Minority rights and majority politics: a critical appraisal

by

KATE JEAN DENT

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SUPERVISOR: PROF IJ KROEZE

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Abstract

In the interplay between protection of rights and majoritarianism, the court is the arena. This research focuses on the conflicting role of the court within a constitutional democracy and a contestation of the counter-majoritarian dilemma that emerges from such a role. The counter-majoritarian dilemma centres on the idea that judges overturning decisions of the legislature through judicial review undermines democracy by thwarting the will of the majority through a subjective reading of abstract constitutional principles.

As a point of departure, the counter-majoritarian dilemma is contested by revealing that the court can be seen as a democratically consistent institution if democracy can be reconceptualised.

The examination of the South African jurisprudential climate and the adjudicative guidelines followed by the court suggests a rejection of such anti-democratic contention. The court upholds the commitments consented to at the time of the Constitution’s adoption and adjudication is reflective of the values undertaken by the country in reaction to its past. Within these values, minority rights can find a lifeline. Thus minority rights can exist through the implications of majoritarian consent. This research further identifies, in response to the counter-majoritarian dilemma, a constraining self-consciousness on the part of the court and an acute awareness of the court’s precarious role within a democratic infancy. The core of the counter-majoritarian dilemma is the view that interpretative indeterminacy of the Constitution means that the will of the people could be substituted for judicial preference. Through the examination of the court’s interpretative strategies and judicial subjectivity, this research suggests that within judicial subjectivity, adjudication continues to be reflective of the will of the people. Far from a constraining and mechanistic interpretation to avoid judicial subjectivity, the research reveals that open and non-formalist interpretative strategies are necessary to effectuate democratic conciliation within the judicial mandate. The results of this research suggest that, far from being a democratically deviant institution, the court in the current South African jurisprudential context, is the most suited to uphold the concept of democracy.
Key Words:

Consent, Constitutionalism, Constitutional Court, counter-majoritarian dilemma, deconstructionists, democracy, interpretation, judicial review, judicial subjectivity, judicial legitimacy, legitimacy, majority rule, minority rights, moral nihilism, value-judgment.
I declare that MINORITY RIGHTS AND MAJORITY POLITICS: A CRITICAL APPRAISAL is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

NAME: KJ DENT
SIGNATURE: [Signature]
STUDENT NUMBER: 45743215
DATE: 03/11/2015
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CHAPTER 1

INTRODUCTION

1.1 Background: South Africa as a Constitutional Democracy

The apartheid history of South Africa is one of oppression, discrimination and a denial of human rights. This denial ran concurrently with a denial of democratic participation and self-determination to the majority of the population.

Despite non-recognition of human rights on the part of the minority-run government, rights talk percolated through apartheid South Africa in the form of African Claims in South Africa, an idea of a Bill of Rights adopted by the African National Congress (ANC) in 1945. This was followed by The Congress of the People’s The Freedom Charter adopted in 1955; the ANC’s Constitutional Guidelines for a Democratic South Africa in 1989; and The Bill of Rights for a New South Africa in 1993. In 1991 the South African Law Commission published its paper The Interim Report on Group and Human Rights. Rights talk was the mainstay of the argument against the anti-democratic apartheid regime.

In 1991 the Convention for a Democratic South Africa (CODESA) saw multiparty negotiations begin to steer South Africa toward a constitutional democracy. Primarily the goal was toward peaceful democratic governance, but as is consistent with the basic tenets of constitutional democracy, there was a realization that this could not be achieved without a commitment to the rule of law and an independent judiciary.

Within CODESA, a technical committee was charged with constitutional transformation. The challenge was how to balance a constitutional framework that ensured rights protection as

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well as a constitution that out of democratic necessity and democratic authority was adopted by an elected assembly as the embodiment of the will of the people.\(^7\) In the drafting of a Bill of Rights, the technical committee leaned heavily on the ANC’s constitutional guidelines. These guidelines however promoted a Bill of Rights only \textit{in-so-far} as it was aimed at the fostering of majoritarian democracy through free and fair elections.\(^8\) Despite such an historical connection between right and democracy, it had come to a point where it became, and continues to be, viewed as diametrically opposed.

Although the ANC’s \textit{Transition to Democracy Bill} contained a number of substantive rights, it was qualified by the ANC’s insistence that a final Bill of Rights must be adopted by a duly elected Constitutional Assembly.\(^9\) Thus, rights would emerge with the direct consent of the majority as this would in time, assuredly, come to be an assembly where the ANC would hold a large majority and could thereby construct a Bill of Rights to suit ANC objectives. This redrafting had the potential to negate an all-party negotiation and agreement. The possibility of a derogation of rights once in the hands of an overriding majority presented a danger to minority interests. The technical committee, however, apart from the ANC’s draft Bill, also embraced the work of academics that produced \textit{The Charter for Social Justice}, a far more comprehensive draft Bill of Rights that went above and beyond a mere stop-gap measure between negotiation and election.\(^10\) Minority parties, including the National Party, were insistent that the final Bill of Rights may not differ greatly from the version that would precede democratic entrenchment.

In the competing forces between majoritarian governance and rights protection, a two stage approach was adopted. An Interim Constitution allowed for a power-sharing measure to be adopted in which there would be a government of national unity for five years.\(^11\) This was supported by parties on the agreement that a final Constitution must have \textit{democratic} authority and would thus be written by elected representatives after free and fair elections.\(^12\) Yet minority parties needed assurances that they would not be left unprotected and at the mercy of majority rule with no constitutional safeguards yet in existence. Without these

\(^7\) Currie and De Waal \textit{The new constitutional and administrative law} 59-63.
\(^9\) Davis D \textit{Democracy and deliberation: transformation and the South African legal order} (Juta & Co Ltd Cape Town 1999) 3; Davis “Deconstructing and reconstructing the argument for a bill of rights within the context of South African nationalism” 198.
\(^10\) Davis \textit{Democracy and deliberation} 3.
\(^11\) Chapter 4 Interim Constitution.
\(^12\) \textit{First Certification} at para 12; Dyzenhaus D “Democracy, rights and the law” 1991 \textit{South African Journal of Human Rights} 24-49 41.
safeguards in place, minority parties would have walked away from the negotiating table. Assurance was given in the form of an Interim Constitution and in the agreement that a super majority of 75 percent would be needed when adopting the final Constitution by the elected assembly. In addition, the final constitution adopted by the elected assembly would have to comply with the 34 Constitutional Principles drawn up by the negotiating parties, principles that would ensure rights protection in the face of majoritarian governance. Certification of this compliance would be performed by the newly formed Constitutional Court. The draft Constitution drawn up by the elected Constitutional Assembly was sent to the Constitutional Court with 80 percent of the assembly supporting the draft.

Pre-1994 South Africa operated under parliamentary sovereignty whereby the judiciary was only able to judge the procedural correctness of legislation and was deferential to power of the legislature. A move from a culture of authoritarianism to one of justification, representation, non-discrimination, non-oppressive; an open and democratic society based on dignity, equality and freedom would entail a greatly more activist judiciary.

The new South Africa has a system of constitutional supremacy and the court in this new South Africa is charged with a substantive obligation to uphold the Constitution. The court is charged with fostering value-based rights jurisprudence. Inherent in this term is the idea that the Constitution is the supreme law of the land and in terms of section 2 of the Constitution, any law or conduct inconsistent with it is invalid. The power to declare law or conduct invalid with the Constitution rests with the court in accordance with section 172 of the Constitution.

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13 First Certification at para 12.
16 Du Plessis L “The legitimacy of judicial review in South Africa’s new constitutional dispensation: insight from the Canadian experience” 2000 Comparative and International Law Journal of Southern Africa 227-247 227-228. See also Sachs v Minister of Justice 1934 AD 11, 37; Smith v Attorney-General, Bophuthatswana 1984 (1) SA 196 (BSC) and Harris and Others v Minister of Interior and Another 1952 (2) SA 428 (A); See also Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at para 37-40 (hereinafter referred to as Pharmaceutical Manufacturers); Cameron E “Submission on the role of the judiciary under apartheid” 1998 South African Law Journal 436-438.
18 Constitution of the Republic of South Africa, 1996 (hereinafter referred to as The Constitution). See section 165(2) of the Constitution, which reads: “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice” and Section 165(5): “an order or decision issued by the court binds all persons to whom and organs of state to which it applies”; see also Pharmaceutical Manufacturers at para 44.
This power is known as judicial review and is one of the cornerstones of constitutionalism. Constitutionalism is defined as placing limitations on power. Such limitations can be seen, however, as anti-democratic. The court’s role in upholding rights can be seen as anti-democratic. It is questioned why the judiciary, through the upholding of constitutional provisions, should be allowed to nullify democratic decisions. This is the counter-majoritarian dilemma.

At the same time, the will of the people must be upheld as the embodiment of the hard-fought democracy. Thus the court holds a remarkably unsettled mandate in South African jurisprudence as it is tasked with upholding rights without fear or favour and yet must respect the new democratic order. Emerging out of history and in reaction to history, there is a dual commitment on the part of the judiciary that underscores constitutional democracy. There is a commitment to both democracy and to rights. This role of the court that centres on rights protection however creates tension between majority rule and the power of the court.

Little has been written about the counter-majoritarian dilemma in the South Africa context. This research therefore offers particular relevance within the current discourse of South Africa that is increasingly echoing claims of counter-majoritarianism and the court’s role in such regard. Increasingly, democracy is being viewed as majoritarianism and decisions emerging from majority-rule processes seen as paramount and overriding. Emerging from this there is the probability that these attacks on the judiciary and these majoritarian critiques can potentially manifest as harm to minorities. President Jacob Zuma said on the floor of the National Assembly in 2012: “You have more rights because you are a majority. You have less rights because you are a minority. That is how democracy works.” Precisely because of

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20 Currie and De Waal The new constitutional and administrative law 20-21.
21 Du Plessis 2000 CILSA 228-229; see also Currie and De Waal The new constitutional and administrative law 30 and 35-37; Rostow E “The democratic character of judicial review” 1952 Harvard Law Review 193-224 193. Bickel A The least dangerous branch (Yale University Press, New Haven and London 1966) x-xi. See also Lochner v New York 198 U.S. 45 (1905) (hereinafter referred to as Lochner): “No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation and upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people’s representatives.”
Add to this, the ANC Secretary General, in an interview with the Sowetan, referring to the Constitutional Court as “mak[ing] nonsense of a democratically elected parliament.” Sowetan Live http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambshe-judges (date accessed – 22/06/2015). See also the political attacks on the judiciary in light of the High Court of Gauteng, Pretoria’s Al Bashir Ruling Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others (27740/2015) [2015]
such dominance met with majoritarian overtones, the court has an increased role to play in minority protections.

1.2 The Problem Statement

The idea of constitutional democracy is inherently contradictory. It holds on the one hand that the people shall be self-governing and that the government shall be a government of consent. On the other hand, this is juxtaposed with the idea of limited government, where the people’s will is manifested as majority rule, cannot be unconstrained. There must be body of laws, a constitution, that will govern the people and limit their authority and the authority of their chosen representatives. The role of the court and the process of judicial review through the interpretation and application of that body of laws is thereby seen to undercut the people as self-governing. Thus it is contradictory to have majority rule and yet have constraints that are imposed on the majority that stems from outside of the majority. There is inherent tension in

ZAGPPHC 402 (24 June 2015) (unreported judgment). Noteworthy is that the government ignored the high court ruling. See News 24 http://www.news24.com/SouthAfrica/News/Newschanger-Revolution-nostalgia-rule-Gwede-Mantashe-20150628 where Mantashe accuses the courts of overreaching, claiming that the judiciary cannot dictate rules to parliament and such orders from the judiciary will be disregarded. Mantashe goes on to equate judicial review to a coup. See also Mail and Guardian http://mg.co.za/article/2015-07-08-chief-justice-hammers-gratuitous-criticism (date accessed 09/07/2015); http://www.news24.com/SouthAfrica/News/ANC-tells-judges-to-back-off-20150621 (date accessed - 09/07/2015); “sections of the judiciary tend to somehow overreach into areas that one would expect even in a constitutional state to tread very, very carefully... if we don’t debate this, we run the risk of Parliament matters and executive matters being run by the courts.” Mantashe continued his anti-judicial dialogue after two high court decisions did not hold in favour of the ANC. “There is a drive in sections of the judiciary to create chaos for governance; that’s our view,” he said. “We know if it doesn’t happen in the Western Cape High Court, it will happen in the Northern Gauteng – those are the two benches where you always see that the narrative is totally negative and create a contradiction.” http://www.news24.com/SouthAfrica/News/Gwede-Mantashe-singles-out-problematic-courts-20150622 (date accessed - 23/06/2015). This debate is found not just in the South African context but in current American legal/political debate. During the Second Republican Debate on 16 September 2015, candidate for President, Senator Ted Cruz said: “We have an out-of-control Court, and I give you my word, if I’m elected president, every single Supreme Court justice will faithfully follow the law and will not act like philosopher kings imposing their liberal policies on millions of American.” http://www.washingtonpost.com/news/thefix/wp/2015/09/16/annotated-transcript-september-16-gop-debate/ (date accessed 30-09-2015). See also Kohn L “The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?” 2013 South African Law Journal 810-836 812; Ngcobo S “Sustaining public confidence in the judiciary: an essential condition for realising the judicial role” 2011 South African Law Journal 5-17 5-6.

Steele Commager H Majority rule and minority rights (Peter Smith Gloucester Massachusetts 1958) 7-8.
these two concepts. The tension between democracy (as majority rule) and constitutionalism is further strained when placed in the South African context.

South Africa emerged from a history where the will of the majority was denied at the hands of a minority. Thus a narrative forms whereby democracy (in its narrow conception of winner-takes-all) and majority rule are to be paramount in reaction to such a past. Anything curtailing the power of majority will and democratically elected representatives will be reminiscent of that past. As an example of the interplay between majoritarianism and rights jurisprudence, Sachs notes that the adoption process of a Bill of Rights in South Africa was inside out, in that it was regarded with suspicion by the majority, rather than being seen as an instrument of freedom and advancement.\(^{25}\)

Any response to the counter-majoritarian dilemma must therefore be made in light of the unique context in which the Constitutional Court of South Africa operates. It is against this background that Roux argues the court has to balance legal legitimacy, public support and institutional security.\(^{26}\) Within constitutional democracy there is a complex inter-relationship between minority rights, populism and the court’s legitimacy that must be understood and navigated by the court.\(^{27}\)

The court’s awareness of the need to balance pragmatism and principle in order to operate and survive in a new democracy means that the nature of the counter-majoritarian dilemma takes on a slightly different tone in the South African context. It becomes about protecting minority rights in the face of public opinion, majority decisions or popular morality.

The separation of powers doctrine is designed to control the tension. The legislature, as a representative democratic body, is to make the law, and the judiciary is to interpret and apply the law. The judiciary in applying the rule of law must be seen to be consistent, predictable, insulated and independent.\(^{28}\) The paradox here is that the court must have an independent function (read non-democratic function) apart from other institutions in order to justify its role


\(^{27}\) S v Makwanyane 1995 (3) SA 391 (CC) at para 184 (hereinafter referred to as S v Makwanyane). “In a democracy, the law cannot afford to ignore the moral consensus of the community…if the law is out of touch with the moral consensus; whether by being too far below it or too far above it, the law is bought into contempt.” See also Paine T Rights of man in Common sense and the rights of man (Sterling New York 2011) (original work published 1791) 393. Du Plessis L “The South African constitution as memory and promise” 2000 Stellenbosch Law Review 385-394 390.

in a democracy.\textsuperscript{29} The court will lean toward judicial independence as much as possible as this is the source of its institutional legitimacy within a democratic society. This independence would prevent the court from inserting itself in the democratic working of government and on the other side of the coin; it would prevent political pressure or the political environment from being injected into adjudicative matters, challenging the impartiality and functioning of the court.\textsuperscript{30}

An important feature of the separation of powers doctrine is, however, the concept of checks and balances.\textsuperscript{31} Reading checks and balances into the separation of powers doctrine anticipates that there cannot be independent, insulated silos but there must be interaction and conversation between the three spheres. The overarching scheme of constitutionalism in a Supreme Constitution would therefore allow for judicial intrusion into the majoritarian sphere.\textsuperscript{32} The \textit{First Certification} case noted that there is no “universal model of separation of powers” \textsuperscript{33} and denied a strict reading of such.

The understanding of the separation of powers doctrine must be coloured by the unique contextual and historical factors\textsuperscript{34} to form a “distinctively South African model.”\textsuperscript{35} Such contextual reading would include a transformative mandate on the part of the court and yet leave space for the political to achieve its democratic vision of transformation. The view of upholding the fundamental values undertaken by South Africa would envision a greater role for the court and such an extensive role must be considered in the design of the separation of powers model and the counter-majoritarian claims that would emerge from such a role.

The purpose of the Constitution is, amongst others, to protect the minority; to protect difference from power and uphold the fundamental rights, to offer protection and prevent abuse.\textsuperscript{36} Minority rights, due to their very nature, need to be protected and upheld by the court. Ackerman noted in the case of \textit{National Coalition for Gay and Lesbian Equality} that

\textsuperscript{29} Bickel \textit{The least dangerous branch} 24; \textit{West Virginia State Board of Education v Barnette} 319 U.S 654 Justice Frankfurter dissenting: “If the function of this court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure, and they should be made directly responsible to the electorate.”

\textsuperscript{30} \textit{SA Association of Personal Injury Lawyers v Heath and Others} 2001 (1) SA 883 (CC) para 26 (hereinafter referred to as \textit{Heath}).

\textsuperscript{31} Constitutional Principle VI in Schedule 4 of Interim Constitution.

\textsuperscript{32} \textit{First Certification} at para 109.

\textsuperscript{33} \textit{First Certification} at para 108.

\textsuperscript{34} \textit{First Certification} at para 109.

\textsuperscript{35} \textit{Heath} referencing \textit{De Lange v Smuts} 1998 (7) BCLR 779 (CC) at para 24.

Their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves. They are accordingly almost exclusively reliant on the Bill of Rights for their protection.\(^{37}\)

The court is therefore a necessary counter-weight to the “tyranny of the majority”\(^{38}\) and judicial intervention into the democratic workings may be necessary to uphold the fundamental commitments undertaken in a Supreme Constitution\(^{39}\) that transcends all spheres of government and private relations\(^{40}\). This idea emerges not only from a constitutional theory standpoint but is supported by the history of South Africa’s transition to democracy, in particular the adoption of the Constitution and establishment of the Constitutional Court to assuage minority fears. From its very establishment, the Constitutional Court can be seen as intricately connected to minority rights protection.

The inter-relationship between the court’s legitimacy and the protection of minority rights therefore forms the crux of the counter-majoritarian dilemma in South Africa.

Chaskalson held in his judgment in \(S \text{ v Makwanyane}\) that “public opinion may have some relevance to the inquiry” yet the court should not be swayed by public opinion, “its duty is to interpret the constitution and uphold its provisions without fear or favour.”\(^{41}\) Part of the duty of an independent judiciary is to be objective in its interpretation of the constitutional provisions.\(^{42}\) The court, in referencing the case of \(Furman \text{ v Georgia}\) held that public opinion lies at the “periphery.”\(^{43}\) Perhaps the most compelling articulation concerning the place for minorities within a constitutional democracy is the following reference to \(West \text{ Virginia State Board of Education v Barnette}\) made by the Constitutional Court:

\[
\text{The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and...}
\]

\(^{37}\) National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) at para 25 (hereinafter referred to as National Coalition); Sunstein C “Naked preferences and the constitution” 1984 Columbia Law Review 1689-1732 1711; Cameron E “Sexual orientation and the constitution: a test case for human rights” 1993 South African Law Journal 450-472 quoting Justice Rand, Canadian Supreme Court 1951 at 471: “The courts in the ascertainment of truth and the application of laws are the special guardians of the freedom of unpopular causes, of minority groups and interests, of the individual against the mass, of the weak against the powerful, of the unique, of the non-conformist…”; Du Plessis 2000 Stell L Rev 390. \(S \text{ v Lawrence; S v Negal; S v Solberg}\) 1997 (4) SA 1176 (CC) at para 160 (hereinafter referred to as \(S \text{ v Lawrence}\)).

\(^{38}\) Steele Commager Majority rule and minority rights 8.

\(^{39}\) The Constitution section 2.

\(^{40}\) The Constitution section 8(2).

\(^{41}\) \(S \text{ v Makwanyane}\) at para 88. See also \(S \text{ v Mamabolo}\) 2001 (3) SA 409 (CC) at para 16 (hereinafter referred to as \(S \text{ v Mamabolo}\)).

\(^{42}\) Mohamed 1998 SALJ 663.

\(^{43}\) \(S \text{ v Makwanyane}\) at para 89; Furman v. Georgia, 408 U.S. 238, 290 (1972); Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Another 1994 (4) SA 592 (SE) 594 D (hereinafter referred to as Matiso); “[t]he function of judicial review, based on the supremacy of the Constitution, should not be hidden under the guise of simply seeking and giving expression to the will of the majority in Parliament. Judicial review has had a different function…”.
officials and to establish them as legal principles to be applied by the courts...fundamental rights may not be submitted to vote; they depend on the outcome of no elections. 44

Despite the assertions that the court should not be swayed by public opinion, the importance of public opinion as being necessary for judicial legitimacy cannot be ignored, especially in South Africa's constitutional infancy. As Madison noted, the public belief in the legitimacy of the court is the only arsenal available to the court. It is this need for legitimacy that provides the checks and balance for the judiciary, offers a constraining force and the answer to the question “who guards the guardians”?

The presumption that, in stepping outside of the judicial sphere and the rigidity of the plain text, law would be seen as anti-democratic is met with an additional and yet contrary obligation. When the court upholds minority rights in a way that runs counter to public opinion, or institutional policy, the danger is that the court will be seen as anti-democratic, which in turn places the legitimacy of the court in danger. If the legitimacy of the court is then questioned, protection of minority rights is indirectly jeopardized. The defence of minority rights must therefore engender a defence of judicial legitimacy.

