to perform a duty and is not absolute.<sup>200</sup> Abuse of discretion occurs when judges act for wrong reasons – for example considering a matter that is not ripe for hearing. It may also occur when judges show bad judgment in arriving at decisions, or put politely, when they commit judicial errors. In the context of judicial legitimacy, Fallon uses a combination of discretion and jurisdiction to connote wrongful or rightful exercise of power within defined limits. According to him, when judicial legitimacy is invoked, it suggests that a court:

- (1) had lawful power to decide the case or issue before it;
- (2) in doing so, rested its decision only on considerations that it had lawful power to take into account, or could reasonably believe that it had lawful power to weigh; and,
- (3) reached an outcome that fell within the bounds of reasonable legal judgment.<sup>201</sup>

Conversely, a claim of judicial illegitimacy involves negation of the above – namely, lawful power, its considerations and reasonable outcomes. How then should a court's legitimacy be measured? Is it by compliance with its decisions? Is it through public

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<sup>196</sup> Webster's New Twentieth Century Dictionary of English Language (1979) (2<sup>nd</sup> ed) 1035

<sup>197</sup> Barry Friedman, (n 162) 1453 & 1455

<sup>198</sup> It should be noted that the meaning of jurisdiction is a fiercely contested concept. See E. T. Lee, 'The Dubious Concept of Jurisdiction' (2003) 54 *Hastings Law Journal*, 1614

<sup>199</sup> H. Fallon, (n 167).

<sup>200</sup> As Dworkin humorously put it: 'discretion, like the hole in a doughnut, does not exist, except as an area left open by a surrounding belt of restriction' (Taking Rights Seriously, N 50) 31

<sup>201</sup> Fallon, (n 167)1819

opinion or reaction to judicial decisions? Is it measured by the level of public confidence in the judiciary's ability to dispense 'justice,' or is it a combination of all these? Fallon seems to endorse a combination, as he believes that claims about judicial legitimacy under the Constitution arise in legal, sociological, and moral contexts.<sup>202</sup> Recalling ambiguities in the meaning of legitimacy discussed in this study, it is prudent to proffer answers to the posed questions through the lens of legal legitimacy.<sup>203</sup> But first, a brief scrutiny of studies on the legitimacy of the Constitutional Court is necessary.

#### **4.3.4 Studies on the Court's legitimacy**

In *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*,<sup>204</sup> Professors Gibson and Caldeira used a national survey to investigate the legitimacy of the Constitutional Court in the context of a civil liberties dispute regarding the rights of political minorities. They found that the Court's legitimacy was, compared to foreign apex national courts, relatively low; that its legitimacy varies across racial groups; and that its ability to convert its legitimacy into acquiescence was circumstantial. They also concluded that 'the Court has a limited ability to foster political tolerance' or act as 'protector of unpopular political minorities from the wrath of the majority.'<sup>205</sup> They however admitted that they failed to address conditions under which the judiciary's institutional legitimacy contributes to acquiescence to court decisions and institutional effectiveness.

Gibson and Caldeira's work requires two short comments. First, their survey was conducted between 1996 and 1997, barely one year after the emotive decision in *S v Makwanyane*. Second, as they conceded, nearly half of their respondents were undecided about how to react to the survey because the Court was only recently

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<sup>202</sup> As above, 1813, 1794

<sup>203</sup> Fallon believes that whereas moral legitimacy is a normative concept, sociological legitimacy is a question of fact, involving what people consider legally or morally legitimate, not necessarily what is legally or morally legitimate. I share his view that the 'public's relative lack of attentiveness makes it impossible to gauge substantive sociological legitimacy' (p 1830). He argued that when legitimacy functions as a legal concept, 'legitimacy and illegitimacy' are measured by legal standards. Thus, 'a claim of legal authority is legitimate insofar as it is accepted (as a matter of fact) as deserving of respect or obedience,' or otherwise 'acquiesced' to. He distinguished *substantive* legal legitimacy of judicial rulings, (reflecting correctness or reasonableness as a matter of law), from *authoritative* legitimacy or legally binding character of judicial rulings, (which may depend on standards that allow a larger margin for judicial error). Fallon notes however that legal legitimacy can rely on moral contemplations closely aligned with moral legitimacy (p 1790, 1791 & 1849 -1851). But see B. Friedman, (n 162) 1387: (suggesting that 'the work of constitutional judges must have both "legal" and "social" legitimacy.' According to him, 'social legitimacy, as distinguished from legal legitimacy, looks beyond jurisprudential antecedents of constitutional decisions and asks whether those decisions are widely understood to be the correct ones given the social and economic milieu in which they are rendered.')

<sup>204</sup> J. L. Gibson & G. A. Caldeira, (n 136)

<sup>205</sup> Above p 3

created. I shall return to *Makwanyane* later. Suffice it to state that ten years have passed since the survey and recent jurisprudence of the Court would certainly affect a similar survey today.

