

The Politics of Constitutional Adjudication

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To reconcile the practice of judicial review with the sovereignty of people to govern themselves, it is necessary to show that courts do not resolve conflict and judge the way those in government exercise the powers of the state on the basis of their own personal opinions of what is right and wrong. One needs a theory about the way in which judges should exercise their powers of review that tells them how they can distinguish laws that are a legitimate expression of the coercive powers of the state from those that are not, without being influenced by their own biases and personal points of view.¹

1. Introduction

The functions of adjudicating disputes and the authoritative determination of the content and meaning of the law, has been the responsibility of persons and institutions entrusted with authority since times immemorial. In ancient monarchies the authority of “the state” to legislate, govern, administer and adjudicate was not diversified. In the process of the diversification of the state, this became the task of judges and eventually of an institutionalised judiciary. This fact reminds us that judicial authority is not distinguishable from state authority: a court’s jurisdiction is

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¹ David M. Beatty, *The Ultimate Rule of Law*, 2004, 5.

a specialised component of the authority of the state. A court is an organ of the state.

As the various parts of the structure of the modern constitutional state were institutionalised, it became settled in the minds of both governors and the governed that politicians dealt subjectively, i.e. “politically”, with policy preferences in the making of laws, their execution and administration and in fiscal and policy planning and implementation. It is in the nature of modern democratic political intercourse that controversial debate on policy matters and on the manner in which the various powers of the state should be exercised, and overt competition for popular support will occur among politicians in order to attain and retain the desired positions of governmental power. At the same time, it is generally supposed that judges should maintain a staunch attitude of objective rationality in order not to be seen to be prejudiced in matters that need to be adjudicated by them. In short, legislators and members of the executive branch are supposed to be constantly engaged in politics, whereas the involvement of judges in politics in any form is frowned upon.

However, when it comes to the adjudication of a variety of disputes and the interpretation of constitutions and the law, the courts, as depositories of the judicial authority of the state, cannot escape from politics. There is a distinction between politically motivated judgments, and judgments having political consequences. A judicial officer has no choice or control over the latter situation, which is brought about objectively due simply to the nature of the jurisdiction of the court. A politically motivated judgment is however characterised by findings determined by the subjective predisposition of a judge. The challenge to the bench is not to produce politically motivated judgments, the more so in cases having political consequences. Wide-ranging opinions regarding the degree to which this challenge can reasonably be met, exist.

Despite the unique, studiously abstract language and mode of argumentation employed by the judiciary,² judges, especially those adjudicating constitutional issues, are more often than not participating in and practising politics. This is a statement that may startle some and which may evoke outright rejection from others. Nevertheless, it is not new, nor can it be made without qualification. It does, however, deserve serious analysis in order to promote a balanced understanding of constitutional adjudication.

Many views exist on the political nature or otherwise of the law and the judicial process. What the law is, and how the law should be interpreted and applied by *inter alia* the courts, are inevitably profound philosophical issues. The nature, func-

² Patrick Lenta, Democracy, Rights Disagreements and Judicial Review, 20 South African Journal on Human Rights, 1/2004, 29-30 aptly argues that judges tend to be anxious about the choices they make between various arguments, and continues: “This anxiety frequently causes judges to write in a register intended to convey that their decisions are compelled by the facts of the dispute to be resolved. Judges most often write in a monological voice that effaces the appearance of freedom of choice, and presents the verdict as forced by the logic of the situation itself ... In their judgments, judges often fail to acknowledge and argue against positions and arguments contrary to their own.”

tions and jurisdiction of courts as provided for in a constitution may generally be considered to be matters of normative and rarely contested legal regulation. It is however not that simple: no norm, however formal, exists in isolation, detached from considerations of principle, theory, history and underlying values.

The core question in this analysis is: how should a judge respond when faced with a decision which will have political consequences?

Judicial definitions of “politics” or “political” are hard to find. Most dictionary definitions of these terms refer to

- government and the state,
- opinions or attitudes regarding choices to be made concerning government, and
- association with a group or party promoting a particular approach to government.

For present purposes, therefore, the opinions, preferences or attitudes regarding the manner in which the country should be governed and by whom, is the meaning allocated to “politics”.

The relevance of an investigation into this matter is emphasised by the fact that constitutional courts are frequently seized with a certain group of constitutional issues, such as the resolution of disputes between organs of state, the determination of the constitutionality of legislation and of executive conduct and the settlement of electoral disputes. Matters of a political nature are however not limited to this group. A prominent testing ground for judicial politics takes the form of the adjudication and enforcement of constitutionally determined positive obligations of the state, especially in the form of socio-economic rights.

Since political opinion certainly is founded in subjective, inevitably biased considerations, constitutional adjudication, exposed as it is to politics, must pose extraordinary challenges to the “objectivity” (as opposed to “colourless neutrality”³) of the judge.

This paper was written primarily from a South African perspective. It must however be accepted that, especially due to the globalisation of constitutionalism, the problem under consideration justifies comparative consideration.

The concern that almost instinctively arises when the judiciary and politics are mentioned, the “counter-majoritarian difficulty” is discussed in the section following this introduction. The historical American origins of the construct are set out, followed by a description of its current reflection in the German, Canadian and South African systems. From this analysis it appears that constitutional review may be seen as an instrument to limit the dangers inherent in unfettered democratic majoritarianism.

In the third section the political dimension of especially the appointment procedures of judges of the constitutional courts of Canada, Germany and South Africa are described and a recent express recognition by the South African Constitutional Court of the inevitability and relevance of politics in the personal makeup of a constitutional judge is described. In similar vein the next section sets out the man-

³ A phrase coined by Cameron J in *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 3 SA 705 (CC) para [14].

ner in which the German, South African and Canadian constitutional courts have dealt with recusal. Recusal does not occur frequently, but the circumstances under which the matter arises show how real the danger for politically warped adjudication in the form of majoritarian subservience can be.

In the fifth section the other issue that instinctively comes up under this theme, the doctrine of the separation of powers, is discussed with reference to the manner in which the South African Constitutional Court is developing the doctrine, the foundational role of the doctrine in Germany and the dichotomy in the Canadian approach. From this description it appears that the doctrine does not, due to its elasticity, achieve much more in the present context than inhibiting unsubstantiated judicial overreach.

The last section contains some concluding remarks concerning the political responsibility of the judiciary.

2. The Counter-Majoritarian Difficulty

2.1. Origins

An important element of the contemporary authority of especially the highest courts, is its jurisdiction to adjudicate upon the validity of legislation measured against the constitution. This is generally referred to as “judicial” or “constitutional review”, which is a foundational and often controversial phenomenon.

It is only in relatively recent history that judicial review has become the norm in the modern constitutional state. The American precedent established in 1803 by *Marbury v Madison*⁴ stood alone until 1920, when the republican constitution of Austria introduced a specialised court with review jurisdiction. Ireland followed in 1922, Japan in 1947 and Germany in 1949. Many continental countries, beginning with Spain in the 1970’s and Central and Eastern European countries in the 1990’s followed the German example.⁵ Canada introduced constitutional judicial review in 1982 and hardly a new constitution has been adopted in the past fifteen years that does not provide for it.

Due to the significant political power that judicial review affords a court, a vast volume of literature has developed on the theme of what has become known as “the counter-majoritarian difficulty”. This is mainly a conceptual controversy about the defensibility of the situation that a court, which is not a representative in-

⁴ 5 U.S. (1 Cranch) 137 (1803).

⁵ Tim Koopmans, Courts and Political Institutions, 2003, 35-44 and also Wolfram Müller-Freienfels, Zur Rangstufung rechtlicher Normen, in: Institute of Comparative Law (ed.), Law in East and West/Recht in Ost und West, Tokyo 1988, 8, who states that the influence of American judicial control of the constitutionality of actions of the state can be traced in Central and South American states, Scandinavia, Ireland, Turkey, Japan, India, Greece, Italy and Germany. See also Albrecht Weber, Typen der Verfassungsgerichtsbarkeit und Rezeptionsprobleme, in: Christian Starck (ed.), Fortschritte der Verfassungsgerichtsbarkeit in der Welt – Teil I, Baden-Baden 2004, 37-41.

stitution, should have the power to annul a law adopted by a democratically elected legislature. An obvious argument against judicial review and the enforcement by the court of positive socio-economic rights, is that the implementation of these rights is a matter of governmental and administrative policy which must be justified against the majority will, rather than a field for judicial engagement. This kind of argument presupposes a democratic system in which the electorate is effectively represented by the legislators and the executive. Naturally the counter-majoritarian difficulty would hardly arise in a system which does not meet the requirements of constitutional democracy.