From this outline, legitimacy and institutional security must be achieved through a dichotomous focus on both independence and reputation on the part of the court. Reputation contains within it further contradictory commitments. First is the acknowledgment that judicial

44 West Virginia State Board of Education v Barnette 319 U.S. 624, 638 (1943) referenced in S v Makwanyane at para 89. See http://m.news24.com/news24/SouthAfrica/Politics/DA-debate-Merit-vs-Popularity-20150506 where DA parliamentary leader Maimane during a televised debate for the leadership of opposition party Democratic Alliance said in regard to the death penalty: “[democracy] is for the people, by the people and if the people want to vote on it, they must vote on it.”

26 Carpenter G “Public opinion, the judiciary and legitimacy” 1996 South African Public Law 110-122 113: “courts should not be swayed by public opinion, which is not only fickle and changeable but may even be irrational.”

46 The Federalist No 78 (A Hamilton) http://avalon.law.yale.edu/18th_century/fed78.asp (date accessed 01/08/2015); Mohamed 1998 SALJ 661; Ngcobo 2011 SALJ 5-17.

47 Zylberberg P “The problem of majoritarianism in constitutional law: a symbolic perspective” 1992 McGill Law Journal 27-82 41; Motala 2006 Temp Pol & Civ Rts L Rev 148: “If the political system is unable to surmount the legitimacy crisis, the system is likely to face a crisis and ultimately rupture.” Madison Federalist 51 referred to in Ely H Democracy and distrust: a theory of judicial review (Harvard University Press Cambridge 1980) 80. Part of Madison’s Federalist papers states that there is a “precarious security” when the court “espouse[s] the unjust views of the major, as the rightful interests of the minor party”; Hirschl Towards juristocracy: the origins and consequences of new constitutionalism (Harvard University Press Cambridge 2004) 153; Friedman B “The birth of an academic obsession: the history of the counter-majoritarian dilemma part 5” 2002 Yale Law Journal 153-259 161 says of the American constitutional context: “mid-century liberals lived with the anxiety that the public itself ultimately would turn on the Court and endanger a set of results these academics approved. The promise of a Court protective of liberty was dear to them, but they were sure such an institution inevitably would run afoul of popular opinion, and were sceptical that such an institution could exist or survive public disapproval.”

48 Mohamed 1998 SALJ 666.
reputation is achieved through independence in decision making; decisions that reflect the laws of the nation and not the courts own personal preferences. Sustaining the public confidence that the court is independent in this regard is crucial. Yet when the counter-majoritarian dilemma is read into questions of legitimacy, would reputation, in addition, have to be understood as incorporating social congruence and popular acceptance within judgement when controversy arises? Moreover, when there is an unpopular decision, it stands to reason that not the substantive content of the judgment but the independence and character of the judiciary will be attacked. This creates a strategic mandate on the part of the court to both engage and retreat, to somehow find the balance between timidity and activism, deference and protection.49

The counter-majoritarian dilemma is often stated as a zero-sum argument. It assumes that the court, in overturning a decision by democratically elected representatives, does so in isolation and without consideration of the will of the people and the social context in which the court operates.50 It is seen as an either/or relationship where, in order for minority rights to be upheld, populism must be denied. In this version of the counter-majoritarian dilemma democracy and constitutional supremacy are seen as diametrically opposite. Arising from that tension, a necessary incompatibility between minority rights and majority rule is constructed. Thus there is a need to integrate the protection of rights within a democratic accord without resorting to a timidity of judicial function and an abdication of minority rights in the achievement of such a goal.

1.3 Methodology and philosophical approach

Little has been written about the counter-majoritarian dilemma in South African jurisprudence. As such this research leans heavily on the literature of American constitutional theorists and academic scholarship. The teachings from these American based theories are then examined in light of the South African context and the application is critically extended to South African jurisprudence.

49 Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 794 (CC) at para 56 (hereinafter referred to as Prince).
50 See Kroeze IJ “Legal research methodology and the dream of interdisciplinarity” 2013 Potchefstroom Electronic Law Journal 35-65 53: “Because law is a social artefact, the consideration of legal issues and problems will always and necessarily require looking at socio-political and economic factors, for example. This is a conscious and unconscious mirroring of what courts do. A judicial decision that looks at legal rules and legal rules only is basically impossible.”
Writings and commentaries from South African constitutional scholars in journal articles and books are used to assess the constitutional climate and provide critical analysis into the underlying workings of the Constitutional Court that would underscore any judgment. Primary sources of Constitutional Court case law and in particular minority rights judgments are examined. The Constitution and the Interim Constitution, as well as technical committee reports and draft reports as secondary supporting documents are drawn upon.

The research will primarily be driven by a rationalist approach whereby evidence to support the central thesis will emerge through a logical consistency of argument. Various philosophical schools of thought will be utilized in the examination of the counter-majoritarian dilemma.

1.4 Assumptions and limitations

Reference to minority in this research is all encompassing – race, gender, sex, ethnic or social origin, sexual orientation, religion, conscience, belief, culture and language.

This research begins from the assumption that there is a belief that the court operates with disregard of the people's will and the will of elected officials and is thereby in opposition to democracy.

It is furthermore assumed that the counter-majoritarian dilemma is becoming more acute in the South African context.

It is assumed that minority rights are clearly delineated in the Constitution. As such, the research will begin from the assumption that minority rights enjoy remarkably progressive constitutional protection within the South African context yet are also vulnerable when confronted with majoritarian politics.

The examination of the counter-majoritarian dilemma in this research will be focused on a philosophical approach whereby the dilemma is examined in terms of judicial strategy and

51 S v Makwanyane; National Coalition; Prince; Daniels v Campbell NO and Others 2004 (5) SA 331(CC); Hoffman v South African Airways 2001 (1) SA 1 (CC) (hereinafter referred to as Hoffman); Minister of Home Affairs v Fourie (Doctors for Life International and Others Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs 2006 (1) SA 524 (CC) (hereinafter referred to as Minister of Home Affairs v Fourie).

52 Prinsloo v Van der Linde 1997 (3) SALR 1012 (CC) at para 31: “Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender.”
interpretative analysis. The arguments of appointment, tenure, accountability and representative demographics of the judiciary are, for the purpose of this research, beyond the scope. This is not to ignore however that a broader examination of the counter-majoritarian dilemma would however have to include these points toward full landscape of argument.

1.5 Hypothesis

The jurisprudential context of South Africa renders claims of counter-majoritarianism contestable. The court in its protection of minority rights is not being overly interventionist but is rather operating in a manner that is consistent with democratic theory.

1.6 Framework

The counter-majoritarian dilemma is examined from three standpoints: the counter-majoritarian dilemma within the Constitution, within judicial review and finally within judicial subjectivity.

Chapter 2 outlines the contentions made by the counter-majoritarian dilemma together with a brief examination of the dilemma within the broader scheme of a young constitutional democracy such as South Africa. The preliminary argument against the counter-majoritarian dilemma is that the court is applying the Constitution mandated by the Constitution itself. This leads to an examination of how the court engages with the constitutional text. The constitutional commitment to value judgements in addition to the argument outlined in this chapter regarding the shortfall in engaging in formalist interpretative strategies results, however, in interpretative indeterminacy. The contention raised by the counter-majoritarian dilemma is that as a result of this indeterminacy, the court engages in adjudication that is not based on the Constitution but adjudicates through a subjective interpretation of abstract constitutional provisions. The contention is that democratic will is being overridden by unbounded judicial preference. The result of interpretative indeterminacy can therefore only be a resort to majoritarianism.

As the core of the counter-majoritarian dilemma is the view that judicial review is anti-democratic or a deviant democratic institution, the concept of democracy is critically examined. Chapter 3 offers a recasting of democracy. Beginning with a rejection of majoritarianism as democracy, the research argues that beyond a traditional conception of democracy as free and fair elections and winner-takes-all, democracy understood as self-rule and a justification of power means that in the current South African climate, the court is the
most suited to upholding democracy. Democracy is thereby defended as popular-sovereignty reinforcing in addition to democracy being viewed as difference, deliberation and equality. A recasting such as this renders the court’s protection of minority rights consistent with democracy.

Through a contextual South Africa jurisprudential approach, this research considers the ways in which an anti-democratic contention can be dispelled through deeper insight into the workings, guidelines and self-consciousness of the judicial institution.

Starting from a broader constitutional standpoint within the counter-majoritarian dilemma, stage one of the argument is that the court is not applying its own will but the will of the people through the interpretation and application of the Constitution (interpretative contestation notwithstanding for the time being). Chapter 4 views democracy within the broader scheme of constitutionalism and the Constitution. Through the analysis of the South African Constitution’s negotiation, adoption and certification, this chapter offers the argument that democratic will exists within the constitutional scheme and the court is a crucial institution towards fostering democracy within South Africa. The people’s consent is expressed in the Constitution. This chapter will make the contention that understanding the nature of the constitutional enterprise means that to fully effectuate that consent and to read the Constitution in light of the here and now, there must be reliance on an open judicial mandate.

Chapter 5 examines democratic theory within judicial review. Moreover, evidence of democratic theory within judicial review would challenge the notion of judicial preference within judicial review. This chapter espouses certain guidelines that the court follows that constrain and channel judicial review. Embracing the work of the Critical Legal Scholars, the contention is that in reaction to the history of the nation, bright *leitmotivs* have emerged that guide constitutional adjudication. While these *leitmotivs* may invoke some democratic impetus, the chapter acknowledges the idea of advanced consent, whereby the transformative mandate of the Constitution may lead to disconnect between public opinion and judicial decisions, albeit a decision that is consistent with the *leitmotivs*. This leads to the understanding of a need for a distinction between political consensus and a moral consensus when discussing the counter-majoritarian dilemma. Emerging from this, the argument is extended to reveal that if minority rights can be guided by the concept of dignity; there can be connection, a tying of the fates, between majoritarian belief and minority rights. Dignity is the nexus. Embracing the work of the deconstructionists, the chapter details how the judicial role can be used in the interpretation and extrapolation of these *leitmotivs* towards a resolution
that both admits of democratic origin and carves out a space for minority protection with majoritarianism.

Chapter 6 argues that judicial preference is not imputed into judgment as a result of indeterminacy but rather that judicial preference is steered toward a democratic accord, indeterminacy notwithstanding. The considerations of South Africa as a young democracy and the need to avoid charges of judicial subjectivity create, it is argued, a self-conscious court who has displayed an unwillingness to stray beyond the textual bounds of the Constitution. Deriving from such deference, the chapter assesses whether this faith in formalism can adequately reflect a democratic commitment and whether such a judicial strategy is appropriate to mask judicial preference. It further examines whether this faith in formalism as a means to circumvent the counter-majoritarian dilemma results in an abdication of judicial role within a constitutional democracy. While arguments have been made up to this point of the external guidelines that the court must factor into its judgment as means of constraint and direction, such a rational is predicated on a certain type of judicial officer who is willing to make an external appraisal, to acknowledge and accept such constraints. This leads, therefore, to a discussion of the deconstructionist views regarding internal preferences and how interpretative meaning is formed. This includes how interpretative meaning is constrained by performative value and the professional ego. It acknowledges subjectivity but argues that that subjectivity is already formed through a pre-existing normative framework in which case the judge cannot be seen to be operating outside of a democratic reality. As a result, this research contends that judicial subjectivity is the best indicator as to what we as a democratic society, in line with our commitments, feel is just.

The composite of these chapters endeavours toward the argument that judicial subjectivity does not necessarily translate into nihilism. In the alternative, however, the research will also contend that the understanding of nihilism and the awareness of nihilism within adjudication prevents, to a greater extent, judicial preference. In addition, nihilism can be seen to engender a rejection of majoritarianism and indeed create the space for minority voices to be heard. The chapter evokes various judicial strategies to avoid nihilism and mechanisms to retain judicial legitimacy within counter-majoritarian contentions of interpretative indeterminacy and nihilism.

Finally this research ends with an analysis of four minority rights judgments in Chapter 7. This chapter will point to evidence of constraining judicial guidelines and evidence of the democratic accord within the South African Constitutional Court that argue a rejection of the counter-majoritarian dilemma.
CHAPTER 2

THE COUNTER – MAJORITARIAN DILEMMA

2.1 Introduction

The counter-majoritarian dilemma is an American idea that originated in Alexander Bickel’s seminal work, *The Least Dangerous Branch*. First published in 1962, this book has had a profound effect on American constitutional scholarship. It sets out the conflict between an unelected judiciary and democratic principles as a “deviation” in American democratic ideas.

The counter-majoritarian dilemma underscores the tension between democracy and constitutionalism. The concern that this dilemma poses in a South African context is that this tension is viewed as zero-sum, each seemingly incompatible with the principles espoused by the other. As constitutional democracy is viewed through such a bifurcated lens, there is a danger in pushing too hard in enforcing the constitutional mandate onto a polity that exists in a new and thus potentially unstable democracy. The chances of meeting institution-ending resistance are far greater than one would have in a mature democracy.

There are two lines of argument deployed by the counter-majoritarian dilemma. The first argues that the people’s will is not represented in the text of the Constitution and that, as the Constitution ages, the democratic deficit between the people and this outdated text will increase. The second line of argument emerges from the first, arguing that as this time increases, so does the judicial role and the judicial freedom in interpretation. The central core of the counter-majoritarian dilemma is, therefore, the issue of judicial subjectivity.

Outside of a question of academic scholarship for constitutional theorists, the counter-majoritarian dilemma is used in response to specific decisions made by the court that some would not agree with. Thus the counter-majoritarian dilemma relates not just to the theoretical institution of judicial review itself but specific case results that emerge therefrom. This would presumptively be decisions that the majority (whether political or normatively

53 Bickel *The least dangerous branch*.
54 See also Friedman 2002 *Yale L J* 153-259.
56 Michelman F “Forward: traces of self-government” 1986 *Harvard Law Review* 4-77 16; Bickel *The least dangerous branch* 16-17: “When the Supreme Court declares unconstitutional a legislative act, it thwarts the will of the people of the here and now.”
57 Friedman 2002 *Yale L J* 165; Mohamed 1998 *SALJ* 663.
statistical) oppose. Indeed this is implicit in the very name chosen by Bickel. There is therefore, a joinder of minority rights within a conceptual critique of the counter-majoritarian dilemma. Interpretative indeterminacy has created the response that such judicial power in interpretation must therefore be ceded back to the legislature which has a greater democratic mandate to work with such indeterminacy. This however, abandons the problem to majority rule process and raises the question how there can be protection of minorities within such an advocacy?

The necessary examination of the counter-majoritarian dilemma, toward a full landscape of argument, can be broken down into three concentric issues. The dilemma can first be viewed from a broad perspective of the role of constitutionalism and the written Constitution’s commitments. Following this examination, there can be a narrowing of focus to view the dilemma in light of judicial review and finally viewed through an examination of judicial subjectivity.

2.2 The counter-majoritarian issue with interpretation

A formalist interpretative approach, rooted in the text of the constitution can lead to certainty and apparent objectivity. The judiciary’s application of concrete rules can ideally be seen as a way to avoid judicial activism as a formalist approach can be seen as neutral and a-political. The landmark American case of *Marbury v Madison* that would uphold judicial review as legitimate operated on the assumption of a written constitution providing answers in a mechanical fashion, made abundantly clear in the text. Textual clarity underlies the entirety of the judgment. This interpretative strategy has come to be criticised and if the reasoning of *Marbury v Madison*, long used in defence of judicial review, falls away, the legitimation of judicial review must fall with it.

Considering South Africa’s history, it must be acknowledged that when a formalist approach to law on the part of the judiciary helped to entrench the apartheid atrocities, the court, in

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58 See Kroeze IJ “Power play: a playful theory of interpretation” 2007 *Tydskrif vir die Suid-Afrikaanse Reg* 19-34.
59 Kroeze 2007 *TSAR* 20.
60 *Marbury v Madison* 5 U.S. 137 (1803).
61 Bickel *The least dangerous branch* 73-74. *Minister of Health and Others v Treatment Action Campaign and Others* (no 2) 2002 (5) SA 721 (CC) at para 99 (hereinafter referred to as *Treatment Action Campaign*). “In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.”
reaction, has moved towards a value-driven culture of justification.\textsuperscript{62} Section 39 of the Constitution mandates this interpretative strategy, noting the "values of an open and democratic society" and section 39(2) holds that the court must "promote the spirit, purport and objects of the Bill of Rights."\textsuperscript{63} This is the value-based strategy that emerges from the Supreme Constitution. The notion of upholding the spirit of the constitutional enterprise thereby creates an obligation on the part of the judiciary that transcends the mechanical application of the constitutional provisions. It demands a holistic and teleological interpretation rather than a strictly literal interpretation.\textsuperscript{64}

This results, paradoxically, in a text-based directive to engage in non-formalist reasoning. However, the Constitution cannot be engaged through a value driven directive without viewing the Constitution substantively. The Constitutional Court has raised the values in the Constitution to an objective status.\textsuperscript{65} The space for value judgments has been opened and yet this move towards a substantive approach to adjudicative reasoning may seem to open the door for judicial subjectivity. Fagan argues that turning away from rule-based decision making results in judgments that are guided by moral reasons.\textsuperscript{66} Arguments have been made that it opens the door for the unbounded free-play of the judicial mind.\textsuperscript{67}

\textsuperscript{62} Du Plessis 2000 \textit{CILSA} 228; Kentridge J and Spitz D "Interpretation" in Chaskalson M \textit{et al} (eds) \textit{Constitutional law of South Africa} (Juta Cape Town 1996) 72; Cockrell A "Rainbow jurisprudence" 1996 \textit{South African Journal of Human Rights} 1-38; S v Makwanyane at para 302. See also South African Law Commission \textit{Working Document 25 Project 58: Group and human rights} (1989); Dyzenhaus 1991 \textit{SAJHR} 42. For a contrary view, see Kroeze IJ "Re-evaluating legal positivism – or positivism and fundamental rights: a comedy of errors" 1993 \textit{South African Public Law} 230-236, where Kroeze argues that such a view of positivism stems from a misunderstanding of what positivism actually means. She denies the narrow and predominant view of positivism as the command theory or the intention theory. Embracing the work of leading positivist writers, Kroeze understands positivism to engender judicial oversight, and legislative limitations that suggests a transcendent nature of law, a law that stems from morality. In addition, such writers support the idea of fundamental rights within positivsit law. Therefore, the self-conscious constraint on the part of the South African jurist to not make the law and merely to apply the law is not congruent with a broader and more complete definition of positivism. Such a constraint would thereby seem to stem from a judicial strategy deriving from extra-legal workings based on an understanding of a perhaps submissive judicial role. Positivism would thereby not be as constraining as the original understanding. Such an understanding must be imputed into the broader argument around the 'shortcomings' of positivism in the counter-majoritarian argument and the area of judicial purview in working with formalist law. Emphasis added. See also \textit{K v Minister of Safety and Security} 2005 (6) \textit{SA} 419 (CC) at para 17.

\textsuperscript{63} Emphasis added. See also \textit{K v Minister of Safety and Security} 2005 (6) \textit{SA} 419 (CC) at para 17.

\textsuperscript{64} Kentridge and Spitz \textit{Interpretation?}; \textit{Baloro and others v University of Bophuthatswana and Other} 1995 (4) \textit{SA} 197 (B) 227 E-G (hereinafter referred to as \textit{Baloro v University}).

\textsuperscript{65} On the objectivist stance of the court regarding values, see Kroeze IJ "Doing things with values: the role of constitutional values in constitutional interpretation" 2001 \textit{Stellenbosch Law Review} 265-276.

\textsuperscript{66} Fagan E "In defence of the obvious: ordinary meaning and the identification of constitutional rules" 1995 \textit{South African Journal of Human Rights} 545-570 559; Fagan E "The ordinary meaning of language – a response to Professor Davis" 1997 \textit{South African Journal of Human Rights} 174-178 177: "It is not clear to me that we can preclude a court from one day using the interpretative lassitude to which Professor Davis subscribes in order to ignore ordinary
A deeper focus on the counter-majoritarianism dilemma reveals that the concern is not about subjecting the will of the people to the Constitution but subjecting the will of the people to a *subjective interpretation* of the Constitution. The rise of the interpretative turn and post-modern hermeneutics results in a plain text, objective reading of the Constitution being questioned. In this regard, the contention is that the judge is not applying the law, but creating the law. The subjectivity inherent in textualism leads to the presumption that there is an infusion of a judge’s personal preferences into adjudication.

That the majority operates under a Supreme Constitution raises the point that what is enacted in the legislative sphere is presumptively believed in their mind to be constitutional. So when the issue reaches the point of judicial override, what is being suggested is not that the court is upholding the Constitution in light of unconstitutional activity but upholding the court’s version of constitutional interpretation over the majority’s version of constitutional interpretation. Such a contention is further strained when it is suggested that the court’s version of interpretation stems from a preference coloured reading of the Constitution. It could be argued that the court is able to make such an attestation due to its role in minority rights protection that would not be adequately represented in the majoritarian view of what is constitutional. This does emphases however, the manipulability of the Constitution as well as the connection between minority rights and the court within discussion of the counter-majoritarian dilemma.

If the court were to deny its obligation to value-judgment and turn to a positivist understanding of the Constitution, it would not resolve the issue. Engaging in formal interpretative strategies does not preclude the issue of judicial subjectivity. The assertion that meaning of the
constitutional provisions can be derived from a plain text reading, standing autonomously, must be contested. Increasingly, the rise of the interpretative turn has "unsettle[d] the belief that deference to linguistic form guarantees objective interpretation, uninfluenced by the interpreter's inarticulate premises."\(^71\) Friedman argues that judges have come to be seen as self-determined actors, rather than instruments to apply constitutional logic.\(^72\) In this regard, Davis has doubts about the idea of semantic autonomy.\(^73\) The concern that emerges out of such an understanding is the undermining of the connection between the rule of law and the certainty of such law.\(^74\)

The values that underpin the South African Constitution are clear, yet the content and understanding of values is read into the text by each person who engages with the text. A judicial officer could counter such claims of subjectivity through an acute awareness of his characteristics, position and through an ability to subject himself to critical examination. Davis argues, however, that even in the conscious divorcing of these identity-forming factors, there are composites of influences throughout one's life that shape one's outlook without even one being aware that one's thoughts, positions and convictions are so shaped and conditioned. This is what is meant by inarticulate premises.\(^75\) It raises the question as to whether critical examination will be enough to counter claims of judicial subjectivity and preference within the law.