Mattes *et al* examined democratic governance in South Africa. A section of the study dealt with public perception of political institutions. They concluded that 60 percent of South Africans agree that the 'Constitution expresses the values and aspirations of the South African people,' while 68 percent feel that the Courts have the right to 'make decisions that people always have to abide by.'<sup>206</sup> The above studies represent public opinion, one limb of three questions asked earlier on how to measure legitimacy. These questions are now considered.

#### **4.3.5 Measuring the Court's legitimacy**

##### *4.3.5.1 Compliance with court decisions*

Measuring legitimacy by compliance with court decisions is relatively easy to determine. Virtually all controversial decisions of the Constitutional Court have been complied with by individuals and government. In the aftermath of the death penalty decision, President Mandela was reported to have rebuked Deputy President de Klerk for unwillingness to accept the ruling of the Court. Mandela stated:

'The Constitutional Court is the final arbiter on matters of this nature. They have pronounced themselves very clearly and I will defend any decision which they take, whether it is against my own interest, my own wishes, or is consistent with my own ideals.'<sup>207</sup>

As stated earlier, the Constituent Assembly did not reintroduce the death penalty in the final draft of the 1996 Constitution. This is clear evidence of not just compliance, but also acceptance of the *Makwanyane* ruling.

Similarly, soon after invalidating President Mandela's effort to modify the *Local Government Transition Act*, so as to favour the ANC in the Western Cape (*Executive Council of the Western Cape Legislature and others v President of the Republic of South Africa and others*),<sup>208</sup> the President proclaimed that 'government respects the

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<sup>206</sup> R. Mattes *et al*, 'Democratic Governance in South Africa: The People's view, (2003) *Afrobarometer Paper No 24*; at <http://www.afrobarometer.org/papers/AfropaperNo24.pdf> (accessed 26 September 2007)

<sup>207</sup> BBC, 'Mandela and De Klerk Disagree "Sharply" on Death Penalty, Amnesty,' *BBC Summary of World Broadcasts*, November 26, 1995

<sup>208</sup> 1995 (4) SA 877 (CC)

Constitutional Court's decision and will support it.<sup>209</sup> Likewise, despite public opposition to the *Civil Union Bill*, Parliament complied with the *Fourie* judgment.

#### 4.3.5.2 *Public opinion*

Proceeding to public opinion, it may be said that recurrent disputes about judicial legitimacy concern Courts' power to recognise rights that are relatively indefensible by reference to the Constitution's language and framers' intention.<sup>210</sup> These often-misunderstood rights are resented by the majority, expressed through public opinion. There are several arguments as to why courts should not be influenced by public opinion. I need only highlight the most prominent. Other than need to maintain the judiciary's independence, it may be validly argued that public opinion is not reliable, as it cannot be assumed that the masses have access to sufficient information on controversial issues, or opportunity to weigh intelligently different points of view.<sup>211</sup> The issue here is whether such opinion erodes judicial legitimacy.

I submit that by the peculiar nature of the judicial function, it does not. In the *Makwanyane* case, the Constitutional Court expended time to explain why public opinion should not overtly influence its decisions.<sup>212</sup> As Du Plessis has stated in this regard, 'in cases involving national moral issues,' courts have the duty to protect the rights of minorities against public opinion or 'majoritarian influences.'<sup>213</sup> Again, in measuring the Court's legitimacy, one must keep in mind the 'diffused' nature of institutional legitimacy. According to Easton,<sup>214</sup> institutional legitimacy is commonly referred to as 'diffuse support,' which is similar to the concept of 'loyalty.' Loyalty is of course obedience or sticking together whether or not it makes sense to do so.<sup>215</sup> Thus, it may be argued that the Court would still enjoy legitimacy regardless of public reaction to its decisions.

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<sup>209</sup> BBC, 'Mandela Says Elections To Go Ahead, Calls for Emergency Sitting of Parliament,' *BBC Summary of World Broadcasts*. September 25, 1995

<sup>210</sup> A scholar believes that 'an air of illegitimacy surrounds any alleged departure from the text or original understanding of the Constitution.' See D. A. Strauss, 'Common Law Constitutional Interpretation,' (1996) 63 *University of Chicago Law Review*, 878; see also R. Dworkin, 'Rawls and the Law,' (2004) 72 *Fordham Law Review*, 1387, 1401 (noting that recognition of a new right may call into question the Court's 'standing and legitimacy.')