American review jurisdiction was construed in 1803 in the judgment of Chief Justice Marshall in *Marbury v Madison*. Despite the absence of specific constitutional empowering provisions, Marshall relied very little on other possibly relevant provisions of the Constitution to construe judicial review jurisdiction.⁶ The Chief Justice argued that the Constitution was adopted in written form to limit legislative power and if judges were to enforce unconstitutional laws, Congress would have “a practical and real omnipotence”. Furthermore he held that judicial review was inherent in the “judicial department’s” duty to interpret the law where a choice between the Constitution and conflicting legislation had to be made.⁷

In the years of the introduction of constitutionalism to America, extensive theorising, both European and American, shaped that process. Thus in 1788 Alexander Hamilton remarked in *The Federalist* on the duties of the judiciary to uphold the Constitution as supreme against irreconcilable ordinary laws.⁸ Emmanuel Siyès drew upon these remarks by Hamilton in the French National Convention in 1795. It is clear that Chief Justice Marshall found justification for his judgment in *Marbury v Madison* in the same source.⁹

Since *Marbury v Madison*, and especially in the second half of the twentieth century, what has become known as “the counter-majoritarian difficulty” has occupied the minds of especially American academics to the degree that it is referred to without hesitation as an “obsession”.¹⁰

Unresolved and as intensely debated now as it was even before *Marbury* is how and when the judiciary should exercise its power. Because federal judges and justices are unelected and appointed for life, and judicial review may trump exercises of power by representative branches of government, concern historically has existed with the anti-

⁶ With some hesitation he did however note that Article VI para [2] provided for the supremacy of the Constitution and of federal laws made in pursuance of the Constitution; that Article VI para [3] provided for judges to be bound by oath to support the Constitution and that Article III section 2 para [1] provided that the judicial power extended to all cases under the Constitution.

⁷ David P. Currie, *The Constitution in the Supreme Court – The First Hundred Years 1789-1888*, Chicago 1985, 66-74.

⁸ *The Federalist* No 78 quoted by Christian Starck, *The Legitimacy of Constitutional Adjudication and Democracy*, Fifth World Congress of the International Association of Constitutional Law, Rotterdam 1999, II 1.

⁹ Currie (note 7), id.

¹⁰ Barrie Friedman, *The History of the Counter-majoritarian Difficulty, Part One: the Road to Judicial Supremacy*, 73:2 *New York University Law Review* 333-343 (1998).

democratic potential of the judiciary. Criticism of the judiciary is especially intense when it strikes down legislation on grounds that it conflicts with a right or liberty not actually enumerated by the Constitution.¹¹

The essence of counter-majoritarian criticism is captured by Friedman.¹² He wrote that it

refers to a challenge to the legitimacy or propriety of judicial review on the grounds that it is inconsistent with the will of the people, or a majority of the people, whose will, it is implied, should be sovereign in a democracy. Therefore, the counter-majoritarian criticism embraces any criticism of the courts as interfering with the will of a popular majority.

That a court should be entrusted with the authority to annul the legislative, executive and administrative actions of popularly representative legislatures and governments, is considerably less than self-evident. Arguments against constitutional adjudication include the following:¹³

- The separation of powers requires the legislature itself to ensure that its laws are adopted lawfully in accordance with the constitution: should a court decide that a law adopted by the legislature is unconstitutional, it amounts to judicial interference in the legislative authority;
- Since the courts are not endowed with their judicial authority through democratic processes, they should be spared from involvement in political controversy such as the validity of laws adopted by a democratic majority;
- The mechanism of constitutional adjudication involving the potential overturning of actions of other organs of the state, undermines legal certainty, since the constitutionality of such actions is uncertain until it has been tested judicially.

From these and similar arguments, it should be clear that the problems involving constitutional adjudication primarily concern the legitimacy of the jurisdictional authority of the court and the question how its legitimacy is to be justified.

The debate on the counter-majoritarian difficulty has gone through numerous phases of intensity and the nature of the debate has varied over time.¹⁴ It is important to note that the fluctuations in the debate in the United States were closely related to the development of various elements of its constitutional system.¹⁵ It was also related to the policies and personalities of, amongst others, incumbent presi-

¹¹ Donald E. Lively et al., *Constitutional Law – Cases, History and Dialogues*, Cincinnati 1996, 9.

¹² Friedman (note 10), 354.

¹³ Bert van Roermund, (ed.) *Constitutional Review – Verfassungsgerichtsbarkeit – Constitutionele Toetsing*, Zwolle 1993, 5-6.

¹⁴ An excellent seminal description and historical analysis of this process appeared in a set of three articles by Barry Friedman (note 10) (Friedman I); *The History of the Counter-majoritarian Difficulty, Part II: Reconstruction's Political Court* 91, 1 *The Georgetown Law Journal* 1 (2002) (Friedman II), and *The History of the Counter-majoritarian Difficulty, Three: The Lesson of Lochner* 76, 5 *New York University Law Review* 1383 (2001) (Friedman III).

¹⁵ It was e.g. at the centre of the evolution of the federal system (cf. Friedman I, 390 et seq.), the development and interpretation of the Bill of Rights (cf. Friedman, I 415 et seq.) and the legitimacy of the judiciary (cf. Friedman II and III).

dents and chief justices.¹⁶ The nature of the legislation, executive policies and litigation concerned influenced the acuteness of the controversies. In short, counter-majoritarian judicial authority has been a consistent component in the development of the American constitutional system. Constitutional development is open-ended and it is therefore to be expected that the counter-majoritarian argument will not stop unless the constitutional system is fundamentally changed to deprive the Supreme Court of its judicial supremacy. Put differently, the counter-majoritarian difficulty is an inherent component of the constitutional dispensation of the United States which is as unlikely to be resolved in one way or another as are other systemic controversies such as the system of presidential elections, the “paradox of democracy”¹⁷ or the procedure for the appointment of judges.

Where, in constitution-writing in this era of the constitutional state, the issue of the legitimacy of the jurisdiction of constitutional courts came to the fore over the past five or six decades, the American precedent provided a foundational example, inclusive of and despite the counter-majoritarian difficulty. Thus e.g. section 81 of the Japanese Constitution of 1947 explicitly empowers the Supreme Court “to determine the constitutionality of any law, order, regulation or official act”, a power which is exercised with reticence, but nevertheless exercised.¹⁸ The German *Grundgesetz* of 1949 requires federal legislation in article 94 (2) to “specify the cases in which its [the Federal Constitutional Court’s] decisions have the force of law”, and the relevant legislation¹⁹ renders the decisions of the Court binding on all “constitutional organs as well as on all courts and authorities”.²⁰ The South African Constitution of 1996 is construed on clear assumptions as to the status of the Constitution and its enforcement: in section 2 the supremacy of the Constitution is established and it is provided that “law or conduct inconsistent with it is invalid”; the High Court and Supreme Court of Appeal are endowed with jurisdiction on constitutional matters (sections 168 and 169), but in terms of section 167 (5) “The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional ...” Judicial constitutional review therefore appears to have been accepted towards the end of the twentieth century to be an inherent characteristic of the constitutional state.

¹⁶ Friedman’s historical analysis is presented with reference to the regimes of presidents like Jefferson, Jackson, Andrew Johnson and Franklin Roosevelt and of chief justices like Hamilton and Marshall and Associate Justice Oliver Wendell Holmes and the roles played by those personalities in the countermajoritarian controversy.

¹⁷ The supposed paradox lies in the entrenchment of a political system based upon popular election in a constitution which is difficult to amend: cf. e.g. Stephen Holmes, *Verfassungsförmige Vorentscheidungen und das Paradox der Demokratie*, in: Ulrich K. Preuß, *Zum Begriff der Verfassung* 1994, 133.

¹⁸ Francois Venter, *Constitutional Comparison – Japan, Germany, Canada and South Africa as Constitutional States*, 2000, 87-90, and more recently, Koji Tonami, *Die Entwicklung der Verfassungsgerichtsbarkeit und die Probleme der richterlichen Prüfungsbefugnis über die Verfassungsmäßigkeit in Japan*, in: Stark (note 5), 15 et seq.