Emerging from this interpretative contest is the notion that all viewpoints, all interpretations of the scope of the values demarcated in the Constitution are equally worthy. This is the realm of nihilism.\(^76\) Foundational values that are to guide constitutional interpretation as higher laws are amongst themselves in conflict and as Singer notes, in the absence of a meta-theory, resolution comes down to choice.\(^77\) Any choice made in this regard as to what the content of a value should be is then a choice that excludes other equally valid interpretations. The attempt at certainty becomes a tool of exclusion and one that is inconsistent with equality.\(^78\)

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\(^{71}\) Kentridge and Spitz *Interpretation* 33; Klare K "Legal culture and transformative constitutionalism" 1998 *South African Journal of Human Rights* 146-188 162.

\(^{72}\) Friedman 2002 *Yale L J* 223,171-172.

\(^{73}\) Davis *Democracy and deliberation* 27 and at 166-167; Hutchinson 1985 *NYU LR* 886 and at 864; "...the positivistic view in which the text is a self-contained, organic whole whose meaning and unity can be identified and grasped without reference to history or biography".

\(^{74}\) Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) at para 108; Kruger v President of the Republic of South Africa 2009 (1) SA 417 (CC) at para 64.

\(^{75}\) Davis *Democracy and deliberation* 168.

\(^{76}\) Kroeze IJ "When worlds collide: an essay on morality" 2007 *South African Public Law*323-335 330-332.


\(^{78}\) Froneman “The impossibility of constitutional democracy” 102 quoting Michelman: "entire and perfect conformity of all the basic-law interpretations to be considered convictions held by each
This post-structuralist engagement with the Constitution enhances the claims posed by the counter-majoritarian dilemma. Text-based adjudicative reasoning is just as indeterminate and subjectively formed as a value-based interpretation. Alive to these difficulties is the idea that court cannot interpret a written document as it stands without engaging in interpretation coloured by personal preferences or moralities. There is then a supposed connection between the judge and the text. The evidence of this claim of judicial preference is further revealed in the counter-majoritarian dilemma’s calls for a representative judiciary. A desire for a representative judiciary presupposes the subjectivity of the law. Singer summarizes the central issue of the dilemma and one of the key questions that this research seeks to address when he asks: "Is the realm of judicial action, then, inevitably governed by whim and caprice?"
CHAPTER 3

DEFINING DEMOCRACY

3.1 Introduction

An in-depth analysis of the concept of democracy is aimed at finding evidence of a re-imagining of democracy beyond the traditional line of thought. The purpose is to determine if such a re-imagining can support the idea of democracy that is not diametrically opposed to judicial review and the judicial protection of minority rights. 81

The concept of democracy is a deeply contested and indeterminate one. Democracy traditionally has not been viewed beyond majority rule stemming from free and fair elections. The faith in majority rule processes stems from the reaction to South Africa's past – whereby the problem was understood to be not a lack of constitutional principles and rights protection but a lack of democracy in terms of not letting the people be heard. 82 Such a narrative further suggests that fundamental rights were a conduit to majority rule through elections and nothing beyond that point. This diverging understanding between democracy and rights would mean a defence of rights protection through judicial review would be viewed as opposing democracy. The endeavour is toward the merging of these concepts increasingly viewed as dichotomous. Toward this goal, what follows is a rejection of democracy as unrestrained majoritarianism.

This chapter provides an exposition of what it means to define democracy as “by the people”, a definition that encompasses concepts of equality, listening to a multitude of voices, tolerance of difference, deliberation, openness, transparency and accountability. These concepts underscore true democratic functioning and far from being anti-democratic, this chapter will argue that within the current South African context, judicial review is the mechanism that is the most suited, and most capable of allowing the people’s voice to be decisive.

81 Hutchinson A and Monahan P “Law Politics and the Critical Legal Scholars” 1984 Stanford Law Review 199 -245 230: “In so far as liberalism is the enemy of true democracy, there will have to be a revolution in democratic consciousness.”
82 Kentridge and Spitz Interpretation 6: “the century’s long denial of the humanity and dignity of the majority of South African under white minority rule – not the absence of a supreme constitution – that must be blamed.”
3.2 Rejecting Majoritarianism

Ely holds that, for moral relativists, due to the interpretative indeterminacy and deadlock, there is a need to have faith in majoritarian democracy. But this leap from moral nihilism to majority-rule as a solution is not without problems. The 1821 American case of *Cohens v Virginia* upheld that people’s will must be regarded as the “whole body of the people.” For a section of that people (however dominant or majoritarian) to make decisions, particularly decisions that will have constitutional impact, can thereby be seen as a “usurpation” of the power or will of those whose will is represented in the Constitution. Thus democracy, or the people’s will, must be seen as all-encompassing and not exclusive and discriminatory based on the outcome of a major rule process.

A minority group cannot be denied the political freedom of self-government assured by the Constitution based on the self-government of the majority. From this standpoint, minority self-government cannot be denied without in some way undermining the claim to one’s own self-government. Accepting the idea of justice as fairness, the principle that one cannot be the judge of one’s own case must be acknowledged with regard to majority rule. It is contrary to fairness for the majority to be able to prescribe the limits on its own power. In this regard majoritarian democracy is inconsistent with justice.

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83 Ely H *Democracy and distrust* 7; Zylberberg 1992 McGill L J 47: “the very definition of democracy itself invests supreme normative authority in the majoritarian legislative process”.
84 *Cohens v Virginia* 19 U.S. 6 Wheat. 264 264 (1821) at 389 (emphasis added); Sunstein 1984 *Colum L Rev* at 1729: “…to ensure that the relevant values are genuinely public, in the sense that they are the product of broad deliberation rather than interest-group struggle.”
85 Zylberberg 1992 McGill L J 5: “ensuring the priority of democracy…regardless of majority will.”
86 bizos g *odyssey to freedom* (Random House South Africa 2007) 544. Writing about the First Certification Judgment, Advocate George Bizos recounts first-hand the exchange that took place in the newly formed Constitutional Court regarding what would be, ostensibly, the role of majority rule in a Constitutional dispensation: “JUSTICE CHASKALSON: What troubles me is understanding how we are to approach inherently political questions.
BIZOS: Leave it to the politicians.
JUSTICE MOHAMED: I am not sure. There may be one man opposed to it. But he may be right.” See also Rickard “The certification of the constitution of South Africa” 233.
87 Dworkin R *Taking rights seriously* (Duckworth London 1977) 133,173,194. As per Dworkin’s reasoning, the character of the “constitution, and particularly the Bill of Rights, is designed to protect individual citizens against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.” Hutchinson1985 *NYU L Rev* 876; *Prince* at para 147: “Disturbance of established majoritarian mind-sets are the price that constitutionalism exacts from government.”
88 Dworkin *Taking rights seriously* 142; see also Rawls J *A theory of justice* (Harvard University Press Cambridge 1971); Mohamed 1998 *SALJ*660 “the body armed with that power cannot be the alleged transgressor itself.”
Deconstructing the counter-majoritarian dilemma is a precarious task in that, within the dilemma, the advocacy of judicial review is seen as opposing democracy. It becomes challenging to walk the tight rope that Roux speaks of. The tension between constitutionalism and democracy is increased if such a rejection of a majoritarian conception of democracy is proposed in South Africa’s democratic infancy. To that end, it is strategically prudent to raise an argument that offers support for the majoritarian people’s will to be uplifted and protected from arbitrary power through the role of the court.

The case of *S v Lawrence* considered an argument that “freedom implies an absence of coercion.” Minority freedoms being subjected to majoritarianism in the absence of rights protection could indeed be deemed coercive to minorities. Paradoxically, the freedom assured to minorities through the role of the court translates into less disruptive and less contestable prevailing of majoritarian will in the political sphere.

A democratic government is a government that acts as an agent of the people and serve the people’s interests. The counter-majoritarian dilemma paints an “us and them” scenario: the court versus the people. But it is not two parties – it is three: the court, the people and the government. For judicial review to be seen as popular sovereignty reinforcing, there must be a separation between the government and the people because the government’s interests and the people’s interests may not be the same. Within such discourse of the counter-majoritarian dilemma, the role played by special interests, private power, the constitutions and rules of political parties, party loyalty and corruption that discolour the pure republican ideal cannot be ignored.

South Africa is a republic. The country is not run by democratic will. It is run by the decisions of representatives; these representatives being chosen through a process that quantifies democratic will. There is a vast chasm of distinction between these two points. Burke reasoned that a representative should not apply the will of those whom he represents but

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89 Roux 2009 *Int’l J Const* 115.

90 *S v Lawrence* at para 92, further referenced in case of *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 18 (hereinafter referred to as *Christian Education*).

91 Bickel *The least dangerous branch* 30-31.


rather the representative should apply his own judgment.\textsuperscript{94} He adds that a representative must do what is good for the nation as a whole and not what his constituents believe to be right and just. So within this understanding, neither the will of the majority nor the minority are represented in the Parliament of a republican state. If one speaks of a quantitative majority and minority, the process of judicial review is not eleven justices overriding 50 million South Africans but rather eleven justices overriding the unconstitutional decisions of the legislature. Judicial review does not override the will of the majority but the \textit{will of the representatives} of that majority. This is a crucial distinction and when weighed within this understanding, the scales of judicial review do not seem so democratically unbalanced.

Furthermore, Michelman offers an interesting recasting of republicanism. Traditionally viewed as communitarianism, republicanism would entail a rejection of otherness and would operate as a consolidated normative majority. Michelman argues for a conception of republicanism that would be “plurality-protecting”.\textsuperscript{95}

3.3 \textit{Democracy as popular sovereignty}

The direct focus of this research is the examination of judicial review as it relates to minority protection within a broader scheme of democratic will. A supporting argument can be made however that judicial review is crucial to the serving of the majority interests. As is mentioned above, the connection between minority and majority interest is imperative toward resolving the counter-majoritarian dilemma and consolidating minority rights.

The constraints on power that arise through constitutional supremacy being upheld through judicial review can prevent tyranny and thus judicial review can be seen as reinforcing popular sovereignty. Thomas Paine points out the distinction between election and representation, noting that the former does not guarantee the latter. Paine argues that if checks and balances do not continue after elections, “candidates are candidates for despotism”.\textsuperscript{96}

The workings of judicial review provide a resource for not only minority protection but majority advancement and concretisation. When the government does not fulfil the mandate for which


\textsuperscript{95} Michelman F “Law’s Republic” 1988 \textit{Yale L J} 1493-1537 1505; \textit{Christian Education} at para 23. See also Dworkin 1990 \textit{Alta L Rev} 330 in regards to the distinction between integrated and monolithic communal action.

\textsuperscript{96} Paine \textit{Rights of man} 402; Dyzenhaus 1991 \textit{SAJHR} 31.
it was elected, the people find themselves in the same unprotected boat as minorities. Such a possibility has become reality in South Africa. In his exposition of recent South African political events, Paul Hoffman speaks of “oppressed minorities” and “forgotten masses” in the same breath.  

In *Leviathan*, Thomas Hobbes conjures the image of chains that connect the mouths of those in power to the ears of the people. These chains, that Hobbes calls civil laws, provide accountability, transparency and openness between the leaders and the people those leaders serve. It is a check on absolute power, a way to ensure that the people are being served; that the people can know when their leaders are doing something of which the people would disapprove. The principle of constitutionalism with its commitment to judicial review is the chains of which Hobbes speaks. The court’s protection of civil liberties is thereby the mechanism that ensures that democracy survives.

Beyond this view of democracy as the people’s will, the charge that judicial review is anti-democratic cannot withstand the lengthy list of cases where the court has protected democracy in its narrow conception of fair and free elections and one person one vote.

In this procedural working of the court, the court does not impose its own will but rather removes any blockages that would impede the people's will from being the governing will. The role of the court in reviewing government decisions brings the state closer to the republican ideal. In this line of thinking, Davis notes that, in the absence of constitutional neutrality...
posed by post-modernist interpretative workings, a circumventing goal of the Constitution must be to facilitate deliberation. This belief underscores the need for a framework of individual liberties to ensure true communicative action and equality of engagement.\textsuperscript{103}

In the case of \textit{Doctors for Life International v Speaker of the National Assembly and Others}\textsuperscript{104}, the court emphasised the connection between conceptions of democracy and openness, transparency and accountability ensured by the court. Democracy is viewed in this regard as a justification of power rather than a granting of absolute power to the majority.

Much has been said about the need for popular support of the court’s decisions but the inverse is also true. Viewing judicial review more systemically, the court, as a light-house that shines values and principles, has the potential to frame an issue as a constitutional issue or as something that is constitutionally indigestible. This framing of the issue by the court can then lead to society changing stances and policies to fit the constitutional framework,\textsuperscript{105} and beyond that, the court possess the ability to point out the connection between concepts we hold in common. The constitutional stamp by the court has the potential to spur change and embolden those who wish to fight for it.\textsuperscript{106} Thus Rostow argues “the work of the court can have, and when wisely exercised does have, the effect not of inhibiting but of releasing and encouraging the dominantly democratic forces.”\textsuperscript{107}

\subsection*{3.4 Democracy as difference and deliberation}

Democracy must be conceptualized as considering all voices.\textsuperscript{108} For this pluralism to be achieved there must be a foundational premise of equality in deciding collectively how we as a nation will govern ourselves.

Herzog maintains that democracy is not the result of preference; it is the process of deliberation.\textsuperscript{109} Langa echoes the sentiment that “finding common ground calls for deliberation, collective reflection and an open space for discussion; it does not mean silencing...”

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{103} Davis \textit{Democracy and deliberation} 9.
\item \textsuperscript{104} \textit{Doctors for Life}.
\item \textsuperscript{105} Davis \textit{Democracy and deliberation} 11.
\item \textsuperscript{106} Rostow 1952 \textit{Harv L Rev} 208.
\item \textsuperscript{107} Rostow 1952 \textit{Harv L Rev} 210.
\item \textsuperscript{108} Moseeneke D “Striking a balance between the will of the people and the supremacy of the constitution” 2012 \textit{South African Law Journal} 9-22 11.
\item \textsuperscript{109} Herzog D “Up from individualism” 1998 \textit{California Law Review} 459-467 464. See also Sunstein 1984 \textit{Colum L Rev} 1689-1732; Zylberberg 1992 \textit{Mc Gill L J} 34; Mazibuko NO v Sisulu and Others NNO 2013 (4) SA 243 WCC at para 225: “Of course once the debate takes place and reasoned voices across the floor are heard, the majority may well vote the matter down and that would be the end of it. But what cannot be justified is that the debate should not be allowed to take place.”
\end{itemize}
\end{footnotesize}
Sachs surmised in the case of National Coalition that equality is not about homogenisation, not subjugating difference into one colourless narrative – equality is about respecting difference. Identifying democracy as equality means that the argument is removed from quantitative notions of democracy. Democracy as equality moves the argument away from majoritarianism as the collective becomes the individual.

Democracy and the conception of equality are inextricably linked. Equality is the very concept that allows for the existence of minority rights in the face of majoritarianism. One can argue, therefore, that democracy and minority rights are linked. This is argued for by Sachs in the National Coalition case. Following this reasoning, democracy conceptualized beyond a mathematical majority rule is congruent with the court upholding minority rights.

If democracy is equality, the institution that best manifests equality will be the institution that is the most democratic. As the South African political structure is dominated by one party, it could be argued that the power derived from such dominance means that the party can afford to be intolerant of difference. Due to such dominance, democratic reasoning and deliberation find a better home in the judiciary.

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111 National Coalition at para 132.
112 See Dyzenhaus 1991 SAJHR 24-49.
113 National Coalition at para 107.
114 Hirschl Towards juristocracy 3.
115 See News24 http://www.news24.com/SouthAfrica/News/You-dont-understand-democracy-Zuma-told-20120914 (date assessed - 25/09/2013). See also: Zylberberg 1992 McGill L J at 42: “To that extent it succeeds; it is easier to justify counter majoritarian actions when the political branch is less likely to give full effect to protected constitutional interests”; Tushnet M “Shut up he explained” 2001 North-western University Law Review 907-920 911: “…evaluate these institutions comparatively to see which is more open to the full blast of competing opinions, without attempting to decide whether the one that comes out ahead in that comparison is open enough.” Merafong Demarcation Forum and Others V President of the Republic of South Africa and Others 2008 (5) SA 171 (CC) para 50-51 (hereinafter referred to as Merafong): “There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.” See also Nyati “Public participation: what has the constitutional court given the public?” 2008 Law, Democracy and Development 102-110 108; Villa-Vincencio A theology of reconstruction 92.
116 Herzog 1998 Cal L Rev at 466; Rostow 1952 Harv L Rev 199-200. Froneman “The impossibility of constitutional democracy” 99. Froneman makes a distinction that emphasises that quantitative democracy is not the same as collective engagement and participation; Matiso 598 E-G; see also Kohn 2013 SALJ 815 and her description of a “monolithic executive”.
The traditional counter-majoritarian dilemma rests on an understanding of democracy as representative democracy. The problem is that representative democracy presumes a homogeneous society where all interests are the same thus all interests are able to be represented. But in a heterogeneous society, minorities are unable to be adequately represented through majority-rule processes. Not just in terms of representation but the ability for self-rule is diminished. While the *prima facie* counter-majoritarian argument is that the court’s role means a loss of democracy for a majority, when democracy is viewed holistically, there is a greater loss of democracy for minorities. In this regard, the shortcomings in democratic dispensation can be remedied by constitutional supremacy. Ely notes that the Constitution caters for a “strategy of pluralism”. Where those who are not adequately represented in the political realm, can still have their voices weighed against majoritarian dominance. This is echoed from a South African jurisprudential standpoint in *Doctors for Life International v Speaker of the National Assembly and Others*:

A vibrant democracy has a *qualitative* and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands.

Continuing this line of thought, the concern with the court’s counter-majoritarian dilemma has been described by some authors not as counter-majoritarian but rather counter-conversational. Viewing democracy as deliberation certainly supports such an idea. The court has been found to be conversational in its obligation to listen to such a variety of voices. The court cannot be seen to be counter-conversation and thereby, cannot be seen as counter-majoritarian.

This idea of dialogic strategy is seen to extend beyond just the applicants before the court and is seen as dialogue between the spheres of government. Constitutionalism is infused into political and into the normative. This adds further support to the view the separation of powers doctrine does not translates into insulted silos.

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117 Ely *Democracy and distrust* 79; Davis *Democracy and deliberation* 6, 72.

118 Ely *Democracy and distrust* 80; Dworkin *Taking rights seriously* 198-199: “The idea of political equality “supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves.” See also Hirschl *Towards juristocracy* 34.

119 2006 (12) BCLR 1399 (CC) at para 234 (hereinafter referred to as *Doctors for Life*) (emphasis added); *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC): “the constitution does not envisage a mathematical form of democracy where the winner takes all until the next vote counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered.”

120 See Tushnet 2001 *Nw UL R* 907-920; Bennet R “Counter-conversationalism and the dense of difficulty” 2001 *North-Western University Law Review* 845-906.
When judicial review is needed, it presupposes that a legislative act has potentially infringed rights and freedoms. Injury or alleged infringement is a requirement before the judiciary is endowed with jurisdiction. It is the function of the legislature to legislate, based on a democratic mandate. However, if there are failures in the legislative process, the judiciary has a role to play. This leaves the judiciary vulnerable to charges of being anti-democratic when it was the legislature’s anti-democratic tendencies that bought it to that point. 121 The more the principles of democracy are ignored at the legislative level, the greater the action of the judiciary will have to become. 122 Michelman 123 surmised that there is a reason why it is called judicial review – the court is meant to play a secondary role, only when there is a belief that the legislature has failed in its section 7(2) constitutional mandate to uphold the Bill of Rights.

The concept of equality is constantly expanding. 125 Although the Constitution does not necessarily change, the meaning keeps expanding, not through the role of the court in creating law through alleged judicial activism but through the application of democratic principles because “law is socially constructed”. 126 While extending rights to those groups may be against the majority’s will, what can be seen is that minority rights emerge through the workings of democratic theory and are thus in some way linked. There is not, as the counter-majoritarian dilemma suggests, a contradiction.

The judgment in Doctors for Life 127 separated the idea of democracy from the notion of elections and thereby majoritarian politics. The court, in demanding that the nature of democracy be viewed in light of South Africa’s history, can thereby be seen to link democracy with conceptions of equality, non-discrimination and non-oppression; conceptions that support the existence of minority rights.

Minority rights protection emerges from constitutional sources outside of section 9(3) 128 as the concept of minority is two-fold. Beyond the non-discrimination provisions of section 9, minority

121 Mohamed 1998 SALJ 662-663.
122 This is based on the Functionalist Approach Theory referred to by Hirschl Towards juristocracy 34.
123 Michelman F "Bringing the law to life: a plea for disenchantment" 1988 Cornell Law Review 256-269 266.
124 The Constitution.
125 See Minister of Home Affairs v Fourie; United States v Windsor 570 U.S (2013).
127 Doctors for Life at para 229-230, 234 and at fn 10.
128 The Constitution.
rights must be defined as a positive right, as an ability to forge an identity. Here the constitutional rights regarding freedom of association and freedom of expression are necessary components for minority rights protection.

Rights are the necessary precursor to full democratic engagement. Democracy seen as “of the people” can only be established as true (in terms of both stemming from the people and stemming from their will) if it is preceded by “the ability of the people”. Constitutional rights provide a framework to facilitate, ensure and protect such ability. Accepting that democracy is the ability to self-determining or the people to be self-governing, viewing minority rights as a constituting force that allows one to be self-governing, means that upholding minority rights is upholding democracy.

It is easy to see however that how the debate is presented will determine the outcome. Recasting of democracy can be used to counter the counter-majoritarian dilemma yet this could be challenged as merely a selective understanding of democracy to suit the objective of this research. In response to such a potential challenge, a broader spectrum of contested democratic theory is not denied. Whether democracy is cast as minority rights protection is a matter of perspective and context.

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129 Henrard K Minority Rights protection in post-apartheid South Africa: human rights, minority rights and self-determination (Praeger Publishers, Westport Connecticut 2002) 7; Botha “Rights, limitations and the (im)possibility of self-government” in Botha, van der Walt, van der Walt (eds) Rights and democracy in a transformative constitution (Sun Press 2003) 15. See also Macklem P “Minority rights in international law” 2008 International Journal of Constitutional Law 531-552. But it is argued that denying that categorisation of ‘minority’ in favour of individual rights is detrimental to the protection of minority rights. While success may be achieved through shrinking down the problem to individualism, it is important to remember that the very idea of what it is have a minority identity is fuelled and formed through associations, groups, religions that are much broader that an individualistic protection and indeed may carry greater weight than an individual voice among the multitude. Identity is formed through factors outside of individuality. To protect the individual minority, the protection factors that individuality draws on in its formation will also have to be protected. See Christian Education at para 19.