<sup>211</sup> H. L. Childs, *An Introduction to Public Opinion* (1940) 135

<sup>212</sup> *Makwanyane*, para 88

<sup>213</sup> M. Du Plessis, (n 93) 40

<sup>214</sup> D. Easton, *A Systems Analysis of Political Life*, (1965); cited in J. L. Gibson & G. A. Caldeira, (n 136) 11, FN 18

<sup>215</sup> J. L. Gibson & G. A. Caldeira, (citing D. Easton above)



#### 4.3.5.3 *Public confidence*

Public confidence in the ability of the judiciary to dispense justice ought to be a sword, rather than a shield for judicial legitimacy. This needs brief explanation. It is fairly undisputed that courts are the last bastion for defence of human rights. Thus, the masses turn to the judiciary for redress whenever their rights are infringed by individuals or other arms of government. With about 50% of South Africans living below the poverty line,<sup>216</sup> there is perhaps no better way for public confidence in the Constitutional Court than in increased judicial activism in socio-economic rights. In the *Grootboom* case, the Court failed to utilise this opportunity when it refused to adopt the ESCR Committee's 'minimum core' approach. Similarly, disadvantaged groups in society, or *discrete* and *insular minorities* like same-sex couples, women, children, physically challenged persons, sex workers and detainees, are the major beneficiaries of progressive judicial activism. Public confidence in the ability of the judiciary to dispense justice is therefore strengthened when the Court protects minority rights.

#### 4.3.6 *A final argument*

I recognise that arguments for judicial activism are advocated largely by individuals with particular social visions often accompanied with particular moral justifications or assumptions. Such visions, however noble, might conflict with that of individuals with different assumptions about the nature of humans and societal structure.<sup>217</sup> Accordingly, I acknowledge that justification of progressive judicial activism is incompatible with all assumptions or social visions. However, certain salient facts remain unassailable and require brief elucidation.

First, there are two elements involved in the democratic ideal. One, the people, in whom sovereignty reside, entrust power to government (in a narrow sense, the executive and legislature) in line with the principle of majority rule. Two, to ensure effective, practical justice between individuals on one hand, and the state and individuals on the other, an impartial and independent body is established. That body is the judiciary. Its duty is to regulate tensions between individual rights and majority views. So long as it acts within principles of institutional integrity founded upon constitutional values, it has democratic legitimacy.<sup>218</sup>

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<sup>216</sup> CIA, 'World Fact book,' (2000 estimate); at <https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html> (accessed 5 September 2007)

<sup>217</sup> T. Sowell, *A Conflict of Visions*, (2001) 40 - 66

<sup>218</sup> Lord Steyn, (n 9)

Second, it is incontestable that elected branches of government are nearly impossible to remove and difficult to call to account between one election period and another. The problem with the countermajoritarian difficulty is that it is embedded in 'theoretical notions of social contract, popular sovereignty and majoritarian democracy.'<sup>219</sup> While not suggesting that judges represent the electorate better, justification for progressive judicial activism should be sought in the need to balance 'blind popular majoritarianism with rational judicial arguments.'<sup>220</sup>

Finally, the length of time a court is in operation is a vital contributor to its legitimacy.<sup>221</sup> South Africa has enjoyed constitutional democracy for 13 years. This period is long enough for the Constitutional Court, whose judges are unelected, to engage in robust protection of rights enshrined in the Bill of Rights. Provided such protection is founded on the Constitution's *grundnorm* of human dignity, manifested in the Court's moral authority, its legitimacy is untarnished. As Kriegler J stated in *S v Mamabolo*:

(t)he judiciary is an independent pillar of state . . . Under the doctrine of separation of powers it stands on an equal footing with the executive and legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. ...Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as watchdog over the Constitution and its Bill of Rights – even against the state.<sup>222</sup>

Unbridled majoritarianism is antithetical to diversity and free expression of opposing views – the basic principles upon which constitutional democracy rests. The Constitutional Court, as guardian of the Bill of Rights, therefore complements democracy when it engages in progressive judicial activism. Such activism, especially in socio-economic rights, is vital for promotion and protection of human rights and sustenance of democracy in South Africa and the continent generally.

#### **4.4 Conclusion**

The study has examined how the Constitutional Court's negation of majority will in order to protect minority rights affects its legitimacy. The South African Constitution places great premium on human dignity and mandates the Court to review policies and actions of the executive and legislature. Implicit in this mandate is the duty to

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<sup>219</sup> F. Venter, (n 176) 144

<sup>220</sup> As above, 145

<sup>221</sup> J. Gibson, *et al*, 'On the Legitimacy of National High Courts,' (1998) 92 *American Political Science Review*, 343-358

<sup>222</sup> 2001 3 SA 409 (CC), para 16

protect minorities from majoritarian views antithetical to the values enshrined in the Bill of Rights.

When the judiciary's protection of minority rights contradicts public opinion, it raises a countermajoritarian difficulty, sometimes termed judicial activism. Such activism is often perceived to erode judicial legitimacy. However, as this study has shown, judicial activism is a political concept that varies with particular perceptions of particular judicial decisions. Divorced from politics and judges subjective predispositions, judicial activism becomes progressive if aimed at protecting human dignity – the *grundnorm* of the South African Constitution.

On its part, judicial legitimacy is a problematic concept. Studies on the Constitutional Court's legitimacy have failed to address conditions under which the judiciary's institutional legitimacy contributes to acquiescence to court decisions and institutional effectiveness. Viewed from the perspective of compliance with court decisions, adverse public opinion and public confidence in the ability of the judiciary to dispense justice, the study's hypotheses that progressive judicial activism does not erode judicial legitimacy is established.

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