¹⁹ Article 31(1) of the *Bundesverfassungsgerichtsgesetz*.

²⁰ Venter (note 18), 90-94.

From Friedman's rich historical analysis, a number of elements of the counter-majoritarian difficulty which may be considered to have global relevance wherever the matter may crop up, can be gleaned:

- For the counter-majoritarian difficulty to arise, the decision of a court must indeed run against the will of the majority of those affected by the decision.²¹
- The following four factors form a framework within which the counter-majoritarian difficulty and its American history may be described:²²
 - the measure of judicial interference with popular will;
 - the current public sentiment regarding the degree to which government should be "popular", i.e. reflect the "will of the people";
 - attitudes regarding the meaning of the Constitution, i.e. whether it is relatively fixed or open, and
 - the degree of acceptance that judicial decisions are supreme.
- Since the late twentieth century the tendency has been to justify judicial review as a means to satisfy the need to protect minority rights.²³
- Methods that may be employed (and which had been propagated from time to time in the United States) to solve the counter-majoritarian difficulty include "court-packing", jurisdiction-stripping, holding referenda, judicial recall, legislative override and the election of judges.²⁴
- "Understanding the relationship between judicial review and politics is essential to determining the appropriate bounds of political pressure placed upon ... the ... judiciary."²⁵ In this regard an important conclusion made by Friedman is:²⁶ "It is ironic that when the real world stakes are high, legal rules may be most important; yet, there is at those times the greatest pressure on those rules to give way to political expediency."

2.2. German *Verfassungsgerichtsbarkeit* (Constitutional Review) and Majoritarian Democracy

Article 20 (2) of the *Grundgesetz* provides that all state authority emanates from the people and that the people exercise this authority through elections and voting and by specific organs of the legislature, the executive power, and the judiciary. Article 1 (3) provides that the fundamental rights provided for are binding upon the legislative, executive and judicial branches "as directly applicable law". The jurisdiction of the *Bundesverfassungsgericht* is very clearly provided for in the *Grundgesetz*²⁷ and constitutionally empowered legislation (the *Bundesverfassungs-*

²¹ Friedman I (note 10), 409.

²² Friedman I (note 10), 343-356.

²³ Friedman I (note 10), 412. Also *S v Makwanyane* 1995 3 SA 391 (CC) paras [87] – [89] and BverfGE 44, 125 (143).

²⁴ Friedman I (note 10), 432.

²⁵ Friedman II (note 14), in his footnote 7.

²⁶ Friedman II (note 14), 65.

²⁷ 93 (1) The Federal Constitutional Court decides:

gerichtsgesetz). Article 94 (2) of the *Grundgesetz* requires federal legislation to regulate the details of the composition and procedure of the Court, and significantly, also to specify in what cases the decisions of the Court will have the force of law (*Gesetzeskraft*).²⁸

Essentially the Court may be approached in procedures classified in five categories:²⁹

- disputes between organs of state (*Organstreit*)
- disputes over federal issues
- “abstract” norm control³⁰
- “concrete” norm control³¹
- individual constitutional complaints (*Verfassungsbeschwerde*)

The *Bundesverfassungsgericht* has an extraordinarily high constitutional profile. In terms of article 1 (1) of the *Bundesverfassungsgerichtsgesetz* the Court stands

1. on the interpretation of this Constitution in the event of disputes concerning the extent of the rights and duties of a highest federal body or of other parties concerned who have been vested with rights of their own by this Constitution or by rules of procedure of a highest federal body;

2. in case of differences of opinion or doubts on the formal and material compatibility of federal law or State law with this Constitution, or on the compatibility of State law with other federal law, at the request of the Government, of a State government, or of one third of the House of Representatives members;

2a. in case of differences of opinion on the compatibility of federal law with Article 72 (2), at the request of the Senate, of a State government, or of a State Parliament;

3. in case of differences of opinion on the rights and duties of the Federation and the States, particularly in the execution of federal law by the States and in the exercise of federal supervision;

4. on other disputes involving public law, between the Federation and the States, between different States or within a State, unless recourse to another court exists;

4a. on complaints of unconstitutionality, being filed by any person claiming that one of his basic rights or one of his rights under Article 20 (4) or under Article 33, 38, 101, 103 or 104 has been violated by public authority;

4b. on complaints of unconstitutionality filed by communes or associations of communes on the ground that their right to self-government under Article 28 has been violated by a statute other than a State statute open to complaint to the respective State constitutional court;

5. in the other cases provided for in this Constitution.

²⁸ This is regulated by article 31 of the *Bundesverfassungsgerichtsgesetz*, which provides that decisions of the Court bind all constitutional organs, courts and other authorities. In cases where the Court decides on the validity of legislation or the applicability of a rule of international law, its decisions have the force of law.

²⁹ Markus Thelen, *Demokratie, Grundkonsens und politischer Pluralismus – Rationalität politischer Institutionen und Legitimität des Staates am Beispiel des Bundesverfassungsgerichts*, Aachen 1997, 136-137.

³⁰ Article 93(2) of the *Grundgesetz* deals with “abstract norm control”.

³¹ “Concrete norm control” is regulated in article 100 (1) of the *Grundgesetz*, which provides:

Where a court considers that a statute on whose validity the court’s decision depends is unconstitutional, the proceedings have to be stayed, and a decision has to be obtained from the state court with jurisdiction over constitutional disputes where the constitution of a state is held to be violated, or from the Federal Constitutional Court where this Constitution is held to be violated. This also applies where this Constitution is held to be violated by state law or where a state statute is held to be incompatible with a federal statute.

“independent of all other constitutional organs”. It therefore has the quality of a “superior organ of the Constitution” (*oberstes Verfassungsorgan*).³² It is active in the process of checks and balances between the organs of state, is seen as the protector of the Constitution and in its interpretative jurisprudence it is required to concretise the law of the constitution and to develop it. The Court is therefore a key factor in the determination and exercise of the authority of the state.³³

With reference to the German and American systems, Ulrich Haltern wrote a thesis³⁴ in which he made a very thorough theoretical analysis of judicial review as a practice suspended between notions of populism, progressivism, constitutionalism and democracy. Due to the high degree of abstraction that Haltern achieved, he succeeded in providing a very compact but persuasive characterisation of constitutional judicial review in Germany: according to him, the *Bundesverfassungsgericht* has adopted a (neo-)pluralistic stance in its jurisprudence, interlaced with elements of liberalism. What this means requires some explanation.

The form of pluralism espoused by the Court distinguishes between state and society. Society is composed of groups, operating in a socio-economic environment and competing with each other for power. The function of the state is to ensure that the playing field is equal for all competing groups in society. This implies that the weaker components of society must enjoy the protection of the state and in a social democracy be provided with means to compete freely.³⁵ The political process is seen as a non-hierarchical, competitive process of continuous negotiation in which many groups, distinguished in terms of various criteria such as ethnicity, religion, social status, etc. participate.³⁶

The liberalism espoused by the Court according to Haltern, is founded on John Stuart Mill’s teachings. It is based upon the principle that participation in political life is not merely for the protection of individual interests, but equally indispensable for the creation of an informed, engaged and self-developing People. Article 2 of the *Grundgesetz* clearly reflects this attitude.³⁷

The pluralistic inclination of the *Bundesverfassungsgericht* has been expressed in many of its judgments.³⁸ According to the Court, the self-determination of the People is realised in that every individual interest may be organised and expressed

³² The exact meaning of the concept is not settled and opinions differ on its legal significance. Jörn Ipsen, *Staatsrecht*, 13th ed., 2001, 201-203.

³³ Cf. e.g. Michael Piazolo (ed.), *Das Bundesverfassungsgericht – Ein Gericht im Schnittpunkt von Recht und Politik*, Mainz 1995, 243.

³⁴ Ulrich R. Haltern, *Verfassungsgerichtsbarkeit, Demokratie und Mißtrauen*, Berlin 1998.

³⁵ Id., 142-145, whose exposition is primarily based on the work of Ernst Fraenkel.

³⁶ Haltern (note 34), 120.

³⁷ Id., 157-158. Article 2 reads as follows:

Everybody has the right to self-fulfilment in so far as they do not violate the rights of others or offend against the constitutional order or morality.

Everybody has the right to life and physical integrity. Personal freedom is inviolable. These rights may not be encroached upon save pursuant to a law.