130 Nozick R Anarchy, state and utopia (Basic Books Inc Publishers, New York 1974) 311-312. Nozick denies that there is one conception of Utopia. Rather he believes that Utopia is a framework that allows all people can create and live out their own constructed Utopia. National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at fn 50; Ferreira v Levin 1996 (1) SA 984 (CC) para 50-51 (Ackerman J minority opinion) (hereinafter referred to as Ferreira v Levin); Villa-Vincencio A theology of reconstruction 81: “the recognition that human wellbeing or happiness (utility) is not univocal. Whose version of well-being is to be the measure of good in an unequal and heterogeneous society?” Ntlama 2014 LDD 80 -91 underscores that the philosophy of Ubuntu entailing an embracing of otherness and non-discrimination in the face of difference is the necessary first step that allows participation in communities. Michelman 1988 Yale L J 1501,1505.

131 Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly 2012 (6) SA 588 (CC) at para 49: “South Africa’s shameful history is one marked by authoritarianism, not only of the legal and physical kind, but also of an intellectual, ideological, and philosophical nature. The apartheid regime sought to dominate all facets of human life. It was determined to supress dissenting views, with the aim of imposing hegemonic control over thoughts and conduct, for the preservation of institutionalized injustice. It was this unjust system that South Africans, through their constitution, so decisively seek to reverse by ensuring that this country, fully belongs to all those who live in it.”
through individual rights and the concept of equality and difference, whether cast as self-rule, “we the people” or cast as majoritarianism, representation through elections, or dominant thought or normativity; the below examination of judicial review reveals that judicial review supports all these definitions of democracy.
CHAPTER 4
DEMOCRACY IN THE CONSTITUTION

“At that constitutional moment, We The People, establish our own sovereignty by legislating to ourselves a supreme law.”

4.1 Fostering Democracy

The discussion below seeks to reveal the underlying democratic structure of the Constitution. Mandated to determine whether the draft Constitution complied with 34 constitutional principles that were drafted into the Interim Constitution, the Constitutional Court was the mechanism that would straddle the divide between majority representation and minority protection. It could be argued that the 34 constitutional principles and the Interim Constitution would have provided minority safeguards prior to elections but it must be questioned how and who would interpret and apply these principles. Subjecting the interpretation of minority safeguards to a majority assembly would defeat the very purpose of constitutional principles; as these principles must be immune to majority politics. It further underscores the manipulability of principles and the belief, although perhaps not fully articulated at the time considering the faith placed in formalism - that principles cannot be self-applying. An institution outside of majoritarianism was needed.

The Constitutional Court was to be the “guarantor and guardian”, the very thing that held together the parties solemn pact. Rickard suggests that without the mechanism of a court certification, transition into democracy through the chosen negotiated channels could not have been achieved. This is a key point that arguments of counter-majoritarianism or anti-democratic challenges to the court must take into consideration.

It is suggested, however, that parties may not have supported the draft as it stood but rather were voting to have the court decide on matters that had reached impasse during

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132 The Federalist No 78 (A Hamilton) http://avalon.law.yale.edu/18th_century/fed78.asp (date accessed 01/08/2015).
133 Schedule 4 of the Interim Constitution.
134 Rickard “The certification of the constitution of South Africa” 228; Preamble, Interim Constitution: “And whereas in order to secure the achievement of this goal [a new democratic order], elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles.”
4.2 Consent

The constitutional framework within which the court operates is a product of consensus. \(^{137}\) Called the “principle of institutional settlement”, the judgment of constitutional validity or invalidity lends itself to legitimacy because it is a judgment that has been made through a recognised procedure and institution. \(^{138}\) Legitimacy can be achieved in one of two ways. One, the rule is accepted as valid by the people who are governed by that rule. Two, the rule is accepted because the process used to adopt that rule is regarded as valid, thereby validating any rules that emerge from that process. \(^{139}\) In this regard, when the court applies rules that the community may not agree with, it can still be seen as possessing legal legitimacy notwithstanding popular illegitimacy. As society requires legal legitimacy, the court’s rulings may be seen as in line with the community mandate, even though it may not be in line with community will. \(^{140}\) This does however presupposes clarity and objectivity of the law and the objectivity of the judiciary applying that law.

Minority rights can be seen to be accepted because of the recognition of the judicial institution despite perhaps non-agreement with the minority right that the institution would espouse. There is thus a connection between institutional legitimacy and an acceptance of decisions that would not be accepted outside of this institutional faith. Unpopular decisions have a

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\(^{135}\) Rickard “The certification of the constitution of South Africa” 229. Such a suggestion was confirmed in \textit{S v Makwanyane} at para 25 \textit{in re} the issue of the death penalty that had reach impasse and the decision was to leave the matter for the court to decide.

\(^{136}\) Rickard “The certification of the constitution of South Africa” 229-230: “all the parties, minority and majority, fully accepted the role which the court was about to play, and made much of its importance in the whole constitution-making scheme.”

\(^{137}\) Currie and de Waal \textit{The new constitutional and administrative law} 66.


\(^{139}\) Dworkin \textit{Taking rights seriously} 20; Mohamed 1998 \textit{SALJ} 662.

\(^{140}\) Eskridge and Peller 1991 \textit{Mich L Rev} 716: “The morality of law lay not in fundamental agreement about substantive principles, but instead in the open structures and procedures of government, the \textit{process} by which we can govern ourselves notwithstanding disagreements”; Seidman \textit{Our unsettled constitution} footnote at page 17.
tenuous stability and are dependent on a faith in the institution by the people. A loss of institutional legitimacy will lead to minority protections being put in jeopardy.\textsuperscript{141}

4.3 Consent, openness and the need of the judiciary

The originalist interpretative strategy whereby judges raise the founding thought as evidence to support their plain text readings of the Constitution endeavours to impute some democratic legitimacy in judgements.\textsuperscript{142} When contesting the counter-majoritarian nature of the court, this argument of the people’s consent within the Constitution is an important starting point.

However, the challenge within this argument is the wealth of evidence to suggest that founding thought should not be decisive in terms of offering judicial directive. The shortcomings of the idea of the people’s consent will be discussed below through three different points. Firstly, deeper analysis reveals a democratic deficit in originalist reasoning.\textsuperscript{143} Secondly, such reasoning denies the organic nature of any successful and enduring constitution. Thirdly, originalist reasoning is a flawed argument when the nature of the constitutional climate at the time of adoption is examined. These three points combine to reveal the necessity of judicial workings toward an interpretation that is truly reflective of the people’s consent.

The Constitution is a document created in conflict and designed to be an “unfinished symphony”.\textsuperscript{144} In addition, “it is not framed to be a catalogue of answers to questions.”\textsuperscript{145} When this is added to the primary objective of constitutional adoption, and getting parties to consent to such a Constitution, it skews the content of the document towards immediate goals of adoption rather than lasting ideas. To this end, the Constitution brushed over the

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\textsuperscript{141} Ngcobo 2011 SALJ 7.
\textsuperscript{142} Bickel The least dangerous branch 98; Ely Democracy and distrust 9 quoting Thomas Grey: When a court strikes down a popular statute or practice as unconstitutional, it may also reply to the resulting public outcry: “We didn’t do it – you did.”
\textsuperscript{143} That is democracy / self-rule of the people at this time.
\textsuperscript{144} Davis D “Cases and Comments: The twist of language and the two Fagans: Please Sir may I have some more literalism”1996 South African Journal of Human Rights 504 - 512 508. The United States of America’s constitutional birth has been viewed as not one nation conceived in liberty but rather “one nation, conceived in argument” that emerges from the research of Dionne Our divided political heart 127 (This is a reference to Abraham Lincoln’s’ Gettysburg Address 1863). The constitution is an imperfect settlement. In the South African context, Kentridge and Spitz Interpretation 107 suggest note that “agreement on a written text was possible only on condition that the ideological tensions would remain – and visibly so – to be negotiated and renegotiated every time the text is reread with an interpretative eye.”
most divisive issues. Furthermore, what is needed to be achieved is a Constitution of generality so that the constitution would have not only the ability to grow but to be general enough to be stable and permanent. What is meant by this seeming contradiction of abilities is that if the Constitution is general enough, all parties would be able to invoke the Constitution for their protection, and all parties would be able to see in the Constitution the vindication of their point of view. In doing so, the constitutional enterprise will maintain the allegiance of the people and the Constitution will thereby remain. All of these factors that surround and inspire the type of Constitution that is adopted point to a difficult examination of the concept of consent - one that is not capable of automatically being known by glancing at the constitutional text. While the judiciary may look to the history of adoption as an ingredient of adjudication toward upholding what the people have agreed to; what must also be noted is the need of the judiciary to bring forth the product decisions of that consent.

To have enough flexibility to allow for interpretation in terms of the political moralities and realities on the day, to uphold the will of the people at this time and to prevent a chasm between public opinion and the rule of law, the framers of the Constitution intentionally left room for the abstract principles to be interpreted by the judiciary. The court held in *S v Makwanyane* in this regard that their adjudicative role was due to “the framers of the constitution hav[ing] imposed …an inescapable duty.” The framers would have been unable to predict future circumstances and this argument lends itself to the notion that the framers intended deference to the judiciary as a result of such vagueness. However, this vagueness must not be seen as the entry way to judicial whim and the creating of law but

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146 Bickel *The least dangerous branch* 104; Villa-Vincencio *A theology of reconstruction* 86-87; Michelman 1988 *Yale L J* 1512: “Perhaps we can imagine people being persuaded to accept the requisite beliefs *arguendo* and suitable to the immediate, urgent, practical work of resolving upon some constitution while continuing to deny there deep truth (or rightness or inevitability).” Bickel *The least dangerous branch* 105. Kruger and Govindjee 2012 *SAPL* 202 reference the *First Certification* judgment where the court refused to establish a concrete right to family. It was felt that there were too many conceptions of what constitutes family in the diverse South African context. Defining what constitutes “family” and what type of family is worthy of constitutional protection and what type is not would create insiders and outsiders. Thus the solution was to provide no answer, “The failure to constitutionalize the protection of a particular family form avoids disagreement.” The court held that the right to family life could be protected through extension of the right to dignity. This was successfully achieved in the latter case of *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (hereinafter referred to as *Dawood*). This allows for the extension of family life to a much greater extent than what would be achieved through enumerated constitutionalism and an extension that provides for a greater democratic self-rule. However, this must be paid in the coin of the judiciary facilitating such an extension and the judiciary having some constructive leeway to extend the scope of the right to dignity. The court however, has been conscious of and circumspect with the leeway afforded to them. See *First Certification* at para 3: “to avoid pre-empting decisions in such cases, we have endeavoured, where possible, to be brief and provide reasons for our decisions without saying more than is necessary”; Villa-Vincencio *A theology of reconstruction* 87.

147 *S v Makwanyane* at para 192.
rather the intention being that this vagueness would allow the judiciary to be receptive and responsive to the needs of the day, anticipate prevailing ideologies and imbue that in their interpretation.  

The Constitution is meant to be a settlement to avoid civil strife. An unreflective, out of date and rigid constitutional settlement is ultimately likely to result in questioning, not just the decisions that result from the rigid application, but the acceptability of the enterprise as a whole. This is the great paradox: that too much settlement will cause conflict.\textsuperscript{149} Emerging from such an understanding, to ensure continual constitutional agreement (agreement to settlement and constitutional constraints) there must be, paradoxically, less settlement. Being able to change internally constitutional understandings, to re-examine and re-engage with the settlement again and again throughout changing times means that the constitutional objectives will be able to continually and safely rest on a normative foundation as it moves through the years.\textsuperscript{150} This ability must be necessitated by flexibility of the Constitution. Put differently, the Constitution must be able to bend, or it will break.

The examination of the idea of consent within the Constitution has revealed that one, the judiciary is needed to fully effectuate such consent and, two, the ability of the judiciary to achieve such an objective must rest on an open Constitution. However, this does little to negate the concerns of the counter-majoritarian dilemma. In fact, it exacerbates such concerns through the advocacy of the open and extensive judicial role. It merely raises more questions about the nature of judicial review and the issue of morality. If the court has to interpret the constitution in the light of current political morality, that might be seen as the court acting as a \textit{censor morum} with all the problems that brings. However, that is not the only way to see this. Far from the unconstrained mandate that such openness seems to suggest, the openness stems from an understanding of the importance of democratic impetus within the Constitution. That in itself provides constraint. In addition, the following chapters outline the awareness of the court in a young democracy and the strategic need to circumvent any anti-democratic contention. As a result, the court anticipates a restrained and deferential role. Moreover, the clear guidelines and adjudicative tools used by the court greatly remove any contention of an unbounded judicial mind in the South African context.

\textsuperscript{149} See the deconstruction section below that will argue that this is not so much a conscious process of anticipation and incorporation. Rather prevailing ideologies will already be unconsciously part of judicial reasoning. See \textit{Fose v Minister of Safety and Security} 1997 (3) SA 786 (CC) at para 69: “The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal [to vindicate rights]; \textit{Baloro v University} 227 E, 241 A-B.

\textsuperscript{150} Seidman \textit{Our unsettled constitution} 43.

\textsuperscript{151} Seidman \textit{Our unsettled constitution} 44; \textit{Baloro v University} 241 E-F.
CHAPTER 5

THE COURT’S GUIDELINES

[That judicial review] is still subject to important constraints, and recognition of those constraints is the best guarantee or shield against criticism that such a system of judicial review is essentially undemocratic. 152

5.1 Introduction

The openness and judicial freedom required to affect the interpretative mandate laid out in the Constitution, the disillusion with faith in plain text readings and the intricate connection of the judicial role to any living Constitution can create the idea that the court has the capacity to implement its own will, its own preferences and not the people’s will. This is not hard to imagine when such indeterminacy of law is met with judicial freedom. The indeterminacy of law is the starting point of the counter-majoritarian dilemma. However, there are still guidelines and constraints on the part of the court.

Following these guidelines steers the court away from preference and towards a democratic mandate. As Singer reasons, indeterminacy does not automatically translate into arbitrariness. 153 The central counter-majoritarian contention that a “[rejection] of crude textualism in which the text speaks with a clear and single voice” translates into “textual nihilism that celebrates the multiple, anarchic voices of the text” ignores these guidelines. 154

Singer states that context, shared understandings, an awareness of institutional roles, and factors that emerge from outside of a formalist understanding of law will create a composite of guidelines that will create predictability. These guidelines are discussed now in greater detail.

152 Matiso at 594 D.
153 See Singer 1984 Yale L J 1-70; Nozick Anarchy, state and utopia 318: “We will have to leave room for people’s judging each particular instance. This is not by itself an argument for each person’s judging for himself. Nor is it the only alternative to the mechanical application of explicitly formulated rules the operation of a system wholly dependent upon choices without guidelines at all”; Davis Democracy and deliberation 47 fn 83: “That is not to suggest that I am advocating an approach that anything goes so that the text is irrelevant and the judge simply concludes that her intuitive feeling gives rise to the best interpretation. This accusation is the favourite ploy of positivists – either the text has a correct meaning or you are on your own in a world of complete discretion. In contrast, I acknowledge that we are involved in interpretative work, but the process is about competing interpretations and outcomes each of which requires justification. That the text gives indicators as to which justification is in keeping with the nature of the constitutional enterprise is clear. That which is more in keeping with the communities’ conception of constitutional society is likely to prevail.”
154 Hutchinson 1985 NYU L Rev 863; Dworkin Taking rights seriously 126; Matiso at 597 l-598 B: “This does not mean that Judges should now suddenly enter into an orgy of judicial law-making. Judicial review...is still subject to important constraints.”
5.2 Bright Leitmotifs

South Africa's emerging out of its apartheid past imbued the legal system with metanarratives that have guided constitutional interpretation by the judiciary. Critical Legal Scholars (CLS) argue that "history allows itself to become a source of moral insight."¹⁵⁵ In addition the CLS posit that "law...neither operates in a historical vacuum nor does it exist independently of ideological struggles in society."¹⁵⁶

The court operates within the framework of the Constitution as memorial and the Constitution as monument.¹⁵⁷ The memory of the past informs the values and aspirations of the future and these aspirations will serve as guideposts in interpretation. Given that South Africa is still very much living in its history and in reaction to that history, interpretation made in light of a contextual purposive understanding is thus possible within an intentionalist and originalist understanding; an interpretation that resonates with a democratic authorship.¹⁵⁸ While conscious that tension between democratic will and the court’s activism within a constitutional democracy is increased due to South Africa’s anti-democratic history and democratic youth, that tension, through the above reasoning, is paradoxically guided toward resolution through South Africa’s youth and history.¹⁵⁹ In the openness of the interpretative text, the presumption

¹⁵⁵ Hutchinson and Monahan 1984 Stan L Rev 233; President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1(CC) (hereinafter referred to as Hugo) at para 41: "The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked." Hoffman at para 37: "Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era - it is an era characterised by respect for human dignity for all human beings." S v Makwanyane at para 218: "The emphasis I place on the right to life is, in part, influenced by the recent experiences of our people in this country. The history of the past decades has been such that the value of life and human dignity have been demeaned." Daniels v Campbell NO and Others 2004 (5) SA 331(CC) at para 68: "for all the reasons embedded in the racial, cultural and religious bigotry of our unequal and bruising past, preconstitutional courts have not recognised Islamic marriages as valid marriages."


¹⁵⁷ Du Plessis 2000 Stell L Rev; Kentridge and Spitz Interpretation 68.

¹⁵⁸ Bizos Odyssey to freedom 542. According to Bizos, this democratic participation was indeed evident when it came to drafting South Africa’s constitutional framework: “Those wanting to comment on the draft constitution formed such a broad cross-section of society that it seemed the judges were being asked to hear the ‘people’s voices’ directly.” Kruger and Govindjee 2012 SAPL 200 look to the reasoning of Ferreira v Levin that the Constitution’s written text will still have congruence with the dominant meaning in society and be written with sufficient detail to cover eventualities of the current time. There is not a great gap between original text and current adjudication as one would find in an American jurisprudential context. In this regard, the role of the court in construction and extrapolation of unenumerated rights occurs to a lesser degree. This reasoning is further established by Davis Democracy and deliberation 27 in his acknowledgment of the theory of dependent reasons.

¹⁵⁹ Paine Rights of man 389. This history in the law brings with it its own sense objectivity by what Schlag 1990 Tex L Rev 1645 refers to as providing “stabilization and universalisation of the gaze of the observer.”
is that constitutional precepts will be given “concrete expression...in accordance with reasoned sense of justice.”\textsuperscript{160} While this offers democratic assurance, it is important to note that this must not be read as majoritarian will when identifying that sense of justice.\textsuperscript{161} A central tenet that provides an overarching framework for constitutional values, and perhaps a degree of explication, is the philosophy of Ubuntu.\textsuperscript{162} Ubuntu entails an embracing of otherness. This philosophy cannot be ignored when viewing constitutional values and must form the prism through which our sense of justice is viewed. The idea of otherness must encompass this understanding of justice and must be read into the democratic impetus.\textsuperscript{163}

Carpenter distinguishes between attitudes and values. If the court is to be guided by anything, it must be guided by the values of society and not the attitudes of society. Carpenter holds that there can be agreement to values and differing attitudes that emerge as product of the shared value.\textsuperscript{164} The counter-majoritarian dilemma, at this point, finds resolution by society agreeing on general principles of justice.\textsuperscript{165} The application of these general principles of justice confers legitimacy on the court\textsuperscript{166} when it finds and applies the values that are shared by the community at large.\textsuperscript{167} Noting such, there is not an imposition by the court. Given South Africa’s constitutional youth, finding such values is not difficult. Thus, directive in adjudication will be the values of dignity, equality, freedom of person, speech, conscience and belief in addition to non-discrimination, openness and a culture of justification.\textsuperscript{168}

\textsuperscript{160} Kentridge and Spitz \textit{Interpretation} 7.
\textsuperscript{161} See the American case of \textit{Bowers v Hardwick} 478 U.S. 186 (1986) (hereinafter referred to as \textit{Bowers v Hardwick}) at 196: “there must be a rational connection for the law, and that there is none [in the context of this case] other than the presumed belief of a majority.”
\textsuperscript{162} Epilogue, Interim Constitution.
\textsuperscript{163} See Ntlama N “Reflections on the rejection of the right to sexual-orientation by the Institution of Traditional Leadership: lessons from South Africa” 2014 \textit{Law Democracy and Development} 80-91. Ntlama writes in response to a Traditional Leadership proposal to remove the right to sexual orientation from the Constitution. The conflicting relationship Customary Law has with many constitutional provisions that would support minority right positions leads Ntlama to raise Ubuntu as an argument for conciliation; arguing that traditional leadership was granted constitutional authority on the presumption that traditional leadership could be used as a mechanism to consolidate and nurture constitutional values within the community. For traditional leaders to deny or repudiate the non-discrimination provisions in the Constitution is thus a repudiation of its own authority.
\textsuperscript{164} Carpenter 1996 \textit{SAPL} 116. See the analysis of the \textit{National Coalition} and the inclusion of the right to sexual orientation in the Constitution below.
\textsuperscript{166} Michelman F "Is the Constitution a contract for legitimacy?" 2003 \textit{Review of Constitutional Studies} (Vol 8 no 2) 101-128 101.
\textsuperscript{167} See, for example, \textit{Ryland v Edros} 1997 1 BCLR 77 (CC).
\textsuperscript{168} Mureinik 1994 \textit{SAJHR} 31-48.
5.3 Advanced Consent

The culture of justification coupled with the bright *leitmotivs* that guide interpretation, constrain the unbounded free-play of the South African judge. Within these *leitmotivs* there is still democratic justification as “principles were not hard and fast restraints derived from a non-democratic past. They are evolved *from within the democratic ethos* as perfections of that ethos.”  

The political consensus of the nation is reflected in the Constitution. There are values to which our nation has consented and it is these values that must guide interpretation. Based on this reasoning, the court’s interpretative mandate is not based on morality, but on principles of justice informed by the country’s past. Therefore, the constitutional framework within which the court operates is a product of consensus. As Carpenter notes, the “Constitution is a mirror of the nation’s soul” and Villa-Vincencio states that “a nation’s Constitution is a social vision of what that nation understands itself to be” and in this regard there is some congruence between the people’s will and the Constitution.

However, within the South African context, the idea of consensus is not without its complexity. The role of the Constitution has been described as a bridge. Inspired by a past that no longer exists towards a future that has yet to become realised, the court operates in an environment that is neither here nor there. Kentridge and Spitz concede that while no clear constitutional theory of interpretation operates in South Africa deriving from consensus, *leitmotivs* do offer interpretative direction, if not a clear path.

On the one hand, the theory, as has been touched on in the course of this research, is that the constitutional principles must be widely accepted for those principles to survive and in order to avoid a chasm between public opinion and constitutionalism. On the other hand, it cannot be forgotten that the Constitution is a transformative document, aspirational in its goals; which conveys the idea that the Constitution is a conduit towards something that has not yet been achieved. Any assessment of the will of the people being reflected in the Constitution must take such a paradigm into account. Thus there will be at times conflict, there will be an apparent discordance – but it is a conflict that has been agreed to.

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169 Bickel *The least dangerous branch* 67 (emphasis added).
170 Carpenter 1996 *SAPL* 115.
171 Villa-Vincencio *A theology of reconstruction* 52.
173 Kentridge and Spitz *Interpretation* 2.
174 Du Plessis 2000 *Stell L Rev* 385-394 notes the hardship in trying to work within the lessons learnt from what the nation once was and the commitments made from that as to what the nation ought to be together alongside a democratic faith.
The description of the Constitution as a bridge has been interpreted as meaning a bridge from a culture of authoritarianism toward a culture of justification. Within such a transformative mandate, the court must still endeavour toward reasoning that would incorporate the people’s understanding in order to be in line with this culture of justification. As Mureinik notes the culture of justification means a culture of persuasion, not coercion. The court, through its reasoning will have to endeavour to persuade the public.

In the advocacy of agreed upon principles, the idea of what it means to consent to such principles deserves deeper examination. There has been agreement to be subject to constitutional supremacy, even if there is not agreement as to the decisions arising out of that constitutional supremacy. However aspirational the Constitution’s values, however absent these values are at a grass root level, the court is not deviating from the path laid down for it. There can be discordance between beliefs and judicial decisions and yet that judicial decision can stem from the constitutional commitments, which in turn stems from that belief.

This idea is found in Michelman’s view of the summation of this counter-majoritarian dilemma when he notes that there must be “government of the people and a government of laws and not men.” There is inherent in this idea a gap between men and law. This is both connection and disconnection. When democracy is said to be imbued in the Constitution and in the judicial workings, this gap must be taken into account.

176 Bickel The least dangerous branch 105: “The constitution must not partake of the prolixity of a legal code and so seem false and alien to the people, who are expected to pour into it and draw from it, the sense of union and common purpose, past and future”; Tushnet 2001 Nw UL R915. Botha “Rights, limitations and the (im) possibility of self-government” 17: “Despite the existence of reasonable interpretative disagreement and the absence, in many cases, of a single right answer, judges are constrained by the need to give reasons for their decisions; appeal to widely shared values in a bid to persuade otherness of the correctness of their decisions.”
177 Mureinik 1994 SAJHR 32.
Dworkin articulated that the idea of consent must be seen as consent to the overarching objective of the Constitution, viewing the Constitution as a whole and not just consent to the individual provisions contained therein.\textsuperscript{180}

The indeterminacy argument may create the impression that the court is not applying the law, but in their interpretation of the law, are making the law. The interpretative anchors offered by constitutional values however, allows the court to use a process of reasoned elaboration. Starting from identifying the purpose of the Constitution, areas of controversy must be solved by decision-making that best reflects that purpose.\textsuperscript{181} While there is elaboration, there is not, as the counter-majoritarian dilemma argues, creation. In support of this idea, Nozick states that “there can be no new rights which are not the sum of pre-existing ones.”\textsuperscript{182}

Winter notes that despite the unpopularity of certain decisions,\textsuperscript{183} the judgment is still contingent on the understanding and agreement of the community. Judicial decision making is still shaped by consent and agreed upon political undertakings. Through reasoned argument those that disagree can be brought to see that while they may have a different conception of law or rights, that conception is derived from a higher concept that all would agree with and would consent to be governed by once their interest is reflected in that concept.\textsuperscript{184} “Their full force can be captured in a concept that admits of different conceptions.”\textsuperscript{185}

In the interaction between consent and the judicial mind, the resulting judicial decision is not directly representative of consent but is distilled into “generalization or schematization”.\textsuperscript{186} In other words, there occurs not a reproduction or a replication of meaning\textsuperscript{187} but a learned model of understanding. Using that model will be predicated on identifying a common pattern.

\textsuperscript{180} Dworkin Taking rights seriously 105; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at para 91-92.

\textsuperscript{181} Eskridge and Peller 1990 Mich L Rev 718.

\textsuperscript{182} Nozick Anarchy, state and utopia 90. See also Dawood case and discussion pertaining to Dawood above.

\textsuperscript{183} For example the court’s ruling on the death penalty.

\textsuperscript{184} Hutchinson A “Democracy and determinacy: an essay on legal interpretation” U Miami L R 1989 541-576 555-556. In trying to identify values shared by the community at large, there is the risk that the values will be so vague and abstract that they cannot be applied with predictability and certainty that the law requires.

\textsuperscript{185} Dworkin Taking rights seriously 129; Carpenter 1996 SAPL 116: “it is perfectly possible for a community to acknowledge certain shared values and to differ radically about the attitudes emanating from those very values”; Currie 1999 SAJHR 148; Michelman 2003 Rev Const Stud 101. See also Hutchinson 1989 U Miami L R 551; Griswold v Connecticut 381 U.S. 479 (1965): “Rather, they must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there]...as to be ranked as fundamental.”

\textsuperscript{186} Winter S “Contingency and community in normative practice” 1990 University of Pennsylvania Law Review 963-1002 993.

\textsuperscript{187} Winter 1990 U Pa L Rev 996.
within the scheme.\textsuperscript{188} The concept of a model is that its generalised ideas can be extended to new and disparate circumstances. The idea is one of abstraction and then extrapolation, not one of direct social congruence. Dworkin reaffirms this idea, suggesting that the moral philosopher must take the principles that are certain in his/her mind and then to use that certainty as a foundational reasoning to make decisions pertaining to that which he/she is unsure of.\textsuperscript{189} While the results of these abstractions and extrapolations may seem to be far removed from the normative fabric to the extent that it seems that judicial activism has gone too far, Hutchinson argues that going too far would make the judgement literally unintelligible.\textsuperscript{190} In addition, the court held in the \textit{First Certification} judgment that while there is no “finite list of such rights and freedoms”, any such extension of the constitutional rights will be limited to what is “universally accepted” as a fundamental right.\textsuperscript{191} This reasoning reveals that any extension or extrapolation of rights cannot exceed the democratic reality in which those rights must live.

What must be avoided is a conflation of political consent with moral consensus. There has to be some degree of cognitive dissonance.\textsuperscript{192} There can be adjudicative decisions that may go against the majoritarian will but are none-the-less still derived from majority consent to the constitutional enterprise and foundational value commitments.

5.4 \textit{The difficulty of minority rights protection by the court}

In the apartheid years, because the country was dominated by a minority, incontestable political sovereignty was a crucial ingredient for such power to continue.\textsuperscript{193} Limiting political sovereignty through constitutional supremacy is therefore difficult to hold when the narrative, deeply weaved into the fabric of the nation, is that power is protection. There is a notion that power constrained is power lost. From its birth, the idea of a Bill of Rights was not embraced fully as it was seen as a tool whereby the white minority could hold onto power. The hypocrisy

\begin{itemize}
\item Winter 1990 \textit{U Pa L Rev} 993.
\item Dworkin \textit{Taking rights seriously} 155. See also Winter 1990 \textit{U Pa L Rev} 997 “our sedimented knowledge is unavoidably to act imaginatively in a new circumstance, reasoning in terms of a known one.”
\item Hutchinson 1985 \textit{NYU L R} 867.
\item \textit{First Certification} at para 50; Kruger and Govindjee 2012 \textit{SAPL} 201; Hirschl \textit{Towards juristocracy} 147.
\item See Cockrell 1996 \textit{SAJHR} 23 regarding the distinction between positive morality and critical morality. When examined critically, the central tenet of what positive morality underscores can be identified and then extended, as it has in the instance with the issue of equality and non-discrimination being extending to gay rights (see discussion in Chapter 7 below). Positive morality turns into critical morality once subjected to arguments of consistency, logic, scientific information and so forth.
\item Cachalia F “Constitutionalism and belonging” in Andrews P and Ellmann S (eds) \textit{The post-apartheid constitutions: perspectives on South Africa’s basic law} (Witwatersrand University Press 2001) 361; Davis \textit{Democracy and deliberation} 10.
\end{itemize}
of a minority run government sanctioning human rights violations now uplifting the idea of limited government and a Bill of Rights was not lost on the black population. The Bill of Rights was seen as an opposition to majoritarianism and a blockage to transformation.\textsuperscript{194} Such an understanding must be imputed into any contextual analysis of the counter-majoritarian dilemma. The view was that political freedom would not be protected through the Bill of Rights, but rather, because it benefited the white minority, would be a mechanism where freedom could be potentially blocked.

Freedom has been described as two-fold: The ability to decide for oneself the best way to live one’s life, and to not be subject to arbitrary power.\textsuperscript{195} There is therefore a duality to the investigation of the counter-majoritarian dilemma. When viewing minority rights therefore, it can be in the context of either a normative societal examination (being the former understanding of freedom) or an examination of political power (the latter understanding). The historical hostility towards a Bill of Rights could potentially conflate the two. The fear is that what it is to be a minority in South Africa could be seen very narrowly and in light of the previous minority run government. The fear is that conflating the two could jeopardize the broader scope of minority rights protections that exist beyond the political. So the challenge of limited government in the South African context is three pronged – a distrust of courts from the apartheid era, a Bill of Rights seen as a denial of majoritarianism toward entrenching white interest and the indeterminacy of constitutional law as a means where the judicial mind can run rampant in the advancement of such an agenda.\textsuperscript{196}

5.5 \textit{Minority rights adjudication guided by dignity}

In the lead-up to South Africa’s new democratic order, the idea of majority rule was optimistically to be equated with unity and thereby reconciliation: one nation formed through the democratic process. The focus on minority rights would thereby be seen to emphasise the differences that divide and would contradict calls for a unified national state.\textsuperscript{197}

Through an examination of the nature of minority rights, this conception of unity cannot be seen to engender communitarianism or majoritarianism but in fact carves out a space for minorities. Holding diversity within unity is achieved through universalism.

\textsuperscript{194} Sachs 1991 \textit{JAL} 24-25; Corder H “Judicial authority in a changing South Africa” 2004 \textit{Legal Studies} 253-274 258.
\textsuperscript{195} Michelman 1988 \textit{Yale L J} 1501.
\textsuperscript{196} Dyzenhaus 1991 \textit{SAJHR} 42.
\textsuperscript{197} Cachalia “Constitutionalism and belonging” 359; \textit{Matiso at 598 H; Christian Education} at fn 20.
Universalism upheld the individual equality of all humankind. The focus was thereby on an “anti-difference, universalist orientation.” Recognition of the individual right, not a minority right, would remove difference from the equation while simultaneously protecting it. As such, universalism prompts a breaking down of the quantitative forces that would form majority and minority. The individual right most prominent in minority rights case law is the right to dignity. The right to dignity has been used by the court as the guideline to provide meaning to all other rights. The concept of dignity has become the operational baseline. Davis offers a compelling view of dignity that can be used to solidify minority rights in the face of majoritarianism:

The most basic premise of the Constitution is the unbending commitment to the dignity of the human being. Inherent in this commitment is the principle that all people have a moral right to confront and to answer for themselves the most fundamental questions which touch the meaning and value of their own lives. The principle that runs like a thread through the constitution promotes a community in which no faction thereof is deemed to possess such superiority of wisdom or religious insight that it can decide the most personal questions for other members of that community.

The right of dignity thereby becomes both a subjective and an objective principle whereby “every other rational being also thinks of his existence on the same rational ground that holds also for myself.”

There is an interconnectedness that cannot be ignored, reaffirmed by the Constitutional Court in *S v Makwanyane* when it held that: “It is only if there is a willingness to protect the worst

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198 Cachalia “Constitutionalism and belonging” 360: “We found a lifeline in the abstraction of the individual to which we appealed in making claims to equality, and we demanded recognition on the basis of our common humanity.”

199 Cachalia “Constitutionalism and belonging” 360. It is noted again in *Hugo* at para 41 that the focus of the constitutional protections afforded is on the individual right to equality and dignity. This sentiment is echoed in International Human Rights Law. In his examination of the *International Covenant on Civil and Political Rights*, Macklem 2008 *Int‘l J Const L* 535 writes: “The text of article 27 thus suggests that minority rights are individual rights to engage in particular activities in community with others, not collective rights of a minority population to a measure of autonomy from the broader society in which it is situated.”

200 *Dawood* at para 35: “The value of dignity in our constitutional framework cannot therefore be doubted. The constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels”; *S v Makwanyane* at para 111 and at para 328-329 where O’Regan J refers to dignity as the “touchstone of the new political order”; *National Coalition* at para 120. See also *Prince* at para 50.

201 See also *Hoffman* at para 27 where the court links infringement of dignity to instances of unfair discrimination.

202 Davis *Democracy and deliberation* 38.

203 Davis *Democracy and deliberation* at 71 referencing Kants *Foundations for the metaphysic of morals*. *S v Makwanyane* at para 84 held that the right to life and the right to dignity “are the source of all other rights”; espoused again by the court in *S v Mamabolo* at para 41 and *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) at para 27-28. See also *Hoffman* at para 27 where the court links infringement of dignity to instances of unfair discrimination.
and the weakest amongst us, that all of us can be secure that our own rights will be protected." 204

In a constitutional and democratic infancy, minority rights are dependent on a judiciary and the judiciary’s legitimacy is dependent on public support. Democracy and even popular sovereignty cannot survive without an independent judiciary. Rights are dependent on other rights; freedoms are expounded through other freedoms. The acknowledgment of this interconnection offers a response to the counter-majoritarian dilemma. Majoritarian commitments can be extrapolated to provide a life line for minorities because of and despite majoritarian will.

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204  S v Makwanyane at para 88.
CHAPTER 6

DEMOCRACY IN JUDICIAL SUBJECTIVITY

6.1 Introduction

At the very centre of the counter-majoritarian dilemma, once the argument moves past issues of constitutional consent and constraints for judicial review based on interpretative guidelines; there remains the issue of judicial preference stemming from interpretative indeterminacy. This chapter argues that the institutional self-consciousness on the part of the South African Constitutional Court challenges such an unbounded judicial contention; and further notes the judicial self-restraint and commitment to formalism that emerges from such self-consciousness. This chapter examines a systemic view of legitimacy when the court clings to formalism. It will contend that such a commitment to formalism in response to the counter-majoritarian dilemma will in fact exacerbate the dilemma and far from removing judicial preference, it will merely mask it.

The chapter then discusses how judicial preference and the internal interpretative parameters are shaped and confined by pre-existing societal factors thereby arguing that the people’s will is imbued into judicial adjudication, notwithstanding such adjudication being viewed as preference.

Accepting in the alternative that subjectivity and thereby nihilism cannot be reasoned away, the remainder of the chapter outlines various judicial strategies in response, in addition to arguing that nihilism properly understood, far from the resulting default to majority-rule, in fact upholds minority rights to a greater extent and engenders a necessary role for the court.

6.2 A young democracy and a self-conscious court

There is a distinction between ability and inclination. As a result of indeterminacy, judges have the ability to inject their preferences into decision making. But that is not to say that the ability to do something automatically translates into the inclination to do it. There are various considerations that separate ability from inclination. Dworkin agrees, noting that there is a vast chasm between a judge’s convictions and those convictions being the overriding

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\[205\] Seidman *Our unsettled constitution* 12-13.
determining force in adjudication. The exploration of that chasm and the space that prevents the merging of conviction and decision is now explored.\textsuperscript{206}

The court, operating in a democratic infancy, with the legitimacy of the institution hanging in the balance, has treaded lightly, cautious of being charged as unbounded. The court has aimed to root its judgment in the text of the Constitution,\textsuperscript{207} in the hope that the certainty of a rule-bound, mechanistic application of the Constitution which will leave no room for charges that judicial subjectivity has been injected into decision-making.\textsuperscript{208} This would, ideally, remove the judiciary from the democratic but more accurately, majoritarian cross-hairs.

This formalist thinking pervaded South African jurisprudence before and during the adoption of the Constitution. During constitutional negotiations, the striking point that has been noted by Davis is that both the ANC and the minority parties wished for a formalist working of the Constitution and the Bill of Rights contained therein. The ANC wished that the constitutional mandate would be formalist in the sense that it would be clearly defined and thus contained, with limited application. Outside of this limited scope of application, the ANC, as the presumptive ruling party, would have total authority. Minority parties, having key interests protected by the future Constitution, wished for a formalist mandate in the sense that formalism would be seen as entrenchment; indisputable, fixed, unable to be manipulated. Davis considers that the court’s history of adjudicative formalism may have formed a supposition in the minds of the negotiating parties that this tradition of formalism would continue.\textsuperscript{209} This faith in formalism is further evidenced in the trust placed on plain language. It was hoped that if drafted in plain enough language, “the complexity and contest could be squeezed out of the constitutional enterprise.”\textsuperscript{210}

In the course of the certification process, the court factored in issues that went beyond the draft text before them. The negotiations were so delicate that the court factored into its certification judgment, the potential ramifications of rejecting the draft text and sending it back to the Constitutional Assembly. The court, crossing the boundary between law and politics in its unprecedented role, questioned whether the political tension would survive another round

\textsuperscript{206} Dworkin \textit{Taking rights seriously} 118.
\textsuperscript{207} \textit{S v Zuma and Others} 1995 (4) BCLR 401 (SA) at para 17 (hereinafter referred to as \textit{S v Zuma}); \textit{S v Mhulungu and Others} 1995 (3) SA 867 (CC) para 111; Hutchinson 1985 \textit{NYU L Rev} at 865: “They persist in believing that the text has some independent, objective, and uninterpreted existence outside its community of interpreters.” See Kruger and Govindjee 2012 \textit{SAPL} 199-200 regarding the examination of Chaskalson’s narrow construction of section 11 of the Constitution in \textit{Ferreira v Levin}.
\textsuperscript{208} Davis \textit{Democracy and deliberation} 26-27.
\textsuperscript{209} Davis “Deconstructing and reconstructing the argument for a bill of rights within the context of South African nationalism” 214.
\textsuperscript{210} Davis “Deconstructing and reconstructing the argument for a bill of rights within the context of South African nationalism” 216.
of negotiations should the court reject the draft. It could be argued that the awareness of the delicate political climate may have led to the court potentially certifying a sub-par Constitution for the sake of continued peaceful settlement. While these considerations were in the minds of the justices, the justices made clear during the certification process that there would be nothing sub-par about rights entrenchment. In the course of oral arguments during the *First Certification*, the issue of constitutional amendment by majority process was responded to by Justice Mohamed, who raised the “basic structure doctrine”. There is a core pillar in the Constitution that is untouchable, even to majorities. Any changes to this untouchable pillar would change the very nature and institutional framework of the Constitution.

In South Africa, the culture of justification coupled with constitutional principles constrains judges. The advent of the Constitution has made a formalist approach to interpretation problematic. But the inclusion of value-judgments does not necessarily equate with an explicit politics of adjudication in the non-foundationalist sense. The court has been appreciative of the dangers of a non-formalist approach. Rostow reasons that an awareness on the part of the court of this institutional self-consciousness; an awareness of the contestations concerning the appropriateness of judicial review, forms the mainspring of decision-making on the part of the court.

Judicial self-restraint is, as a result, well evidenced in South African case law. In cases of political sensitivity, the court has adhered to a rule-bound formalism which can be attributed to the constitutional infancy and the need to show faith and deference to democratic processes.

211 Rickard “The certification of the constitution of South Africa” 230-231, 237.

Rickard “The certification of the constitution of South Africa” 253; “Are you saying that there are certain fundamental features that cannot be changed even with special majorities, since that would not be amending the Constitution?” asked Justice Sachs. Justice Mohamed: ‘Yes, not amending but tearing it up.’

212 Ferreira v Levin at para 181-183; S v Zuma; S v Makwanyane at para 107; National Coalition at para 66; Prince at para 109: “The question before us is not whether we agree with the law prohibiting the possession of cannabis. Our views in that regard are irrelevant. The only question is whether the law is inconsistent with the Constitution”; Merafong at para 27: “In determining whether the legislature acted reasonably, this Court will pay respect to what the legislature assessed as being the appropriate method.” Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18 and at para 22: “Judges must be alert and guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.” Klare 1998 SAJHR 166: “[there is a] serious destabilizing downside to the punctilious candour about the politics of adjudication.” See S v Mamabolo at para 18 for an explication of the judicial techniques used to ensure judicial restraint and public confidence in the judicial process.

213 Davis D “Socio-economic rights in South Africa: the record after ten years” 2004 NZJPIL 47-66 49 quoting Sachs: “In the later years when the foundations of a stable new nation have been laid and when its institutions have gained habitual acceptance, it may be possible to conceive
There is uneasiness in trying to adhere to formalism working alongside a value-laden mandate. The court's confusion in trying to straddle both worlds is evident in *S v Zuma*:

> While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.  

The formalist approach may be seen as an effort to avoid the counter-majoritarian dilemma and to preserve the court's integrity. Overstepping would have been detrimental to the nation's delicate constitutional infancy. The irony here is that this formalist approach, a strict boundary between politics and law, is a *politically motivated strategy*, thereby raising the question of just how formalist the adjudication really is.

Klare makes use of the phrase "historical self-consciousness" that anticipates the balancing act that is needed to be performed by the court. There is an understanding that, in reaction to South Africa's history, the court must be a sentinel, guarding against oppression and discrimination. Yet the court must also be *institutionally* self-conscious, understanding the need for the people to have faith in democratic processes and a representative government. As a result of this understanding, the self-distancing and awareness on the part of the court is more of a constraining force than it would be on the court of a mature democracy.