³⁸ Id., 151-157.

politically and a free discussion of different political views and personal interests is made possible.³⁹ This approach emphasises the importance the “democratic” fundamental rights such as freedom of assembly and also the importance of the protection of the interests of minorities. The social *Rechtsstaat* is required to promote the varied interests of components of and groups within the population.⁴⁰ The Court explained its doctrinal position in this regard clearly in e.g. the following *dictum*:⁴¹

Citizens have taken part in this process [of the formation of political opinion] to differing degrees. Large associations, wealthy donors and the mass media can exercise considerable influence, whilst the citizen feels himself to be powerless by comparison. In a society in which direct access to the media and the chance of expressing oneself through them is limited to a few, there only remains to the individual, besides organised cooperation in parties and associations in general, collective exertion of influence by using the freedom of assembly for demonstrations. The unobstructed exercise of the freedom not only counteracts the consciousness of political impotence and dangerous tendencies to a sullen attitude toward the state. In the end it also lies in the well understood public interest because in the parallelogram of powers involved in forming political opinion in general, a relatively correct resultant can only develop if all vectors are developed fairly powerfully.

According to Haltern the combined pluralistic and liberalistic approach of the Court is contradictory.⁴² Liberalism does not tolerate values that are incompatible with liberal values, whereas pluralism strives to be inclusive. The social democracy, which requires the state to engage increasingly in the political, economic and cultural spheres, draws a growing field of state interest into the area which requires adjudication, thus increasing the role of the courts. This promotes what might aptly be termed “juridical democracy”.⁴³

It is to be expected that the *Bundesverfassungsgericht* would in more than half a century’s work have drawn both criticism and praise. Inevitably some of the cases that it had to adjudicate, and some of its judgments in such cases have been highly controversial and there are indications that they ran against the sentiments of the popular majority. Some examples are the prohibition of crucifixes in schools,⁴⁴ the case about the phrase “soldiers are murderers”,⁴⁵ the declaration of non-culpability of participation in sit-ins⁴⁶ and non-punishability of a former East German spy.⁴⁷

³⁹ This is made clear in a passage from BVerfGE 20, 56 (97 ff.) quoted by Haltern.

⁴⁰ BVerfGE 44, 125 (143).

⁴¹ BVerfGE 69, 315 (346), translation provided by the Institute of Global Law, found in the internet in October 2004 at <http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverge.shtml?14may1985>.

⁴² Haltern (note 34), 161-168.

⁴³ Id., 162-164.

⁴⁴ BVerfGE 93, 1.

⁴⁵ BVerfGE 93, 266.

⁴⁶ BVerfGE 73, 206.

⁴⁷ NJW 1995, 1811.

The Court has been subjected to some sharp criticism. Thus e.g. Rupert Scholz⁴⁸ wrote in 1995 that the Court tended increasingly to overstep the borders set by the principles of democracy and the separation of powers;⁴⁹ that it sometimes acted as though it were a super legislator, super executive and super institution for revision;⁵⁰ and that the Court was increasingly allowing itself actively or passively to be drawn into the process of formation of political opinion.⁵¹ These tendencies Scholz considers to be threatening the “independent and neutral status” of the Court as the final protector of the Constitution and he therefore proposed some fundamental reforms.⁵²

Counter-majoritarian and technical (especially academic) criticism of the Court emerges frequently. Strong majoritarian rejection or serious doubt as to the Court’s legitimacy however does not seem to be pervasive. The following statement by the President of the Court, Jutta Limbach, during the celebration of the first half century of the existence of the Court (freely translated here), was chosen for the closing remarks of Schlaich’s standard work on the *Bundesverfassungsgericht*:⁵³

The history of the Court is a history of success. This is true despite the fact that it repeatedly caused critical crossfire with its decisions. This however never led to a lasting loss of trust by the people in the Court. It may be said without exaggeration that the *Bundesverfassungsgericht* had become a citizens’ court *par excellence*. Such popularity is however not to be had without some doubt ... Does such unmitigated immense trust in constitutional justiciability perhaps indicate a political distrust of democracy?

2.3. Canadian Majoritarian Scepticism

The Canadian constitutional provisions are not quite as direct in their empowerment of the Supreme Court as is the case in Germany, but judicial review is a clear reality.⁵⁴ The Court is not a creature of the Constitution, but of an ordinary federal statute.⁵⁵ Although it is therefore theoretically possible for Parliament to abolish or transform the Court, its established stature makes such an undertaking inconceivable. Section 52 (1) of the Canadian Constitution Act of 1982 however introduced an important new dimension to Canadian constitutional law. It provides: “The Constitution of Canada is the supreme law of Canada, and any law

⁴⁸ Rupert Scholz, Karlsruhe im Zwielficht – Anmerkungen zu den wachsenden Zweifeln am BverfG, in: *Verfassungsstaatlichkeit – Festschrift für Klaus Stern*, München 1997, 1201 et seq.

⁴⁹ At 1207.

⁵⁰ At 1211 and 1221.

⁵¹ At 1221-1222.

⁵² At 1222.

⁵³ Klaus Schlaich/Stefan Korioth, *Das Bundesverfassungsgericht – Stellung, Verfahren, Entscheidungen*, 5th ed., München 2001, 368-369.

⁵⁴ Venter (note 18), 94-97.

⁵⁵ The Supreme Court Act of 1985 (preceded by the Supreme and Exchequer Courts Act of 1875).

that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Before 1982, due to the doctrine of parliamentary supremacy, the Court’s function of constitutional review related mostly to matters of federal-provincial legislative authority. The introduction of the Canadian Charter of Rights and Freedoms in 1982, and the combined effect of sections 24 (1),⁵⁶ 32⁵⁷ and 52 (1) projected the fundamental rights dimension of the Constitution to the foreground of judicial activity, and of making the Constitution an “absolute standard”.⁵⁸ The independence of the Supreme Court is, despite the absence of specific constitutional provision therefor, not in any doubt or under pressure.⁵⁹

Potentially essential to the issue of the majoritarian difficulty in Canada, is section 33 of the Charter. It provides that Parliament or the legislature of a province may expressly declare in its legislation that an Act or a provision thereof will operate notwithstanding the provisions of the Charter on the fundamental freedoms, the “legal rights” and the equality rights, in which case the legislation will for a maximum of five years be read as though the rights concerned were not constitutionally protected. The exception may however be re-enacted, by implication after a general election in which the exception may have been at issue. This mechanism has however, except for an early demonstrative political attempt on the part of Quebec, whereby it has gained a degree of unpopularity, hardly been used at all.⁶⁰

Canadian academic opinion on the success of the Supreme Court as a democratically justified institution varies. A critical approach “which is sceptical about the integrity of the law”, indicates alarm about inconsistencies in the work of the Court. Thus Beatty wrote in 1995:⁶¹

⁵⁶ Section 24 (1) provides: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

⁵⁷ Section 32 (1) (a) provides: “This Charter applies to the Parliament and government of Canada in respect of all matters within the authority of Parliament ...”

⁵⁸ *Re McCutcheon and City of Toronto et al* (1983) 41 O.R. (2d) 652: “The Charter of Rights and Freedoms is meant to curtail absolute parliamentary and legislative supremacy in Canada.” The decision was also cited more recently in *Godbout v Longueuil (City)* 1997 3 S.C.R. 844 para [52].

⁵⁹ In the landmark judgment in *Manitoba Provincial Judges Assn. v Manitoba (Minister of Justice)* 1997 3 S.C.R. 3, Lamer CJ stated in para 109: “... the express provisions of the Constitution Act, 1867 and the Charter are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognised and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.”

⁶⁰ Sujit Choudry/Claire E. Hunter, *Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v NAPE*, 48 McGill LawJournal 525 (2003) at 535-536 and 555.

⁶¹ David Beatty, *Constitutional Law in Theory and Practice*, Toronto 1995, 85. Extremely critical is Robert Ivan Martin, *The Most Dangerous Branch – How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (2003).

If one examines the jurisprudence more closely, it turns out that the decisions of the Supreme Court, over the first decade of the Charter, do support the integrity and viability of subordinating democratically elected Governments to the rule of law. If one reads the Court's judgments with a more discriminating eye, it is possible to identify serious logical and/or empirical mistakes in all the major cases in which it has refused to apply the rationality and proportionality principles to their full force and effect.