The court has to play a very unsettled role: to remain within the domain of the Constitution, to apply it without fear or favour and yet also anticipate the consequences of judgement within broader society as well as the ricochet effects on the institution of the judiciary. It must operate within an interpretative mandate that is both formalist and value-based as it is asked to both protect and show deference, to both step forward and step back.

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215 *S v Zuma* at para 17. See also *Executive Council of Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC) at para 99. Cockrell 1996 *SAJHR*37; *Davis Democracy and deliberation* 14-19. This approach takes away from the consistency of the institution as a whole, which can in itself lend credence to the counter-majoritarian dilemma.

216 Currie 1999 *SAJHR* 138.

Winter notes that this self-consciousness and the awareness of all these factors that have to be balanced lends itself to a detached role or role distance on the part of the jurist.\textsuperscript{218} The instrumentalism of the role of the judicial officer creates a large space between judicial opinion and judicial obligation. Balkin notes a similar dissonance when he addresses the idea of "role morality".\textsuperscript{219} In addition, role distance creates an absolving force whereby the judicial officer can hold personal predilections and still make decisions that would be counter to those beliefs, decisions which would be made conflict-free when he/she upholds strategic responsibilities in judgment. Because of this distance between the individual and the individual's role, recruiting the individual will have no effect on the outcome of the role. Role outcome will have to be done by coercion, not persuasion of the individual. Ostensibly, this coercion will emanate from outside of the judicial officer. Because of the understanding of the instrumental/strategic rationality of the institution, the judicial disposition is pre-empted.

6.3 Turning away from formalism

The formulation of the South African Constitution, in that it was certified by an institution by the power given through the very document that it was certifying, reveals a presupposition that was operating in South Africa at the time: principles of constitutionalism operate outside the written document. To argue that the Constitution's plain text indeterminacy should therefore be subjugated to majoritarian politics ignores that the principles and constraints of constitutionalism operates outside the four corners of the document.\textsuperscript{220}

A strict adherence to formalism hand prevents the legitimacy from being threatened as it can claim a separation of law and politics. However, formalism prevents the court from interpreting the law contextually and purposively– increasing the chasm between law and sentiment, illegitimating the court in the eyes of the polity and exacerbating the counter-majoritarian dilemma.\textsuperscript{221} The law is a living tree – dynamic and changing. While this may be

\textsuperscript{218} Winter 1990 \textit{U Pa L Rev} 973.
\textsuperscript{219} Balkin JM "Agreements with hell and other objects of our faith" 1997 \textit{Fordham Law Review} 1703-1738 1704; see also Boyle 1991 \textit{U Col L Rev} 517 where Boyle argues that there is something beneath the professional role that is being actively ignored / subjugated to judgement that is felt worthy of the role.
\textsuperscript{220} Hutchinson 1989 \textit{U Miami L R} at 554: "It is assumed that, if all the facts are known, "the contract" will somehow spring forth and bring the dispute to a demonstrable close...a contract is an idea, not a thing; it is an abstract construction within a socio-historical context. A contract exists in the realm of metaphysics, not in the world of physicality; a written contract is not the contract, but simply evidence of the contract."
\textsuperscript{221} Hutchinson 1989 \textit{U Miami L R} 549. Friedman 2002 \textit{Yale L J} at fn 56 notes the fall-out from the \textit{Lochner} decision that rigidly applied the Constitution without regard to the contextual situation. Such a decision lead to a dissolution in the faith of the court, the birth of realism and that saw a
seen as stepping outside of its formalist mandate to apply the law and not make the law, the law adapting to changing circumstances and modernity is in fact more democratic as the court can interpret the Constitution and legislation in a way that is far more responsive to the needs of society than the original purpose the legislation sought to achieve.  

It is counter-productive for those who agree with the counter-majoritarian nature of the court to advocate deference to the ordinary language as a means of judicial constraint. Accepting that a plain text, autonomous reading of the Constitution was possible, this approach is a short term solution that exacerbates a long-term problem of democratic authority. Davis reasons that “this form of recourse to ordinary language is about closure of debate and deliberation. Over time it will support an attempt to squeeze the political life out of the Constitution.” Michelman uses the phrase "stifling certainties". The preservation of constitutional legitimacy as the nation moves into the future and further away from constitutional justification through original consent cannot be attained by clinging to a faith in originalist positivism. The Constitution will become stagnant, unreflective, out of touch. The freedom afforded judges in the application of the open textured document prevents the document from becoming obsolete. By being able to examine the social and moral standing of the polity through value-based extra-textual interpretative methods, it is hoped that the court can take the needs of the community into account and find in its dichotomous role an ability to balance pragmatism and principle.

The openness of a non-formal interpretative mandate, while potentially indeterminate and thus chancing subjectivity also opens up the space for possibility and accommodation. Dyzenhaus concurs, voicing that the contestable nature of constitutional law provides greater opportunity for democratic engagement and deliberation as to the contested meaning. Such an opposition to a formalist approach to constitutional interpretation is further supported court packing in 1937. Boyle 1991 *U Colo L Rev* 502 notes that this realist critique contrasts sharply against formalist thinking. Seidman *Our unsettled constitution* 42: “The court’s insistence on respect for the constitutional settlement produced a constitutional crisis. Surely, it was the willingness to depart from the settlement, rather than the faithful adherence to it, that lead to a return to civic peace.” *Baylor v University* 241 D-H. Eskridge and Peller 1991 *Mich L Rev* 729; Rostow 1952 *Harv L Rev* 212 and at 198; Bickel *The least dangerous branch* 15 referencing Marshall in *Marbury v Madison*: “that it is a Constitution we are expounding, a living charter, embodying implied as well as expressed powers, adapted to the various crises of human affairs, open to change, capable of growth.” *Davis Democracy and deliberation* 29. See also the response to moral nihilism below. Closure of debate through the application of “certain” interpretations is a mechanism of exclusion. One cannot turn to the ordinary language of the Constitution as a response to the counter-majoritarian dilemma because this feeds the claim of moral nihilism that underpins the cause of the dilemma. Seidman *Our unsettled constitution* 56.

by Tushnet’s view that the counter-majoritarian dilemma is to be seen as a counter-conversational dilemma. Holding onto a formalist meaning of the law ends the conversation. There is domination on the part of the court through its use of formalism and so in order to be more conversational, to counter the counter-majoritarian dilemma, the court must abandon such an approach.\(^{226}\)

And yet this leads to a return to the question of contradictory legitimacy. Legal legitimacy is two-fold – independence, certainty and non-preference through formal judgment, and yet legitimacy through value judgement, allowing decisions to be made within an evolving reality through considerations outside of the text. The concern raised is that a rule-based approach is seen in opposition to a value based-approach. And each of these strategies comes with its own problems that cast doubt on questions of legitimacy when subjected to closer scrutiny. A rule-based approach creates objective overtures. The problem is that a formalist / rule based approach creates what has been described as something akin to a shield. Judges can hide behind this shield and do not have to engage in examination and reason giving through this use of “ad hoc technicism”.\(^{227}\) This is inconsistent with the culture of justification. It could be seen an abandonment of judicial function not to engage in substantive reasoning. Reasoning such as this must have consideration of political, social and institutional factors. Engaging in value judgments is however viewed as a subjective endeavour and thereby value-laden decisions could be seen as “rootless”.\(^{228}\) In this regard, it raises the question as to why a judge’s subjectivity is to have greater decisional force than the subjectivity of public preference. While formalism can lead to certainty, settlement and apparent objectivity, resort to values causes conflict. Despite consensus to values in an abstract form, there will be disagreement about the content, meaning and limitation of these values when they conflict.\(^{229}\)

Admittedly, there can be a point of mediation. The court is not abandoning its role to apply the law, as applying the law, as per the mandate contained in the Constitution, is the commitment to value judgments that engenders an interpretative strategy that is teleological and schematic.\(^{230}\) It is what Cockrell refers to as “soft positivism”.\(^{231}\)

\(^{226}\) Tushnet 2001 Nw U L Rev 907-908.
\(^{227}\) Cockrell 1996 SAJHR 4.
\(^{228}\) Cockrell 1996 SAJHR 16.
\(^{229}\) Ferreira v Levin at para 53: “It is not possible in all circumstances to fully harmonise all the Chapter 3 rights with one another and that in a given case, one right will have to be limited in favour of another.”
\(^{230}\) Baloro v University 241 H.
\(^{231}\) Cockrell 1996 SAJHR 34.
6.4  *Clinging to formalism and why the court can’t*

This Latin phrase translates into “I hold a wolf by the ears”. It depicts a situation where both continuing to hold on and trying to let go, is equally treacherous. This position, holding on to a wolf’s ears, best describes the position of the court.

For judges to accept a formalist working of the law, to accept a “judicial impotence and automatism” does in fact, to follow Bickel’s logic, have the opposite effect of a removal of personal convictions that it endeavours to achieve. Automatism is, according to Bickel, an “illusion”. When judges cling to this illusion, they are emboldened by the correctness of it, but what this confidence leads to is decisions that are unconsidered. There is unawareness on the part of the judicial officer. Within this unaware automatism, personal conviction will hide, unexamined and unnoticed. Accepting this reasoning, the argument could be extended to reveal that awareness and a self-consciousness of the illusory nature of the law would lead to a judge being more vigilant about the possibility of his/her convictions within the decision. When those convictions are acknowledged, there is a greater chance of avoiding the convictions having a directive force. Indeterminacy creates what Seidman calls “epistemic modesty”. He contends that “we might see the plasticity of constitutional law as not a tool for besting our opponents but as a reason for scepticism about our own conclusions.” This reasoning must be imputed into claims of moral nihilism and into claims of majoritarianism.

The counter-majoritarian dilemma will argue that a plain text reading cannot prevent a judge’s predilections being injected into the decision, yet counter-intuitively, acknowledging this possibility, and accepting it, means that it can be prevented. In the awareness of this, the judge will mentality retreat, and allow room for deliberative voices to contest the meaning of the plain text reading. The judge must be brave enough to let go the wolf’s ears for this to happen. Clinging to formalism leaves no room for this engagement. Ironically, his conviction

\[\text{Auribus teneo lupum}^{232}\]

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232 I hold a wolf by the ears.

233 Bickel *The least dangerous branch* 92-93. Bickel notes the inverted nature of those judges who cling to the literal text. It is not that the literal text informs the conviction of the judge but that the conviction of the judge is conveniently located in the literal text. It is thereby not a literal text but a proof text. Du Plessis L “Some of Frank Michelman’s prospects for constitutional interpretation in South Africa – in retrospect” in Botha, van der Walt, van der Walt (eds) *Rights and democracy in a transformative constitution* (Sun Press 2003) 90: “interpreters uncritical unawareness of them, often have a more decisive impact on interpretative outcomes than overt and consciously reasoned assumptions.” See the discussion in Kroeeze 2001 *Stell L Rev* 272 regarding the uncritical usage of values on constitutional interpretation. Davis Democracy and deliberation 42.


235 Seidman *Our unsettled constitution* 59, 75.
tells him that he cannot let go, otherwise his role will be seen as illegitimate as the judge will be viewed as abandoning the authoritative voice of the text.

Bickel further mentions another reason why judges would cling to the illusion of automatism. Bickel notes that the legitimacy of judicial review lies in the distinction between the functions of the judiciary and the legislature. There is a balance between the two spheres, and to achieve that balance, the court must uphold principle and uphold the persistent values of constitutionalism. These are the weights the court has to lay on its side of the scale in the achievement of balance. To accept the dissolution of the illusion is to concede that the law is constructed and not found and this would be to upset the necessary balance and undermine the concrete and absolute nature of the court’s weights. Because once it is realised that the law is a construct, there is nothing preventing that law from being challenged and revised. A constructed law thereby can lead to the presumption that the vague language in the Constitution such as life, dignity and equality, is not meant to be unwavering absolutes that is the court’s duty to uphold but “invitation[s] to contemporary judgment”. While this is congruent with the court echoing an evolving reality as noted above, such an invitation must not be an invitation for the court to abandon the core commitments of the Constitution. The idea of a constructed law therefore becomes a critical challenge to fundamental tenets of constitutionalism and a severing of the ties that would anchor political decisions. So judges continue to hold onto the illusion to maintain their function and maintain the balance between constitutionalism and democracy.

The strategic advantage of formalism prevents claims that the court is being too political and creating law. Yet a deeper examination of formalism, criticism of a plain text reading, and a systemic view of judicial review leads to the rejection of such a strategy toward judicial legitimacy in the face of the counter-majoritarian dilemma. Through evidence presented above, the exclusionary nature of a formalist working of the law must be acknowledged. The obligation of the judiciary toward value-laden judgement that is generous, contextual and rooted in a South African reality must underscore engagement with the text where the law is read as less-exclusionary and offer greater protection through such value judgement. Clinging to formalism means that this obligation cannot be adequately met. In the court’s rush to divorce itself from the appearance of its own subjectivity, to defer to democratic policy or majoritarian processes, it must be questioned whether the court treading lightly could be seen as a timidity of function and a betrayal of its mandate? Viewing the Constitution through this

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236 Bickel The least dangerous branch 85-97.
237 S v Makwanyane at para 200.
societal fabric, it must be questioned how the Constitution can be seen as a memorial, to uphold its reason d’ être and its basic structure doctrine.

The court’s role is to apply the law and remain independent. Does a consideration of the political and contextual implications of its judgment suggest that the court is stepping outside of its purview and is therefore no longer independent? As Roux argues, the endeavour towards the appearance of legal legitimacy is just as necessary as institutional security within the system. The inter-connectedness between the two is also something that cannot be ignored: short-changing the former could jeopardize the latter. But as noted through the examination above, deference to formalism may be counter to that very judicial function, counter-conversational, and what Michelman deems a “flight from responsibility”.

6.5 Institutional constraints apart from formalism

Dworkin is a proponent of interpretation being made in light of the character of the institution of the judiciary. What is understood as that character will be informed by the community. The success of this idea will have to be predicated on a deep understanding on the part of the judiciary of their place and role in the institutional make-up. Once an institutional matrix is set up, all interpretations can be made to accord with that matrix.

Understanding that there is an institutional character that judges must find consistency with in their decisions appreciates that the constraints on judicial power are pervasive, according to Dworkin. These constraints would thereby go above and beyond mechanistic constraints of a rule. While the counter-majoritarian dilemma would argue indeterminacy of black letter law that allows for an injection of judicial preference, Dworkin’s reasoning would counter such freedom and provide constraint even in the absence of black letter law. Thus understanding the character of the game also channels the potential open textured nature of the law.

238 Treatment Action Campaign at para 26 referencing International Covenant on Economic Social and Cultural Rights general comment 3: “If the covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its raison d’être.” Seidman Our unsettled constitution 43 “modern generations cannot easily shift clauses from one category to the other based upon current views as to which should be entrenched.”


240 Michelman 1986 Harv L Rev 15; see also Matiso at 597 I-598 B: “Whether the traditional view was ever correct is debateable, but the danger exists that it will inhibit Judges from doing what they are called upon to do in terms of the Constitution.”

241 Dworkin Taking rights seriously 86-87. Dworkin’s strategy in this regard thus offers a response to the problem with positivism. Davis Democracy and deliberation 27: “to rely on the core/penumbra distinction to preserve the certainty of interpretative result in the core case whilst conceding that the judge would rely on discretion in the rarer, penumbral case. In itself, the concession that ordinary language might run out points to a deeper problem, namely the sustainability of the doctrine of semantic autonomy.”
Pervasive constraints persist even in the workings of judicial discretion and cannot be abandoned or manipulated by a mechanistic interpretative sleight of hand. That the institution is prescribed its character by political history, expectation and convention, further acknowledges a democratic component within Dworkin's construction toward character interpretative strategy. Reinforcing a democratic working, the permissible limits of what shall be taken to be in line with the character will be confined by an ingrained and uncontested meaning of words. Thus while judges may have room to manoeuvre in linking interpreting laws to accord with this character, such link is not disjunctive to societal meaning.

The openness of a non-formalist mandate, while accepting that it is prerequisite for continued democratic input in the law, does not quell the contention that such openness would then translate into the space for judicial preference to be injected into the interpretation of such an open law. The section that follows addresses this issue of judicial preference.

6.6 Upholding the people's will within subjectivity

6.6.1 Turning the spotlight inward on the jurist

This section does not seek to advance the idea of an objective nature of law, but rather to lean towards the argument of subjectivity. At a different level, it seeks to offer an argument toward stabilization and certainty of the law through the understanding that a legal subject’s thought is contingent on societal thought.

This therefore offers a response to the counter-majoritarian dilemma as the notion of indeterminacy is thus disputed. Hutchinson argues that social, political and historical considerations play a role in shaping understanding. This is echoed by New Public Law Scholarship, which notes that preferences cannot be divorced from social context. Preferences are “endogenous to social structure” and are “essentially communitarian ideas”. Indeterminacy of a text is therefore challenged by the idea that the societal narrative shapes the interpretative mandate. Rather than being indeterminate, it provides “possibilities and parameters”. The social context and the shared narrative of society will dictate the

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242 Dworkin Taking rights seriously 102-103.
244 Schlag 1990 Tex L Rev 1643.
245 Hutchinson 1989 U Miami L R 554: “Definitions of law and its component parts therefore are not referential facts, but political claims and ideological appropriations.”
247 Hutchinson 1985 NYU L Rev 861 (emphasis added); Davis Democracy and deliberation 43; Rostow 1952 Harv L Rev 205 referencing the work of Judge Learned Hand. The court must
permissible limits of the formal rule. In the examination of the work of the deconstructionists that follows below, it is hoped to simultaneously achieve two responses to the counter-majoritarian dilemma: the first being proof of a lack of judicial preference driving judicial decisions. The second line of thought involves using the deconstructionist’s argument of what drives judicial decision-making to support the theory that the court is not democratically deficient but rather democratically driven.

Up to this point, the arguments raised have focused on external considerations that must be balanced by the judiciary - considerations that channel and control the judiciary’s decision-making. In this sense, the judge has self-consciously removed himself/ herself, sat outside of and looked in at the moving parts that must be reconciled. This externalization and balancing act presupposes an objective rationality on the part of judge. It must be conceded, however, that externalizing the issue will not immunize the judge from his subjectivity and thus he/she is not immune from the counter-majoritarian dilemma. South Africa does have foundational commitments that could aid in constitutional decision making and much of this research has pointed to the clarity and directive force of those commitments in South African jurisprudence in a counter argument to the counter-majoritarian argument. Diving deeper, however, into the argument of constitutional indeterminacy, Singer notes that these foundational principles such as freedom, equality and dignity may at times be in conflict. The result would, in the end, have to essentially come down to a choice by the judicial officer.

Within in the advocacy of the constraining directives and socio-political awareness utilized in this research; the efficacy of those constraints still comes down to exactly that – awareness. There has to be internalization, an acceptance of the constraints that would precede any manifestation of those constraints as external. The judicial mind is still at the centre. The acceptance of the judicial role as insulated, rule bound and constrained to maintain independence and legitimacy is predicated on the awareness of such an understanding within the internal workings of that judicial officer. Turning to the work of the deconstructionists, what operate within the social environment otherwise it will face questions of illegitimacy. Hand does not deny the existence of constitutional imperatives such as equality and fairness, non-discrimination and non-oppression that guide the court’s adjudicative mandate but argues that these imperatives must be seen in light of the current social environment and applied by the court in the same way the environment sees them. Whether this will take some awareness and self-distancing by the court is disputed by Hutchinson as he argues that the decisions that stem from the judiciaries bosom will be inherently formed by social context.

See Hutchinson 1989 U Miami L R 560; Schlag 1990 Tex L Rev 163; Hutchinson 1985 NYUL Rev 867: “Accordingly, we can only express ourselves intelligibly within a pre-existing framework of conceptual relations and social practices.”

Singer 1984 Yale L J 16.

follows is an examination of *internal considerations*; turning the spotlight inward on the judge, on his/her rationality and his/her preferences.\(^{251}\)

The counter-majoritarian argument would hold that there is nothing but the man, the jurist and his preference. The investigation into the interpretative turn has revealed the subjectivity of understanding and meaning. But this is not the inner most core of the argument. Examining subjectivity reveals a deeper layer. The deconstructionists’ examination of subjectivity reveals that there is no subject. There is not as Derrida phrases it “the full presence, the reassuring foundation, the origin.”\(^{252}\)

### 6.6.2 The source of judicial preference: a deconstructionist view

The deconstructionist’s investigation reveals that the preference, the subject himself and his/her understanding, is a reflection of cultural, historical, societal and political influences.\(^{253}\) Thus the idea of a decentred subject is raised. There is internalization, an introjection of societal meaning and understanding that lends itself to a constructed subjectivity or a socially constructed subject.\(^{254}\)

In this regard, there is a detachment between the judge and meaning. The deconstructionists would argue then that the counter-majoritarian proponents have it backwards: the judge’s preference does not inform the meaning of a text, the text, read in the light of what is understood and accepted by the community at the current time, imbued with a meaning that society has imposed on that text, informs the judge’s preference.\(^{255}\) “The subject is at the mercy of a system of signification that always already precedes her.”\(^{256}\) If the subject were to venture outside of the signifiers of meaning, and thereby outside of society's normative accord, the subject's reasoning would be unintelligible, and within South Africa’s culture of justification, it would be a reasoning that would not be able to stand. Through this reasoning,

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\(^{252}\) Schlag 1989 *Cardozo L Rev* 1643 quoting Derrida.