More recently Choudhry and Hunter reacted⁶² to a public controversy set off by some critical remarks made by Justice Marshall of the Newfoundland and Labrador Court of Appeal in a judgment in which he sought to cast serious doubt on the justifiability of the Supreme Court's approach to judicial review. He expressed his views on the interpretation and application of the limitation clause of the Charter, section 1, in the following strong terms:⁶³

... whilst not downplaying the relevancy of importance and proportionality as criteria in s. 1 analyses, it is submitted that an essential component frequently missing in applications of s. 1 is the rationalisation of this relatively new power to address the justifiability of power choices behind Charter infringements with the Separation of Powers Doctrine. The importance in Charter applications of melding harmoniously this newest defining feature of the Constitution with that longer established one has already been underscored in this judgment. The lessons of history support the imperative of the blend. While it would overly dramatise the importance to democratic society of advertence to the Separation of Powers to hold up the spectre of the bloodshed in which the Doctrine evolved, it is no histrionic foresight to draw real potential for heightening unease over undue incursions by the judiciary into the policy domain of the elected branches of government, going beyond those contemplated by s. 1 justifications in unintended disharmony and conflict with the Doctrine.

In opposition to such sometimes strongly worded criticisms of the Canadian Supreme Court's approach to judicial review, there are convincing indications that the Court has been successful in maintaining a good measure of balance. In the study by Choudhry and Hunter an empirical and quantitative assessment was made of judicial activism in Canada. They found that counter-majoritarianism is not a widespread and central part of Canadian constitutional practice,⁶⁴ that there was no increasing trend of judicial activism, that the limitations clause of the Charter (section 1) was not being interpreted in a manner unduly restrictive of government actions, and that there are no clear indications that the limited reliance by legislatures on the "notwithstanding" clause signifies its delegitimation. This last finding is however qualified by a remark that "... perhaps the override has been delegitimised and replaced by other constraints to judicial activism in the Canadian

⁶² Choudhry/Hunter (note 60), 527.

⁶³ *Newfoundland Assn. of Public Employees v R.*, 2002 NLCA 72 para [364].

⁶⁴ They calculated e.g. that "the overall government win rate" in all possible cases of counter-majoritarian judicial review, was 62,4%: Choudhry/Hunter (note 60), 545. After having examined a number of relevant factors, Kent Roach, *The Supreme Court on Trial – Judicial Activism or Democratic Dialogue* Toronto 2001 also concludes (at 173): "All of these factors make it much more likely that the Court will defer to both serious and second tries by the government to limit rights."

constitutional system, such as public opinion, to which the Court is responding strategically". This latter remark is, I would suggest, significant in the context of the standard and nature of democracy in Canada.

2.4. Public Opinion and the South African Constitutional Court

Very early in the career of the South African Constitutional Court, in fact in what might be referred to as its inaugural judgment,⁶⁵ it confronted the issue of counter-majoritarianism. The issue before the Court was whether the imposition of the death penalty was compatible with the Constitution. The full bench of eleven justices each gave a judgment, all finding that the death penalty had to be abolished. The President of the Court (as he then was), was prepared to assume that public opinion would be in favour of the death penalty, but, in rather stark contrast to the Canadian Supreme Court's "strategic response" to public opinion, continued:

The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence. Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected. This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.⁶⁶

Various members of the Court reiterated this opinion.⁶⁷ Mahomed J however went on to elaborate on the relative functions of the judiciary and the legislature:⁶⁸

The difference between a political election made by a legislative organ and decisions reached by a judicial organ, like the Constitutional Court, is crucial. The legislative organ exercises a political discretion, taking into account the political preferences of

⁶⁵ *S v Makwanyane* 1995 3 SA 391 (CC).

⁶⁶ Paras [87] – [89].

⁶⁷ Paras [188], [192] and [200].

⁶⁸ Para [266].

the electorate which votes political decision-makers into office. Public opinion therefore legitimately plays a significant, sometimes even decisive, role in the resolution of a public issue such as the death penalty. The judicial process is entirely different. What the Constitutional Court is required to do in order to resolve an issue, is to examine the relevant provisions of the Constitution, their text and their context; the interplay between the different provisions; legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical considerations bearing on the problem; the significance and meaning of the language used in the relevant provisions; the content and the sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text; and by a judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits.⁶⁹

The Court's considered position in this regard therefore contains the following key elements:

- the Court is not answerable to the public for the manner in which it protects the rights entrenched in the Constitution, but must exercise its functions according to the requirements of the Constitution;
- whereas Parliament is responsible to the political majority of the electorate for its actions, the Court is required by the Constitution to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process;⁷⁰
- the Court makes its findings after having considered a process of "judicious interpretation and assessment", leading to a reasoned judgment.

In his theoretical discussion of judicial review, *Lenta* expresses the opinion that it "is imperfectly legitimate from a democratic point of view", but that "the record of the Constitutional Court has mostly been good compared to other bodies of legislative review". Quite aptly, he also speculates that "in South Africa, the political majority enjoyed by the African National Congress, sure to continue into the foreseeable future, may tempt the government not always to act in a way that furthers the common good, but rather in a way that prioritises the government's and its supporters' interests over considerations of justice".⁷¹

2.5. The Counter-Majoritarian Difficulty in Perspective

If one considers the bluntness of the electoral instrument with which democratic representation is determined, the ratio of representatives to those represented, the time span between elections, the limited nature of the restrictions placed upon the elected representatives, the difficulty with which legislators can be called to order by voters and the pressures of conformity to the injunctions given by party caucuses, one may seriously doubt the completeness of the representation rendered by

⁶⁹ Cf. also the remarks of *Mokgoro J* in para [305]

⁷⁰ This is distinctly "pluralistic" (as discussed in 2.2 above).

⁷¹ *Lenta* (note 2), 30.

elected legislators and executives even in a fully democratic system in which voters participate enthusiastically. The almost universal truth is that elected legislators and government executives are extremely difficult to dislodge or even to call to account between elections.

This is naturally not to suggest that judges represent the electorate better, or for that matter at all. It does however show that the counter-majoritarian difficulty is a construct embedded in the theoretical notions of the social contract, popular sovereignty and majoritarian democracy. There is nothing particularly wrong with these notions, but to launch an attack on the legitimacy of constitutionally empowered judicial activity as being counter-majoritarian while assuming that the instruments of representative democracy are effective and real, and that they present a more effective instrument for protection against political abuse and injustice, is not justifiable. The justification for constitutional review should rather be sought in the need for the qualification of blind popular majoritarianism with rational judicial argument.⁷²

3. Politicians, Judges and Their Politics

Essentially, judges are appointed by politicians. Various mechanisms are naturally employed to promote the independence of the judiciary from current and fluctuating political sentiments, such as prescribed qualifications, personal qualities, experience and security of tenure beyond political terms of office. Nevertheless, it seems generally to be accepted that it is unavoidable that the appointment procedure of judges is heavily tainted by political modalities.

The judges of the Supreme Court of Canada are appointed by the federal cabinet (formally the Governor in Council) in a process that lacks transparency. To be appointed, a person must be either a judge of the superior court of one of the provinces, or a lawyer of at least ten years' standing at a provincial bar. At least three of the nine judges must come from Quebec. Conventionally informal consultation takes place with the organised bar, but not with the provincial authorities.⁷³ Mc Cormick describes the fact that the Supreme Court is a purely national institution within a federal system as an "Achilles' heel" of the Court.⁷⁴

The German *Bundesverfassungsgericht* is composed of judges selected from the benches of other federal courts "and other members" (which in many cases means

⁷² That is perhaps what President L i m b a c h had in mind when she suggested (as quoted above at note 53) that the popularity of constitutional review might indicate a political distrust of democracy. Such distrust, one might add, may, within bounds, be quite healthy for the protection of constitutional democracy.

⁷³ Peter H o g g, *Constitutional Law of Canada 2003*, Student Edition, Toronto 2003, 232-233.

⁷⁴ Peter M c C o r m i c k, *Supreme at Last – The Evolution of the Supreme Court of Canada*, Toronto 2000, 175: "Its members are appointed by the government of Canada as an exercise of pure executive fiat; there is no ratification process, no way of blocking an objectionable appointment, not even a leverage point from which to negotiate compromise or future concessions."

professors of law). Half the members are elected by the *Bundestag* and half by the *Bundesrat*. The Court is composed of two “senates” each consisting of eight judges. These senates function separately, each as the Court, under the presidency of respectively the President and Vice-president of the Court. A plenary session is required when one senate intends to deviate from a previous ruling of the other senate. For the purposes of the election of judges by the *Bundestag*, an electoral college of twelve members is first elected proportionally. In order to prevent domination by the parliamentary majority, eight votes are required in the electoral college for a decision. As is to be expected, much party political deliberation and negotiation in committee precede the election of the judges, generally leading to a fair distribution of successful candidates promoted by the various parties. The same two-thirds majority is required in the *Bundesrat*, where the election is direct. Three members of each of the Senates of the Court must be appointed from other benches. The judges must be at least forty years of age, and may not continue occupying any other occupation than university professor after appointment to the Court. The term of office is twelve years and is non-renewable, but is terminated when the judge reaches the age of sixty eight. A constitutional court judge may not be dismissed before the end of the term of office, except by special impeachment procedures.⁷⁵

The judges of the Constitutional Court of South Africa must be “appropriately qualified”, “fit and proper persons” and South African citizens. At least four of the members of the bench must have had experience as judges of other courts and a broad reflection of the racial and gender composition of South Africa must be considered in the appointment of all judicial officers. The President of the country appoints the Chief Justice and Deputy Chief Justice of the Court “after consulting the Judicial Service Commission and the leaders of the parties represented in the National Assembly”. This process of consultation does not necessarily bind the President to appoint any specific person. The potential of political considerations playing a decisive role in the deliberations of the Judicial Service Commission appears clearly from its composition: the Commission is a constitutional institution consisting of 3 or 4 judges, 11 or 12 politicians, 4 legal practitioners, 1 legal academic and 4 political appointees. However, chances for blatant political manipulation of the composition of the bench are curbed by the public nature of some of the proceedings of the Commission and by the presence in the Commission of professional and oppositional elements. The other nine judges of the Constitutional Court are appointed by the President from a list of three more names than the number of appointments to be made, drawn up by the Judicial Service Commission. Before making the appointments, the President must consult the Chief Justice and the leaders of parties represented in the National Assembly.⁷⁶ No doubt the President’s considerations in this regard would not be innocent of political motives.

⁷⁵ Schlaich/Korioth (note 53), 27-33.

⁷⁶ Venter (note 18), 98.

The South African Constitutional Court has in the very recent past had reason to address the question of politics in constitutional adjudication quite directly. It would appear that the Court considers it unavoidable that its judgments will in certain “crucial political areas” within its jurisdiction have “political consequences”.⁷⁷

The Court found it necessary in the *Van Rooyen* case⁷⁸ (in which the constitutionality of the legislation and regulations pertaining to the magistrates’ courts had to be adjudicated) to quote the following passage from the famous judgment of the Appellate Division in *Minister of the Interior v Harris*⁷⁹ where Schreiner JA stated that

[t]he Superior Courts of South Africa have at least for many generations had characteristics which, rooted in the world’s experience, are calculated to ensure, within the limits of human frailty, the efficient and honest administration of justice according to law. Our Courts are manned by full-time Judges trained in the law, who are outside party politics and have no personal interest in the cases which come before them, whose tenure of office and emoluments are protected by law and whose independence is a major source of the security and well-being of the state.

Chaskalson CJ followed this quotation with the following:⁸⁰

Under our new constitutional order much has changed since then and more changes are foreshadowed in the bill presently before Parliament.⁸¹ As was previously mentioned, judges are now appointed by the President on the recommendation of the Judicial Service Commission.⁸² Their salaries and benefits cannot be reduced,⁸³ and a decision of the Judicial Service Commission supported by a resolution of two thirds of the members of the National Assembly is required for impeachment.⁸⁴ Salaries and conditions of service are still fixed by regulation, but the Bill makes provision for an independent commission to make recommendations to government on the remuneration of judges.

Over time the attitude of the South African bench toward matters of politics and policy has received much attention. A useful historical mirror of current judicial

⁷⁷ Paras [72] and [73] of the judgment in *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) (the SARFU recusal case): “Section 167 (4) thus confers exclusive jurisdiction to this Court in a number of crucial political areas which include the power to decide disputes between organs of state in the national and provincial sphere, to decide on the constitutionality of any parliamentary or provincial Bill, to decide on the constitutionality of any amendment to the Constitution and to decide whether Parliament or the President has failed to fulfil a constitutional obligation. And, in terms of section 167 (4), this Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional. ... It follows that the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of issues which would inevitably have important political consequences.”

⁷⁸ *Van Rooyen v The State* 2002 5 SA 246 (CC) para [82].

⁷⁹ 1952 4 SA 769 (A) at 789.

⁸⁰ Para [83].

⁸¹ Judicial Officers Amendment Bill 72 of 2001.

⁸² Section 174 (6) of the Constitution.

⁸³ Section 176 (3) of the Constitution.

⁸⁴ Section 177 of the Constitution.

thinking is to be found in Professor John Dugard's inaugural lecture of 1971⁸⁵ in which he endeavoured to expose the endemic positivism in the judicial thinking of the time and the judges' refusal to recognise their own "inarticulate premises". As a solution he offered two "antidotes"⁸⁶:

First, a frank recognition on the part of the judiciary that their role is not purely mechanical; ... and that in disputes between individual and State subconscious personal preferences are an ever-present hazard. Secondly, what is needed is a conscious determination by judges to be guided by accepted traditional legal values ...

These sentiments were naturally expressed against the background of the Westminster-type constitutional situation, involving an extreme form of parliamentary sovereignty at the time. They are nevertheless still quite apt today.

Regarding the specific issue of the political opinions of judicial officers, the *SARFU* recusal case, in which the respondent expressed apprehension of bias against him on the part of all, but specifically of five of the members of the Constitutional Court,⁸⁷ contains a number of relevant *dicta* which produced the following opinions:

- Because courts are required to give reasons for their judgments, criticism of the judgments should be focused on those reasons and not be motivated by political discontent or dissatisfaction with the outcome.⁸⁸ In the *Mamabolo* case⁸⁹ the Court added that a court must in its judgments "rely on moral authority".

⁸⁵ Dugard J, The Judicial Process, Positivism and Civil Liberty, South African Law Journal 181 (1971).

⁸⁶ At 195.

⁸⁷ The grounds for what the applicant presented as "a reasonable apprehension" included the fact that the appellant was the President of the Republic, who had appointed all the justices, past political association of some of the justices with the President, continued social interaction between them and the President and other personal ties.

⁸⁸ Para [68] "Success or failure of the government or any other litigant is neither grounds for praise nor for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is an unfortunate tendency for decisions of courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgment. Our courts furnish detailed reasons for their decisions, and particularly in constitutional matters, frequently draw on international human rights jurisprudence to explain why particular principles have been laid down or applied. Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of a case is no justification for recklessly attacking the integrity of judicial officers."

⁸⁹ *S v Mamabolo* 2001 3 SA 409 (CC) para [16] per Krieger J: "In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state."

- A judicial officer's constitutional duty is to "resist all manner of pressure, regardless of where it comes from".⁹⁰

- The Constitution requires of a judicial officer to adjudicate a case "according to the facts and the law, and not according to their subjective personal views".⁹¹

- Because the core values of the Constitution are in contrast to the pre-constitutional dispensation, political opposition in pre-constitutional times to the old order is practically a requirement for appointment to the bench of the Constitutional Court.⁹²

- Nevertheless "all judges are expected to put any party political loyalties behind them on their appointment and it is generally accepted that they do so".⁹³

- In the opinion of the Court⁹⁴ "it follows that a reasonable apprehension of bias cannot be based upon political associations or activities of judges prior to their appointment to the bench unless the subject matter of the litigation in question arises from such associations or activities".

These considerations are relevant, as will appear from the discussion in the following section, in matters where recusal of judges have to be considered, even if the issues are not specifically of a political nature.

⁹⁰ Para [104] "... The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law." To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the Judiciary would be undermined, and in turn, the Constitution itself."

⁹¹ Para [70] "That a judge may have engaged in political activity prior to appointment to the bench is not uncommon in most if not all democracies including our own. Nor should it surprise anyone in this country. Upon appointment, judges are frequently obliged to adjudicate disputes which have political consequences. It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires."