\(^{255}\) Hutchinson 1985 *NYU L Rev* at 865 “Consequently, meaning is a “kind of knowledge that informs rules rather than follows them.”

and in countering claims of legal nihilism, it is clear that judicial judgment cannot outstrip the democratic accord.\textsuperscript{257}

Dworkin’s theory of law as integrity elevates principle as a guiding and constituting force in constitutional choice, but this theory has to be predicated on a rational "Hercules"\textsuperscript{258} that encompasses the qualities of an outstanding jurist. It is these qualities that a jurist will try to project, but it is also these very qualities from which the capacity for judicial preference springs forth. Returning to the result of the nihilist argument for a moment, the argument would go that any constitutional decision would, in essence, be no more than a constitutional choice.\textsuperscript{259} When building a Hercules and asking a judge to project those qualities, it is imbued in that judge the confidence to make the right choice. After all, he is a rational jurist and a reasonable jurist. But as Winter notes “rational argument is exposed as just a privileging of a perspective.”\textsuperscript{260} The judge, believing himself/herself to be Herculean when making rational argument, becomes a mechanism in which political power is then consolidated and imbued with the symbolic potency of constitutionality. The judge’s own celebrated and sought after rational legal thinking keeps him as a cog in the machine, a mechanism of perpetuation.\textsuperscript{261} This is further reinforced not just in the judge’s mind but in society at large by the narrative formed around an ideal judicial function of reason and application of law beyond politics; that judges are independent, that they will be constrained by legal thought.\textsuperscript{262} There is endeavour towards this narrative, and it is clung onto more fiercely in the face of and in response to the counter majoritarian dilemma. And as it persists, the dominant powers, the moulding forces of the ways of thinking, the scope of possibility within judgement, although invisible, becomes more entrenched. The judge in his/her role is seen, in the words of Hutchinson, not as a "protagonist" but as a "puppet."\textsuperscript{263}

\textsuperscript{257} Michelman 1988 Yale L J 1521.
\textsuperscript{258} Hercules is Dworkin’s reasoned, objectivity, rational adjudicator. Schlag 1991 U Colo L Rev 448; Schlag 1990 Tex L Rev 1667-1668.
\textsuperscript{259} Singer 1984 Yale L J 16.
\textsuperscript{260} Winter 1992 Law & Soc’y Rev 795; Singer 1984 Yale L J 6: “legal reasoning is a way of simultaneously articulating and masking political and moral commitment.” Seidman Our unsettled constitution 6: “decisions based on theories amount to no more than an exercise of raw power masquerading as disinterested reason.” See also Boyle 1991 U Colo L Rev 495. Davis Democracy and deliberation 42 at fn 67: “By emphasising the singular nature of the object, and not recognising that the maintenance of a singular vision simply eliminates all other possibilities, mainstream legal thought proceeds by appropriating or erasing the other, and by maintaining the (hierarchical) differed at the centre of its practice.”
\textsuperscript{261} Michelman 1999 UCLA L Rev 1229-1230.
6.6.3 Community driven meaning

Meaning becomes a question of performative value. The social consequences become more important than the intellectual content and meaning.264 “The authoritative character of these rules is secured by an interpretative community.”265 There is then linkage to the leitmotifs that are accepted by the community, offering judicial direction and thereby not providing an objective meaning in law but bestowing intersubjective meaning.266 This strategy thereby refuses to engage in the objective contest of the counter-majoritarian dilemma by accepting the subjective. What must be emphasised however is that this strategy should be seen as an endeavour toward universalism within such community-driven constitutional meaning. Minority protection cannot be abandoned and as such, there is a danger that community interpretative meaning may be misread as majoritarian interpretation.267 The court needs to make the interconnection between minority and majority and identify the concepts that are held by all, notwithstanding differing conceptions contained therein, when identifying the source of this community-driven meaning. Should this connection between community meaning or community interpretation and judicial interpretation be accepted, it must allow for a universalist conception within such interpretation for minorities not to be overridden.

The need for acceptability of the judicial consequences challenges the idea of indeterminacy and the alleged resulting judicial whim. Singer notes the key role that reputation and legal culture play as a determinist force. He notes that judges are constrained by legal culture268 and the experiential reality.269 The judge not only unconsciously270 frames his reasoning in accordance with the societal narrative but consciously operates in a way that the consequences of his judgments will render his professional reputation acceptable. Being

265 Schlag 1990 Tex L Rev 1996; Dworkin Taking rights seriously 146: “No political principle establishing rights can be sound, whatever abstract arguments might be made in its favour, unless it meets the test of social acceptance in the long run…the supreme court cannot be right in its views…if the community in the end will not be persuaded to recognise these rights”; Eskridge and Peller 1991 Mich L Rev 745.
266 Schlag 1990 Tex L Rev 1669.
269 Seidman Our unsettled constitution 21. See also Rawls A theory of justice 35; S v Makwanyane at para 177: “…value judgment that can easily become entangled with or be influenced by one's own moral attitude and feelings. Judgments of that order must often be made by a court of law, however, whose training and experience warns them against the trap of undue subjectivity.”
270 Dworkin Taking rights seriously 104. Dworkin acknowledges this unconscious professional grooming toward determinacy in his reasoning regarding the construction of the law to be in line with the character of the constitutional enterprise. Such construction will not be such a calculated and externalized thinking process, the understanding of the character of the constitutional game would already have been ingrained during the course of the judge’s career and he/she will work within that understanding without conscious examination.
conditioned to what is an acceptable performance and intertwining the professional ego within that matrix creates a predictability of judicial action.271

Accepting that societal signifiers mould subjectivity, judicial conviction is arguably the greatest mechanism and representation of our own self-rule. Allowing judicial conviction means that the people are being self-governing.272

6. 7  Nihilism and the court’s response: facilitating a democratic accord and working with indeterminacy.

Nihilism is the result of interpretative indeterminacy where no interpretative view can claim greater validity than another. As a result, indeterminacy creates a loss of meaning. Therefore, any interpretation of the text can be challenged as merely personal preference. Nihilism is the result of lack of objectivity in the law.273

6.7.1  The counter-majoritarian response to nihilism

In the absence of constitutional law that is determinate, two responses are proposed. The first is that the issue becomes a decision for majoritarian politics.274 This is the only way that remains to make a decision. This must be challenged on two accounts. Firstly, it is to be governed by a government of men, but not a government of laws. Secondly, the court deferring to majority rule because of constitutional choice is making a constitutional choice. It is a choice made by the judge that is driven by his morality. Deference does not divorce choice or morality. As Dworkin notes, the judge does not set aside his morality in deference to the political but rather the composition of his judicial philosophy is such that he assess that on the issue at hand, the issue must be remitted to the political.275 There is judgment even when

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271  Kroeze 2013 PER 46: “This is what a discipline does: It teaches you the acceptable methodology for your field. It disciplines you so that your work is acceptable to others in your discipline. It gives you the matrix to be able to produce legitimate research results.” Kroeze 2001 Stell L Rev 266-267. Seidman Our unsettled constitution 21: “Once a background culture has been specified, it is simply not true that actor’s feel completely unconstrained when they follow rules.”

272  Michelman 1986 Harv L R 16 -17.


274  Michelman 1988 Yale L J 1499: “it means merely that if a determination of law can only, at bottom, be a matter of acceding to someone’s preferences, then the people should be ruled by the sum of their own preferences (as mediated by the system of representation) rather than by the preferences of a few judges.” See Dyzenhaus 1991 SAJHR 40 how this recourse to majority rule brings with it democratic inconsistencies and an undermining of the purpose of democracy. Steele Commager Majority rule and minority rights 9.

275  Dworkin Taking rights seriously 124.
there is a decision not to judge; determination made even in response to indeterminacy. The judge is using his role to abandon his role and abandon his obligation to protect those who cannot be protected through a government of men and not of laws. The concern is that once a determination is made, it immediately defines the space. The determination to defer to the political is to make that decision, imbued with constitutional potency that the issue at hand and all similar issues that emerge in the future belong in the public arena and are subject to public violence and coercion in its enforcement.

The second response argues that because no such determination can be made, the issue must fall into the realm of the individual, with no constraining and coercive forces upon it.276

Understanding these challenges leads therefore to a need to create a judicial strategy in response to nihilism, accepting in the alternative the need to uphold judicial function within the delicate democratic balance despite a contested authoritative voice of the court. The outlining of such judicial strategy reveals that, paradoxically, rather than abdicating to majority rule in response, constitutional indeterminacy creates an even greater need for the role of the court.

6.7.2 The judicial strategy of working within nihilism

New public law scholarship lays out the characteristics of its scholarship and its framework is especially noteworthy for a judiciary operating in a post-modern world, in a diverse and historically wounded country with competing and equally justifiable moralities. This is a framework that can offer a response to nihilism. Contrary to the "anything goes" belief, the awareness of nihilism results in a constraining directive removed of moral choice. The textual uncertainty can lead to a court that has a normative focus that is rooted in a contextual reality and is aware of the potential for growth and extrapolation of values. When arguments and interpretations may reach the point of deadlock, what that underscores is an acknowledgment of difference and the acknowledgment of a competing version.277

To accept a case of nihilism is to accept otherness. Going forward, majority rule cannot be the solution because that is, in itself, dismissive, and nihilism, that led to a defeatist majority rule end result, is exactly that- defeating otherness that was previously accepted earlier on in the same argument. The logical response to nihilism must therefore be a balancing of visions; an accommodation, trying in some way to bring the extremes into the centre. The court, of all

276 Seidman Our unsettled constitution 32. Michelman 1999 UCLA L Rev 1244; Eskridge and Peller 1991 Mich L Rev 751; S v Lawrence at para 140: “If ever there was a case which required close contextual rather than purely abstract analysis, it was this one.”
the institutions, is the most suited to achieve such a balance precisely because of the unstable and multiple considerations that it must undertake.

The need for balance creates a multifaceted directive that suggests accommodation, openness and a non-absolutist conception of law\(^{278}\) that denies certainty and yet continues to keep the conversation going, continues to search despite the ‘anything goes’ understanding of moral nihilism. It is a conception that resonates with democratic symbiosis.

One way for the court to avoid placing itself in the middle of morally ambiguous issues is to try to base its judgments on the **particularity of a lower law** or a focus on the particularity of the case at hand rather than areas of constitutional generality, as a way of providing stability in areas where there is great "social disagreement and pluralism."\(^{279}\) It is a strategy on the part of the court that avoids the necessity of choice.\(^{280}\) It is a strategy that prevents the court from having to make a singular constitutional definition which would thereby, going forward, have an under-inclusive or over-inclusive scope of the right. This is a strategy of minimalism which Currie notes the South Africa court’s commitment to in its decision making. The focus on particularity and narrowly applicable scope renders issues resolved for the case at hand but undecided for future contestation. Currie notes that minimalism is a legal strategy but does have political relevance in that it stays judicial legitimacy as the court refrains from decisions of finality. The ability for contest and the re-drawing of the constitutional lines and exceptions continues to exist.\(^{281}\) What this approach does is allow for conflicting interests, both irreconcilable and yet both constitutionally protected, to exist in the same space, without destroying one another. Both are able to exist without the court having to construct some hierarchical value system to resolve competing interests. This is a focus on community building, a focus that is crucial in the South African context.

\(^{278}\) Froneman “The impossibility of constitutional democracy” 103 referencing Michelman. See the unsettled theory in Seidman *Our unsettled constitution* 8.

\(^{279}\) Currie 1999 *SAJHR* 149; Du Plessis 2000 *Stell L Rev* 388. This strategy has been seen in cases where customary law is challenged as infringing the Bill of Rights. In the case of *Mahala v Nkombombini* 2006 (5) SA 524 (SE), instead of having to delve into the constitutionality of male primogeniture, the court side stepped the issue of constitutionality by deciding the case on the facts of the matter and according to the wishes of the deceased. In this case of *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) involving a women’s succession to leadership, the court resolved the matter not through raising questions of equality or discrimination but on the grounds that in the facts of the case, the community had accepted the woman as leader. See also the discussion of *Gay Rights Coalition of Georgetown University Law Centre v Georgetown University* 536 A.2d in Eskridge and Peller 1991 *Mich L Rev* 752-761. The case pitted a Non-Discrimination Human Rights Act against religious freedom protected by the First Amendment. The dissenting Judge advocated accommodation of interests rather than a win/lose scenario. It could be done by reframing the issue to distinguish between recognition and endorsement of gay rights on the part of the religious institution. Framing the issue this way, the non-discrimination act that protected gays and lesbians could exist in the same space as first amendment religious freedom.

\(^{280}\) See Singer 1984 *Yale L J* 1-70.

\(^{281}\) See Currie 1999 *SAJHR* 147-159; *Christian Education* at para 27.
The court should not make possibility-killing judgments that would create winners and losers, but provide openness and not closure. The court must adopt a jurisgenerative approach - an approach that must create in its judgement a space where both competing interests can be protected in such a manner that, in time, these interests can organically grow towards each other and form part of the normative framework.\textsuperscript{282}

It must be questioned, however, in the South African context where minority rights are clearly and constitutionally delineated whether the court would be justified in treading lightly when it came to protection of those rights and the non-discrimination and non-oppression of minority groups. The court, in its accommodation, must not venture into abdication.

The view that nihilism translates into anarchy and thus judicial whim when it comes to adjudication is contested. The understanding of moral nihilism as equally worthy viewpoints suggests that the judge is vastly removed from his preferences because he/she must then consider all these competing viewpoints. The judge’s preference, rather than being the overriding determinist force, becomes merely one out of many preferences.\textsuperscript{283} To this end, moral nihilism should be seen as representation. The lack of an objective nature of law and the idea of moral nihilism means that “representation is inevitably interpretation.”\textsuperscript{284} The vantage points of all affected must be considered. This is congruent with the Constitution and its broadened scope of section 38 \textit{locus standi} provisions. To create agreement out of such diversity, what is just can only be determined when all who are affected by the decision are part of that decision.\textsuperscript{285}

While objectivity may be met with doubt in a post-modern world, these disparate forces coming together can create \textit{inter-subjectivity}. Emerging out of a procedural method, inter-subjectivity can result in objective principles, albeit vague and generalized.\textsuperscript{286} Going forward towards a more concrete application of those generalized principles, Davis motivates that this inter-subjectivity is the correct response to the deeply ingrained inarticulate premises of a judge. The tendency, in response to such subjectivity, is to try divorce oneself, to try and ignore all those facets that form preference. The reaction should not be a decrease of factors but an increase; to acknowledge otherness and expose oneself to it.


\textsuperscript{283} Bickel \textit{The least dangerous branch} 83: “Moved not ‘soley by logic and debate’ but by an introspection, by reflection, by reason, of which logic is a tool and which debate can induce, judges have surrendered what seemed to others, and above all themselves “views [held] with absolute convictions.”

\textsuperscript{284} Eskridge and Peller 1991 \textit{Mich L Rev} 778.

\textsuperscript{285} Michelman 1999 \textit{UCLA L Rev} 1232.

\textsuperscript{286} Singer 1984 \textit{Yale L J} 31.

\textsuperscript{286} Michelman 1999 \textit{UCLA L Rev} 1252.
Alive to the result of nihilism and the exposure of viewpoints that must proceed from it, the court’s facilitation of dialogue emerges as crucial. Michelman advocates “pragmatic, normative dialogue.” The pragmatic normative dialogue that Michelman speaks of is present in section 36 of the Constitution, in that section 36 demands that the court consider all aspects. The court must consider the nature, extent, importance, and relationship of competing claims and how it all relates to the structure of an open and democratic South Africa based on human dignity, equality and freedom. Michelman’s pragmatic dialogue presupposes a plurality of ideas and competing claims as well as deliberation; a reasoning that is consistent with more complete definitions of democracy mentioned above.

6.7.3 The problem with representation

In the search for a “universalizing standard of justice” that goes beyond preference, inter-subjective investigation is therefore dependent on openness and representation. But must this representation necessarily be part of the judicial composition? Michelman advocates that a court should focus on the legal and not the moral questions as a mechanism of evasion; evading moral contestation and thereby frustrating the counter-majoritarian viewpoints emerging out of particular decisions. He notes that as a result of this, a bench compiled to be representative may not be ideal. The representative, aware of who he/she represents, will be beholden to that representative group and would have to fight for the moral argument and substantive value choice of that group. Post-modernism, equality, moral nihilism and hermeneutics all point to a moral battle in the court that cannot be won. How then can representation sit comfortably with a post-modern working of the court if representation is seen as both necessary and incompatible?

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287 News 24 “Democracy the victim of Parliamentary chaos – analysts” http://www.news24.com/SouthAfrica/Politics/Democracy-the-victim-of-Parliament-chaos-analysts-20150213 (date assessed 24/07/2015). Hutchinson 1985 NYUL Rev 873: “The most urgent undertaking of theorizing is to contribute to the democratization of this hermeneutical struggle. It can do this by chronicling the historical operation of power and enabling us to lessen “the pervasive presence of the status quo in our thoughts, hopes and actions.”


289 The Constitution. See discussion of practical application of section 36 in Prince below.


292 Michelman 1999 UCLA L Rev 1252; Rickard “The certification of the constitution of South Africa” 226. Rickard notes that the appointment of justices to the Constitutional Court was made with a move away from South Africa’s apartheid history in mind. The philosophies and ideologies of the justices appointed to the bench were, as a result, “homogenous in its political views.”
Michelman argues that an "empathetically connected judiciary" not a representative judiciary, can adequately meet the representation requirement, indeed even more so because the detachment from oneself in order to be empathetically connected can result in a degree of objectivity. New Public Law offers a similar idea to these necessary components of dialogue and empathy in the form of "perspectivalism" in that one should be attuned to the perspectives of others. It is reasoned that the holding together of a myriad of subjective viewpoints can, out of that amalgamation, create objectivity\textsuperscript{293} and sit more comfortably with democratic theory. In as much, perspectivalism thereby upholds the worthiness of minority rights within the democratic conversation.

\textsuperscript{293} Eskridge and Peller 1991 \textit{Mich L Rev} 786.
CHAPTER 7

ANALYSIS OF THE COURT’S APPROACH TO MINORITY RIGHTS

7.1 National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC)

That the Constitution has entrenched minority rights despite a lack of public support for those rights can be attributed to the success of minority advocacy groups linking minority rights to the meta-narratives of non-discrimination and non-oppression at the time of the Constitution’s formation. The reaction to apartheid created what de Vos calls a “master frame or a master narrative” that minority groups could tap into for justification of their cause. Gay rights groups, including The National Coalition for Gay and Lesbian Equality, successfully linked the struggle for racial freedom and non-discrimination to sexual orientation, freedom and non-discrimination. Tapping into the master narrative was in this sense finding and identifying the abstract value. In addition, this cannot be viewed in isolation from the political climate from which the consolidation of gay rights emerged. Cameron notes the support that gay rights garnered from political institutions and role-players combined with the force of effective lobbying power toward concretisation of the right. Thus these minority rights, prima facie absent public support, derive from an extrapolation of history and institutional support. This is supported by Tushnet’s view that “the court’s intervention fails when it attempts to act on a specific and important issue without substantial pre-existing support on that issue from politically organized forces.”

As a result, gay rights were able to be included in section 9(3) of the Constitution. A refusal to include these rights in the Constitution would have been a refusal to oppose discrimination and oppression (the recognised pattern), the very foundation on which the democratic South Africa is built. The extension of these themes forms the bedrock of constitutional adjudication.

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294 De Vos 2007 SAJHR 436; Schlag 1991 U Colo L Rev 443: “We can also think of the various forms as appropriating and reapropriating each other for their own ends.”
295 Cameron 1993 SALJ 465; ANC Draft Bill of Rights – preliminary revised version (1993). See National Coalition at para 6 where, despite being a respondent, the Minister of Justice made no challenge and stated prior to the final judgment that the state would accept the court’s decisions.
296 The ANC’s institutional support at the time of the constitutional formation included other areas that did not have public support such as the prohibition of the death penalty and issues around abortion.
297 Tushnet 2001 Nw U L R 912 (emphasis added).
298 Section 9(3): “The state may not discriminate directly or indirectly against anyone on one or more grounds, including…sexual orientation.”
The right to sexual orientation falls under the right to equality whereas differentiation based on sexual orientation constitutes presumptively unfair discrimination. As a result of such a clearly enumerated constitutional protection, a limitation of such a right would have to be held justifiable under section 36 of the Constitution. In the case at hand, where applicants challenged the criminal offence of sodomy as unconstitutional, Ackerman J noted no such rational connection that would justify the limitation of the right. A limitation of a right could be limited when such right would cause harm to others and their rights or harm to broader society. The court held that there was no clear purpose and no clear harm caused that would justify homosexual activity as criminal other than the “moral or religious views of a section of society.” The court held that such views cannot stand as a legitimate purpose for limitation.

While applicants plead the right to privacy in the alternative, the court viewed such a claim as problematic to the broader scope of gay rights within society. Viewing the issue solely as a right to privacy in a sense reinforces that homosexuality shall be tolerated so long as it is hidden. It does nothing to eliminate the sense of stigma and the idea of homosexuals as deviant. It ignores the broader messaging of society that affects a gay person’s psyche, affecting all areas of their lives and contributing to alienation. It reinforces exclusion that would prevent those who are perceived as different from full citizen engagement.

There is thus a *prima facie* view that the court has rejected moral views, norms and majoritarian will as directive. However this cannot be concluded to be thereby anti-democratic. The under-current of the court’s reasoning suggests that the court’s view of democracy, and the court’s role in such a regard, is one that supports the idea of a facilitative framework towards full and active citizenship. Security of the person is the prerequisite for engagement, and this security must extend beyond the privacy of the bedroom. Put differently, difference viewed as deviant-ness and thus exclusion by a statistically normative community is being read by the court as an impediment to democratic functioning. In terms of the place for minority rights in South Africa, the court was cognisant of the interconnection,

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299 The Constitution section 9(3).
300 *National Coalition* at para 26. See also *Bowers v Hardwick*.
301 *National Coalition* at para 37.
302 *National Coalition* at para 134: Sachs J noting “at the very least, what is statistically normal ceases to be the basis for establishing what is legally normative.”
303 *National Coalition* at para 107: “At a practical and symbolic level, it is about the status. Moral citizenship and the sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.”
highlighting that celebrating difference must be achieved if the success of the constitutional project is to succeed in South Africa.\textsuperscript{304}

To this end, as a point of interconnection, the court turned to the concept of dignity. Dignity, as viewed by the court, must be determined through placing oneself in the position of the other, looking from another’s perspective and viewing the issue contextually.\textsuperscript{305} Thus the concept of dignity, a concept that finds itself in the very centre of jurisprudential reasoning in South Africa, requires both an abandonment of abstract law and a double-consciousness on the part of the judiciary. This is congruent with the results of nihilism advocated in this research. Dignity thus requires both a distancing and a necessary human subjective element that can only be achieved through non-mechanistic judicial workings.