⁹² Para [72] "The core values of our new order are reflected in the provisions of section 1 of the Constitution. None of those values was recognised by the old order which was replaced by the Constitution. Where we used to have a supreme Parliament, we now have a supreme Constitution. The Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values." And para [74]: "... it would be surprising if respect and support for the core values of the Constitution by candidates for appointment to all of our courts, and particularly the Constitutional Court, were not taken into account by the Judicial Service Commission when preparing a list of nominees for submission to the President. It would be equally surprising if the President and the Cabinet failed to do so. Barely five years into the new order it is all but inevitable that in the professional or public lives of such candidates their antipathy and opposition to the evils and immorality of the old order, to a greater or lesser extent, would have manifested themselves. The public hearings of the Judicial Service Commission reflect this reality."

⁹³ Para [75] then continues: "In South Africa, so soon after our transition to democracy, it would be surprising if many candidates for appointment to the bench had not been active in or publicly sympathetic towards the liberation struggle. It would be ironic and a matter for regret if they were not eligible for appointment by reason of that kind of activity."

⁹⁴ Para [76].

4. Recusal

A prejudiced judge cannot be expected to deliver a just judgment. It follows that, if it is clear that bias on the part of a judge is present in a specific matter, the judge should withdraw.⁹⁵

The *Bundesverfassungsgerichtsgesetz* provides in paragraph 18 that a judge may not exercise the judicial office if he or she or a close relation is involved in a case before the Court or if he or she has already been officially or professionally involved in the case. Such “involvement” is not implied by the judge’s marital status, profession, origin, membership of a political party or similar general consideration of interest in the outcome of the case. A judge is also not considered to have been involved in a case if he or she had participated in a legislative process or had expressed a scholarly⁹⁶ opinion on a legal question that is relevant to the case. In terms of paragraph 19 a judge is required to express him- or herself regarding recusal and such recusal must be motivated. This provision is particularly important where a constitutional judge initiates his or her own recusal.

The *Bundesverfassungsgericht* has on various occasions had to deal with requests by parties to matters before it for recusal of judges or with requests from judges to recuse themselves. In 1990 the constitutionality of legislation of a federal *Land* concerned with fees payable for water use was challenged before the Court. When the legislation was considered by the legislature three years previously, Judge Kirchhof, then a professor of law not yet appointed to the Bench, was invited by members of the government of the *Land* to a discussion regarding the constitutionality of the law, since it was in contention. In these discussions the professor expressed the view that the proposed legislation would pass constitutional muster. On that basis, he was instructed to submit a formal opinion (*Gutachten*), which then provided the justification for the adoption of the legislation. The opinion could thus not be considered merely to be an expression of scholarly thought, and was therefore found to provide sound reason for the recusal of Judge Kirchhof. The Court was split 4:3 on the decision. The majority did not consider this to be a particularly strict standard that was set for recusal, since it primarily concerned public and political statements made by constitutional judges.⁹⁷

In 1992 Judge Söllner made a statement in terms of paragraph 19 of the *Bundesverfassungsgerichtsgesetz* in which he motivated his wish to be recused in a matter concerning labour law, in which he was a recognised expert. Ten years before the matter came before the Court, Söllner had written an opinion for the Rail-

⁹⁵ “If that apprehension [that there were improper motives on the part of the judges] were reasonable, all its members would have been under a duty to recuse themselves, despite the fact that no formal application for such relief was made.” Para [6] of the *SARFU* recusal judgment.

⁹⁶ A more direct translation of this term (*wissenschaftlich*) would be “scientific”.

⁹⁷ The last sentence of the majority judgment BverfGE 82, 30 [40] reads: Dem kann hier auch nicht ein “besonders strenger Maßstab” für die Prüfung der Befangenheitserklärung von Verfassungsrichtern ... entgegeng gehalten werden. Dieser bezieht sich, soweit er denn Geltung hat, primär auf öffentliche und politische Äußerungen von Verfassungsrichtern.

ways Labour Union after discussions with the Union regarding the question whether his opinion would support the Union's position. The opinion was subsequently published as an article and again reprinted in a publication of the German Labour Federation. The Union appearing before the Court in 1992 as a party was also a member of the Federation and the case was very similar in fact and in law to that which gave rise to the opinion of 1982. The Court pointed out⁹⁸ that it was not necessary for the judge requesting recusal to consider himself to be prejudiced: it was sufficient for him to point out circumstances indicating that there are reasons for a determination to be made regarding him possibly being prejudiced. The Court stated that concern about prejudice exists where a party to the case has reason after reasonable weighing of all the relevant circumstances to have doubt whether the judge is unbiased. In the specific circumstances the Court found that concern that Judge Söllner would not in the dispute be able to be open and unbiased, was understandable and the request for recusal was granted.

In 1999 a comparable, but slightly different situation arose again involving Judge Kirchhof. In 1980 Professor Kirchhof wrote an opinion on instruction of the government of Baden-Württemberg for the purposes of preparing for the proceedings in the *Bundesrat* where legislation dealing with financial and fiscal equalisation between the Federation and the *Länder* was to be considered. In 1983 he represented the *Land* government before the *Bundesverfassungsgericht* where the constitutionality of the specific law was in dispute. In the 1999 case,⁹⁹ the Court, of which Judge Kirchhof had now been a member for eleven years, again had to consider the disputed legislation. Three parties (*Länder* governments) took the opinion that the judge would be biased, given his previous involvement. Kirchhof duly made the statement required by paragraph 19 of the *Bundesverfassungsgerichtsgesetz*, pointing out, however that his opinion was written 18 years before and his conduct of the case before the Court occurred 13 years ago. He further pointed out that the legislation concerned had in the meantime undergone development, much litigation had taken place, wide spread academic work had been done at the highest level and Germany had been reunited, all of which resulted in extensive economic and constitutional development of the field. In this instance the Court declined to approve of the recusal, thereby triggering some strong (uncharacteristically sharp) commentary.¹⁰⁰ Nevertheless, the Court reiterated (in paragraph 16 of the judgment) that the law (paragraph 19) was not concerned with the question whether a judge was in fact partisan (*parteilich*) or prejudiced (*befangen*) or considered himself to be prejudiced: the only consideration was whether a party to the matter had reason, after reasonable assessment of all the circumstances, to

⁹⁸ BverfGE 88, 1 [3] and [4].

⁹⁹ BVerfG, 2 BvF 2/98 of 6. July 1999, paras (1-24), <<http://www.bverfg.de/>>.

¹⁰⁰ E.g. Rolf Lamprecht, *Karlsruher Befangenheits-Logik*, NJW 38, 2791 (1999). The article starts with the exclamation "Es kann nicht sein, was nicht sein darf!" ("It can't be what should not be!") and ends with an appeal to the "Law of Logic" for the rejection of the idea that the 1990 case discussed above and this one might be distinguished.

doubt the objectivity (*Unvoreingenommenheit*) of the judge. The expression of scholarly opinion on similar matters, although expressly excluded by the law as a ground for recusal, could however become such ground if an element was added. Such an element would have been present had the judge's association with Baden-Württemberg and the previous case existed not too far back in time and if the substance of the matter was such to allow for the construction of a continued relationship with that *Land* as a party before the Court. Furthermore, if the previous involvement of Judge Kirchhof with the *Land* as party to the current dispute served the function of a guarantee (*Gewährfunktion*) for the outcome of the judgment (paragraph 19 and 20 of the judgment), it would have required recusal. It was however found that these elements were not present in the particular case.

In a recent judgment of the *Bundesverfassungsgericht*¹⁰¹ the Court stated¹⁰² that (freely translated) it can in principle be supposed that the judges of the *Bundesverfassungsgericht* possess the required inherent independence and distance that enable them to come to unbiased and objective decisions. To this the Court added that the provisions regarding concern about judicial prejudice were intended to avoid any appearance of bias.¹⁰³

In the South African *SARFU* recusal case, much of the detailed grounds for the recusal application concerned the past political activities and affiliation of the justices.

The essential test for recusal was formulated as follows:

The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.¹⁰⁴

The judgment in the *SACCAWU* case (delivered by Cameron AJ, who was not a member of the bench that decided the *SARFU* recusal case, provides some

¹⁰¹ "Fall *Jentsch II*" NJW 47, 3404 (2003).

¹⁰² In the final paragraph of the judgment and with reference to two previous judgments: BVerfGE 35, 171 (173f.) and the dissenting opinion at 175 et seq.; BVerfGE 73, 330 (335 f.).