The court did however endeavour to justify its findings beyond the text of the Constitution, citing the changing attitudes of society toward gay rights and the international, social and jurisprudential growing toleration of the issue.\textsuperscript{306} The court went on to state that in the absence of an express provision of sexual orientation, the court would still be in a position to find the way it did, arguing that the United States Supreme Court is imbued with the power to decide whether an issue falls within constitutional protection by consideration of the issue’s “nature” despite not being “readily identifiable in the Constitution's text.”\textsuperscript{307} This reinforces what has been mentioned in the course of this research in regards to interpretation being made in line with a constitutional character and an understanding of an overall purpose of the enterprise and not just a text-based interpretation. Such an interpretative method would circumvent any formalist interpretative problems raised by the counter-majoritarian dilemma toward the claim of judicial illegitimacy. The court is still being bound by the Constitution through such an approach. The court then points to a number of foreign courts who have decriminalized sodomy despite not having an express provision enumerating such a specific right to sexual orientation in their constitutions.\textsuperscript{308}

Indeed this creates a large area for the judiciary to play, yet the acknowledgement by the court of history suggests a constraining and channelled directive,\textsuperscript{309} in addition to the court’s assertion that this judgment is reflective of an “evolving social reality”\textsuperscript{310} suggesting that the court is not the imposer of a will but rather the receiver of such a will that is already existing outside the court.

\textsuperscript{304} National Coalition Sachs para 133,135.
\textsuperscript{305} National Coalition at para 112 and at fn 124 -125.
\textsuperscript{306} National Coalition at para 38.
\textsuperscript{307} National Coalition at para 55.
\textsuperscript{308} National Coalition at para 57.
\textsuperscript{309} National Coalition at para 127.
\textsuperscript{310} National Coalition at para 130: “the law catches up with an evolving social reality”; S v Williams 1995 (3) SA 632 (CC) para 59.
Toward the end of his majority opinion, Ackerman J equivocates, noting that social standards can prevail and society can legislate against what it finds offensive, so long as it is in line with the Constitution. It is clear that such a passage is to reassure the people who would not agree with this judgement of their power in the political sphere and the court’s awareness and respect of such power. What is not clear is whether such a reading of what is in line with the Constitution would entail a text-based express anti-discrimination provision or a broader reading of implicit protection that Ackerman advocates earlier in his judgment. The inclination is to the former, a return to a faith in positivism at the tail end of a remarkably progressive judgment; a move that reinforces the judiciary’s self-consciousness, despite its boldness. As Ackerman notes, the text-based unfair discrimination provisions allow the court to uphold fundamental rights while not being in danger of “over-intrusive judicial intervention.”311 For all the talk of value judgements, Ackerman’s equivocation leads to a subjunctive reasoning that, without the clearly enumerated sexual orientation provision in the Constitution, and without the force of lobbying power, the court may have found differently.

7.2 Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 794 (CC)

The applicant in this case was a lawyer who was denied admittance to the Law Society due to his insistence that he has smoked, and would continue to smoke, Cannabis as part of his Rastafarian faith. Cannabis is a banned substance under statutory law. Section 15 and section 31 of the Constitution provide religious protections. And under such an enumerated right of freedom of religion, any limitation of the right would have to be reasonable and justifiable in an open and democratic society based on freedom, equality and dignity under the limitation clause of section 36.

The court in this case made great strides to emphasise the importance of constitutional protections, and the court’s role in that protection, to those that are marginalized and vulnerable and who cannot find relief through legislative channels due to their lack of political power.312 The court reiterates that difference, diversity and dignity is a cornerstone of the constitutional enterprise,313 going on to cite that the beliefs should not be scrutinized or belief holder’s within minority religions be made to prove their faith or belief.314 Sachs J’s minority judgment, unequivocal in the uplifting of minority rights, the accommodation of difference and

311 National Coalition at para 123.
312 Prince at para 112.
313 Prince at para 49-51.
314 Prince at para 42,170.
the necessary limitation of majoritarian mind-sets when operating under a Supreme Constitution, still endeavours to tie such a belief to connections outside of the Constitution. He evokes historical African and traditional evidence of cannabis for religious purposes.\textsuperscript{315}

The clearly enumerated constitutional right entails a move to section 36 examinations which brings in factors that would not be possible through a formalist reading. The balancing that takes place under this section invokes the need for a contextual analysis. Sachs J, in his dissenting judgment, elaborates stating that balancing

\ldots has always to be done in the context of a lived and experienced, historical, sociological and imaginative reality. Even if for the purposes of making it’s judgment the court is obliged to classify issues in conceptual terms and abstract itself from such reality, it functions with materials drawn from that reality.\textsuperscript{316}

This is certainly consistent with the theoretical position espoused in this research regarding the source of judgment within interpretative indeterminacy. Within the balancing appraisal, the court has to consider reasonableness and proportionality, creating far more judicial work than a text-based reading of section 9(3) non-discrimination provisions. But it also opens up the space for a much wider examination of social parameters being considered within the judgment. It allows for the people’s will, both minority and majority, to be heard. Echoing the deconstructionist song, Sachs assesses

that in the present matter, history, imagination, and mind-set play a particularly significant role, especially with regard to the weight to be given to the various factors in the scales.\textsuperscript{317}

This reveals that social understanding and democratic impetus will have a solid weight when such section 36 considerations are balanced. Sachs notes that in “the extreme positions of the…irresistible force of democracy and general law enforcement against the immovable object of constitutionalism and protection of fundamental rights” section 36 serves as a point of mediation, pulling each pole closer to a more balanced centre. Section 36 appraisals by the court does not allow for dismissal of majoritarian or legislative will even in the face of clear constitutional protections of the constitutional right. Such injection of majoritarian or community concerns in relation to minority rights comes through the work of the court.

Chaskalson CJ for the majority believed that the issuing of permits for the excepted use of cannabis by the Executive would lead to an examination of who constitutes a “bona fide Rastafari” and such an inquisition into one’s faith would not be reconcilable with freedom of religion.\textsuperscript{318} Thus the court, paradoxically, held that in denying a part of the expression of

\textsuperscript{315} Prince at para 153.
\textsuperscript{316} Prince at para 151.
\textsuperscript{317} Prince at para 151.
\textsuperscript{318} Prince at para 138.
Rastafari religion, the court would be upholding religious freedom in a broader sense. Thus the court, in its majority judgment that justified the limitation of the right, still sought to uphold its function.

The court expressly notes the lack of institutional support, lobbying and political organization\(^{319}\) and it is here, where this research makes the contention that it is for this reason that a judgment in favour of the minority right was not successful. It has been mentioned above in the course of this research the need for a pre-existing infrastructure for any minority rights claim to be upheld in the court, despite the court’s assertion of its role to protect the marginalized.\(^{320}\) This case provides a clear example of the point – that the court will not outstrip the social infrastructure and discourse but rather it will echo what is external to it.\(^{321}\) The contention is made therefore that had there been a more politically astute selecting of the applicant that would be the face of the Rastafarian cause, the decision may have gone the other way.\(^{322}\) The Court itself noted so when it claimed that the problem was the individual nature of the applicant. Had the applicant been the Houses of Rastafari and the priests from those Houses, the findings in terms of cannabis permits may have been different.\(^{323}\)

7.3 Minister of Health and Others v Treatment Action Campaign and Others (no 2) 2002 (5) SA 721 (CC)

The case of Treatment Action Campaign involved whether the government had failed in its constitutional obligation to make readily available Nevirapine, a drug to prevent mother to child transmission of HIV Aids. The constitutional obligation to assess only the reasonableness of government policy provides a clear example of a separation of powers case where the court should be deferential when it comes to matters of government policy.\(^{324}\) The court however did not accept that such deference would render socio-economic rights

\(^{319}\) Prince at para 135-136.

\(^{320}\) Prince at para 160 Sachs dissenting: “These are well-organised religions, capable of mounting strong lobbies and in a position materially to affect the outcome of elections. They are not driven to seek constitutional protection for the court." Sachs’ reasoning in this regard implies that the court must protect the Rastafarian cause precisely because of its lack of power.

\(^{321}\) Prince at para 158 Sachs dissenting: “The difference of the treatment lay not in the nature of the activity or exemption, but in the status of religious groups involved.”

\(^{322}\) It must be questioned whether a lawyer applying to the law society was the best applicant? The court’s obligation to uphold the law and the integrity of the legal system as a whole, including legal professionals, could not sit well with an applicant, who would become part of that system, claiming that he would continue to break the law.

\(^{323}\) Prince at para 142.

\(^{324}\) Treatment Action Campaign at para 22.
non-justiciable from the start. The Constitution provides a core-minimum obligation toward the progressive realisation of the right, within available means (the idea of a core minimum having its origins in the United Nations). Thus despite policy implications that are not the court’s purview in terms of the separation of powers, what is justiciable is the assessment of whether the constitutional obligations on the part of the State are being performed in a reasonable manner. The reasonability requirement, as contained in the Constitution therefore does place the policy issue in the court’s sphere. As the court noted “there are no bright lines that separate the roles.” It does, however, not permit the court from imposing its own idea of policy direction but merely assessing whether the policy as it stands is reasonable or not reasonable. It is not, in this regard, a usurping of function.

Despite such assertion of the court’s power and constitutional obligation to decide the matter, the court displayed a self-awareness of the legislative and judicial parameters and need for circumspection.

The start of the judgment suggests the court has the right to be interventionist and to dictate to the legislature, especially on an issue that involves the protection of the weak and vulnerable (no more clear an example than an infant at risk to a life-threatening disease). But further on in the judgment, the court specifically addresses the role of the court in such an instance. The court acknowledges the respect for the separation of powers through reference to a litany of cases before re-iterating its duty to uphold the Constitution in terms of section 172. It notes that it cannot negate its foundational duty, nor turn its back on its primary function: to uphold the values underlying the Constitution.

The court, in the need to justify that such a granting of power stems not merely through its own interpretation, turns to the foreign jurisprudence of the United States, India, Germany, Canada and the United Kingdom; all of which support judicial encroachment into the realm of legislative policy.

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326 Treatment Action Campaign at para 88.
328 Treatment Action Campaign at para 38: “the Constitution contemplates rather a restrained and focus role for the courts.” See also at para 38 the court’s acknowledgment of budgetary implications of socio-economic rights.
329 Treatment Action Campaign at para 96.
330 Treatment Action Campaign at para 98.
331 Treatment Action Campaign at para 101.
333 Treatment Action Campaign at para 107.
336 Treatment Action Campaign at para 110.
337 Treatment Action Campaign at para 111.
The *Treatment Action Campaign* judgment is an ebb and flow of retreating and assertiveness. Despite the justiciability of policy, the court noted the necessity of a narrow scope of judgment. The judgment should not be of such a scope so as to arrest future policy development.\(^{338}\) Beyond the constitutional infringement of the current matter, the legislature and executive are still, democratically speaking, the sphere that undertakes and has a breadth in policy matters. And yet, the court appreciates that from a broad standpoint, policy must be also be transparent and open\(^{339}\) – a necessary component of reasonableness of which is in the court’s purview to assess.

The assertive reading of the Constitution is diluted somewhat in the court’s recognition that the court feels comfortable making such a judgment against the policy because, at the time of the court hearing the appeal, the “requisite political will is [now] present” to change the policy in a direction that is more consistent with its constitutional mandate.\(^{340}\) This political will was in addition to the court learning of available funding for HIV prevention\(^{341}\) – thus the budgetary implications as a counter to socio-economic justiciability of rights does not factor. This once again reveals that the court will not step beyond the social and political reality. It does raise the question whether the court would have found differently had the requisite political will not been present?

In an effort to prevent an exacerbating of the tension within a constitutional democracy, and the potential for government to feel that the court order constitutes an intrusion into the domain which the government believes it is its own, the court belies such fears remarking “government has always respected and executed orders of this court.”\(^{342}\)

Finally, a noteworthy point about the *Treatment Action Campaign* judgment is the unanimity of the decision by the court. The judgement being written by “the court” and not an individual judge writing the majority opinion, suggests a consolidated force.\(^{343}\) Such a strategy undercuts the potential for criticism of the judgment though highlighting apparent interpretative discord within the court itself. Such unanimity is a crucial weapon within the contestation of the counter-majoritarian dilemma – particularly in a judgment that overrides majoritarian government policy.

\(^{338}\) *Treatment Action Campaign* at para 114 and at para 127 regarding the governments right to adapt the current policy under adjudication. See discussion of particularist / minimalist decision making above. *Ferreira v Levin* at para 250: “We should ever be mindful of the fact that the review powers of this Court are not concerned with maintaining good government, or correcting governmental error, but with keeping government within constitutional limits.”

\(^{339}\) *Treatment Action Campaign* at para 123.

\(^{340}\) *Treatment Action Campaign* at para 119.

\(^{341}\) *Treatment Action Campaign* at para 120.

\(^{342}\) *Treatment Action Campaign* at para 129.

\(^{343}\) *Treatment Action Campaign* at para 81.
The case of *Christian Education v Minister of Education* saw the South African Schools Act 84 of 1996 (hereinafter referred to as the Schools Act) that would abolish corporal punishment in schools challenged as unconstitutional for a lack of religious exception for religious based independent schools. The case provides an example of competing constitutional values. The judgement in examination points to the factors that the court considers and the guidelines it follows in achieving the balance that must be sought in a case where both sides argue the constitutionality of their claim. The court endeavours to reconcile the competing claims into one coherent reading of the Constitution that allows each claim to be as generously upheld as possible. There is no evidence within a reading of this case, to suggest that constitutional values in collision translate into a resolution by judicial choice.

On the one hand, as raised by the applicants, the right to religious liberty was sought through application of sections 14, 15, 29, 30 and 31 of the Constitution. The respondent for the State on the other hand, raised a constitutional defence for the lack of religious exception to corporal punishment in the Schools Act based the rights of the child, equality and dignity (sections 10, 12 and 28 of the Constitution).  

The court noted the wide support received from various educational bodies, representatives and unions in the drafting of the Schools Act, in addition to noting participation and consultation in the consideration of the Applicants submission to parliament during the drafting process.  

In its judgment the court once again acknowledged the role that history plays as a directive force, citing the violence of the past as well as the country's international obligations and the international trends in other democratic countries that would sway the balance in favour of the Respondent.  

While the application was rejected, Sachs J, writing for the majority, continued to uphold the notion of respect for difference and the refusal to have belief systems subsumed to the general norm. The court upheld the need for plurality as essential to democratic functioning.
and the need for the court to protect diverse smaller groups in the face of majoritarianism. Through section 36 analysis performed by the court, there is still an exposition by the court of that which may be ultimately limited. This exposition means that the values continue to exist in within constitutional discourse - that can be drawn on in defence of future minority rights cases. The court in this sense was still able to espouse the protection of all constitutional values and thereby still uphold its judicial function, even though in the specific instance, there had to be some limitation in the final adjudication. Once the court does make a pronouncement it closes down that space, it justifies and solidifies considerations that would lead to future curtailment – it makes a constitutional choice. In light of the culture of justification, the court would still have to raise the principles and the nature and importance of the right that, notwithstanding limitation, it has considered in the course of its adjudication. Thus is can still uphold principle, albeit less declarative and more educational.

Alive to these difficulties of closing down the space or allowing future contestation, the court underscored the practice of minimalism advocated for in the course of this research. In the areas of colliding constitutional values, the court voiced support for a narrow and prudent interpretation that would allow the values, beyond the particular instance, to not be subjected to a definitive reading that would close down the space for future application of the value.

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348 Bickel The least dangerous branch 70-72.
349 Christian Education at para 27.
It was Thomas Jefferson who suggested that the Constitution be rewritten every 19 years so that it can remain in line with the times and so an originalist interpretation will not be needed and there will not be the untenable tension between constitutionalism and democracy. Interestingly, South Africa is coming up to the 20 year mark. Jefferson’s timing seems to be prophetic when the South African jurisprudential context is explored. Never before has the nation faced bigger threats to the Constitution, and to the judiciary that would apply it, than at this time. The counter-majoritarian dilemma has become the weapon of choice. Tactical political assaults on the court, hiding under the guise of majoritarianism and democracy, threaten judicial independence. Subsumed in this threat is a risk to minority protections ensured by an independent judiciary.

It is noted that understanding the tension between constitutionalism and democracy at once appreciates the necessity of the tension and prevents the tension from boiling over into constitutional crisis. Therefore, this research has deployed two lines of argument in an effort to calm the waters but not to resolve the tension.

The first line of argument has been a recasting of democracy to reveal that the constitutional function performed by the court is consistent with a broader understanding of democracy. The second line of argument is that judicial interpretation, and to a degree, judicial subjectivity, is always working within a democratic mandate that frames, guides and constrains the bounds of judicial discretion. This research has argued that the people’s will is, and continues to be, supported through the Constitution and through the interpretation and adjudication of the Constitution by the judiciary. The judiciary must be seen therefore, not as a democratically deviant institution but as a democracy fostering and a democracy protecting institution. The court has shown evidence of the delicate balancing act it has performed and the respect and circumspection shown for democracy in its limited sense while still endeavouring to uphold its function.

The court’s cautious and self-conscious role, its awareness of the need to balance pragmatism and principle in order to operate and survive in a new democracy means that the veracity of the counter-majoritarian dilemma in the South Africa context is diluted. The
court however must be vigilant in the assessment of whether pragmatism and self-consciousness in an effort to calm the waters does not translate into an abdication of function.

There is a formalist mandate to engage in non-formalist value judgments, teleological and holistic, congruent with the spirit and purport of the Constitution that exists. Such a function cannot be achieved though rigid and mechanistic text based reading of the Constitution. Within such a necessitated open mandate, the South African court endeavours towards operating within a three way compromise between the authority that emanates from a formalist approach, an individual rights protection from value-driven adjudication irrespective of majority sentiment, and a democratic conciliation by an examination and implementation of judgment that is reflective of society’s ideological *leitmotivs*. Notwithstanding the existence of this subjectivity, the considerations that the court must factor into its judgment channel that subjectivity. There are, unique to the South African jurisprudential context, constraints on subjectivity. Acknowledging contextual realities, precedent and expectations, traditional roles and extra-legal considerations, the judge’s morality becomes a rooted morality. If there is a morally driven decision, it is a decision that emerges out of these considerations and is anchored by the balance of these considerations. The judge, in his/her decision-making capacity, cannot thereby be viewed as unbounded.

The deconstructionists would posit that the judge is a product of societal forces, who then reinforces, echoes and perpetuates that force. The idea of democracy and constitutionalism as partitioned concepts must be questioned by the deconstructionist’s observation of the interconnection between judge and society. In revealing the source of judicial preference, adjudication is brought within the matrix of democracy.

The court does not operate in isolation, wilfully overriding, interfering and placing itself in opposition to other institutions. The court operates within a constitutional morality consented to by a nation that is young enough to remember why it did so. Claims that judicial review overrides the will of the majority are claims that ignore where South Africa has come from and what the nation promised to become. It is a claim that ignores that adjudication is imbued with a cognizance of the delicate democratic dispensation and the unique history from which we emerge, showing great deference to the legislature and executive.

Part of the counter-majoritarian dilemma argues that it is anti-democratic for the people to be governed by an outdated text. A believed lack of democracy within the Constitution or within the judiciary’s application thereof leads to the argument that such governing and decision making should be ceded to majority rule. This challenge does not, as of yet, find a foothold in

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352 Klare 1998 SAJHR 159.
South African jurisprudence. South Africa is still living through the memory of why the constitutional dispensation was adopted. Thus an originalist and intentionalist interpretation on the part of the court is possible. A large part of the court's adjudicative guidelines stem from a focus on the lessons from the nation's history. The results of this, far removed from the resort to majority rule, sees the end result of the counter-majoritarian dilemma examination in line with a minority rights advocacy while still upholding commitments made by the people. Moreover, it can be argued that the end result of a post-modernist exploration of judicial interpretation is nihilism, yet an unbounded faith in majority rule cannot be the reaction to this perceived nihilism. The response to nihilism, should, by its own logic, be accommodation of difference, not a dismissal of difference through majority rule. That is remissive of the problem. Nihilism, according to Dworkin, should not mean the end of the road in examining the counter-majoritarian dilemma, but rather just the beginning. By its own logic, stemming from indeterminacy of law, and resulting in the non-exclusionary potential of law, it is this nihilism that should open the door to be more receptive of minorities.

While the arguments laid out in response to the counter-majoritarian dilemma suggest a congruency between minority rights and popular will, there is still doubt whether this argument can ensure stable unenumerated minority protection going forward. As memories fade, and new circumstances emerge that deserve an interpretation and application unsuitable to what was done in the past, an originalist interpretation will become less possible and less valid. The will of the people at the time of the constitutional adoption must be subjugated to the will of the people at the present time. The justification of the people’s will, as embodied in the law rule, will push up against the will of the people of the here and now. As the nation moves away from those justifying anchors, a conversation around constitutional literacy will be imperative to sustain the foundational value commitments. While moving away from the birth of the Constitution will place greater strain on the court in its justifications, it will also signify the greater need for the court to ignite those conversations about values. The court will have to be the living memory.

Looking into the future, it has to be questioned whether the minority rights house has been built on the sand. When the seas of time wash away that sand, will the house continue to
stand? When the memory fades that the existence of these rights were in reaction to history, when the social tides change, when the institutions that supported the adoption of the rights no longer offer such support; will the house continue to stand? The lineated constitutional rights are entrenched as a result of interest groups engagement at the time of the drafting of the Constitution. The concern is, going forward in to the future, when new argued for rights emerge that are not specifically outlined in the constitutional text, how will the Constitutional Court enfold those constitutional claims? There has been endeavour to tap into a central core of dignity as a roadmap yet rarely has the court been tested with elaboration without the formal Constitution providing justification through a plain text reading. When this is coupled with majoritarian force and attacks on the judiciary, will the court be bold enough to read into the Constitution protection of emerging minorities or will it undermine its legitimacy by trying to protect its legitimacy and betray its mandate through timidity? Will the court uphold justice even if it means the heavens will fall?

Within a working constitutional democracy, there can be, ultimately, no resolution. The entirety of the constitutional democracy set-up hinges on tension; on a delicate balancing act that will always be in a flux of correcting and counter-correcting to maintain the balance. Any declarative solution will upset the tension. For the continued stability of the nation as a whole and for all sides, majority and minority, to be continually protected, there must be balance. The means to achieve this balance is through continual conversation.

The court has been shown to be the best institution to foster this conversation. Indeterminacy of the law means not that the court should back down but rather such indeterminacy increases the necessary role of the court as the arena in which competing interpretations of the indeterminate text can be voiced and democracy in action can be effectuated.
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