¹⁰³ Bei den Vorschriften über die Besorgnis der Befangenheit geht es aber auch darum, bereits den bösen Schein einer möglicherweise fehlenden Unvoreingenommenheit zu vermeiden.

¹⁰⁴ Para [48] of the *SARFU* recusal case.

useful analyses of the former judgment. The Court pointed out that the following considerations are prominent in the test for recusal:¹⁰⁵

- A presumption that judicial officers are impartial in adjudicating disputes. Consequently –
- the applicant for recusal bears the onus of rebutting the presumption of judicial impartiality, and
- it is a strong presumption, rebuttal of which requires cogent or convincing evidence.
- Because judges are human, their life experiences will unavoidably influence their understanding of judicial duties. “Absolute neutrality” in the judicial context is therefore not achievable.
- Judicial impartiality, clearly distinguished from “colourless neutrality”, is however an absolute requirement for a civilised system of adjudication. Such impartiality the Court defines as “that quality of open-minded readiness to persuasion – without unfitting adherence to either party or to the Judge’s own predilections, preconceptions and personal views”. In practical terms, therefore, “a mind open to persuasion by the evidence and the submissions of counsel”.
- A “double requirement of reasonableness”:
- the person concerned about the danger of judicial bias must be a reasonable person, and
- the concern (“apprehension”) itself must be reasonable in the circumstances.¹⁰⁶

Anxiety on the part of the litigant requesting recusal, however strong and honest, is therefore not sufficient: “The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant’s anxieties. It attributes to the litigant’s apprehension a legal value, and thereby decides whether it is such that it should be countenanced in law.”¹⁰⁷

- In recusal applications, two contending factors need to be weighed:
- ill-founded and misdirected challenges to the composition of a bench should be discouraged, and
- public confidence in impartial adjudication must be maintained.

The Canadian position on recusal is very similar to that of South Africa. In an appeal to the Supreme Court concerning apprehension of bias in a judge of a lower court, Cory J expressed the following opinion, which seems to have become a compact expression of current judicial thinking in Canada:¹⁰⁸

The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every hu-

¹⁰⁵ *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 3 SA 705 (CC) paras [12] – [17].

¹⁰⁶ Cf. also *S v Roberts* 1999 4 SA 915 (SCA) para [32] approvingly referred to by the Court in the *SACCAWU* judgment (para [14]).

¹⁰⁷ Para [16] of the *SACCAWU* judgment.

¹⁰⁸ *R v S.(R.D.)* 1997 3 S.C.R. 484 para [119] (references omitted).

man contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

In a judgment of 1999, this *dictum* and the South African *SARFU* recusal judgment were applied by the Supreme Court of Canada as authority in dismissing an application for recusal of a Supreme Court judge.¹⁰⁹ In a very brief judgment, Justice Bastarache dismissed an application for recusal, stating (rather reminiscent of the facts of some of the German cases referred to above) that “no evidence was adduced demonstrating that my beliefs or opinions expressed as counsel, law professor or otherwise would prevent me from coming to a decision on the basis of the evidence”.¹¹⁰

In 2002 the Supreme Court handed down a unanimous judgment written by Justice Binnie in which an appeal by two Indian “bands” was dismissed. In 2003 the Court was again approached with a motion for an order “vacating” the 2002 judgment on the grounds that Justice Binnie was, seventeen years ago when the original claims were being developed, Associate Deputy Minister of Justice responsible for dealing with such claims. Actual bias on the part of the judge was not averred, but it was submitted that the circumstances gave “rise to a reasonable apprehension of bias”. Justice Binnie recused himself from the 2003 proceedings. In the judgment by the remaining eight members of the bench,¹¹¹ in which the motion to vacate the previous judgment was dismissed, the following elements emerged:

- There is a “well-settled, foundational principle of impartiality of courts of justice”: “... public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.” (para 57);

- The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case. (para 58);

- “Reasonable apprehension of bias” is the standard in Canadian law for the disqualification of a judge. This standard (which was laid down in 1978) was confirmed by the Court in the following terms (para 60):

¹⁰⁹ *Arsenault-Cameron v Prince Edward Island* 1999 3 S.C.R. 851 paras [3] and [4].

¹¹⁰ Paragraph 6 of the judgment.

¹¹¹ *Wewaykum Indian Band v Canada* 2003 2 S.C.R. 259.

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?”

- The good faith of the judge is rarely at issue. Should actual bias be proven, it would disqualify a judge. The apprehension of bias, the more probable ground for an application, is based upon the possibility that the judge might unconsciously be affected:

Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.¹¹²

- Judge Binnie’s past status as Associate Deputy Minister was, in itself, insufficient to justify his disqualification. (para 79)

The need for recusal of a judge is not easily assumed, especially not on the grounds of suspected political prejudice. Judges normally attain their appointment on the basis of their qualifications and experience. Appropriate experience for a judge almost inevitably involves public engagement, which very frequently has a political aspect. It does however become suspect when judges are appointed precisely because of their past (or even worse, current) political affiliations. Herein lies the greatest danger for warped constitutional review. It really amounts to the opposite of the “counter-majoritarian difficulty”: the danger of majoritarian subservience and adjudication resonating with the current political idiom.

5. Separation of Powers

5.1. South African Advances

The Constitutional Court of South Africa has expressed itself frequently on the doctrine of the separation of powers. In so doing it has been active in developing a specifically South African perspective on the doctrine.

When called upon¹¹³ to determine whether the Constitution conformed to the requirements of the separation of powers as was prescribed by Constitutional Principle VI in the 1993 Constitution, it took the position that despite some basic principles characteristic of the doctrine, “no constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation” and that the South African model “reflects the historical circumstances of our constitutional development” (paras 109 and 112).

¹¹² Para [65], quoted from a 1960 judgment of the British Queen’s Bench.

¹¹³ In the “First Certification Judgment” (in *re: Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC)).

In *De Lange v Smuts*¹¹⁴ the Court stated that the South African model to be developed by the courts should establish “a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest”. The Court also tended to depend on its interpretation of the Constitution to discern the perimeters of the separation, confirming its support of the sentiments of *Tribe*¹¹⁵ that “where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favor of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution’s structure”.¹¹⁶

The Court described its responsibility for upholding the separation of powers as follows:

In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of the separation of powers requires that the judiciary, in its comments about the other arms of the state, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the judiciary and one another.

It is especially in the field of the development of the notion of enforceable socio-economic rights that the Constitutional Court has been exploring the perimeters of judicial authority *vis-à-vis* the other branches of government. For its leading role in this regard the Court found much justification in the provisions of the Constitution.

Due to the historically atypical nature of socio-economic rights in the sense that they do not provide the bearers with defences against incursions by the authorities, but purport to create claims against the state to perform certain actions and provide specific services, there is a long-standing debate on the enforceability and justiciability of those rights.

The rights concerned are primarily provided for in sections 26 and 27 of the Constitution and are rights to access to adequate housing, health care services, sufficient food and water and social security. Significantly the rights are qualified by the state’s responsibility to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the rights.

The first indication of the Court’s readiness to blaze a new trail, not only in the development of South African law, but on a global scale, appeared in the process of constitutional certification.¹¹⁷ The Court conceded that these rights did not fall into

¹¹⁴ *De Lange v Smuts and Others* 1998 (3) SA 785 (CC) para [60], reconfirmed in *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para [24].

¹¹⁵ American Constitutional Law Vol. 1, 3rd ed., Foundation Press, New York 2000 at 127.

¹¹⁶ *Van Rooyen v S* 2002 (5) SA 246 (CC) para [34].

¹¹⁷ The transitional Constitution of 1993 required the Court to certify that the “final” Constitution to be adopted conformed to the requirements of 34 “constitutional principles”. Cf. *Ex Parte* Chairper-

the category of “universally accepted fundamental rights” as required by Constitutional Principle II, but rejected an argument that the enforcement of such rights in a manner that would have implications on the budget of government, would be in conflict with the separation of powers. The Court stated its view that the socio-economic rights were “at least to some extent, justiciable” and that, at the very least, “socio-economic rights can be negatively protected from improper invasion”.¹¹⁸

In the first case which tested this attitude¹¹⁹, the Court declined an application for an order that a provincial hospital should provide costly renal dialysis to a terminally ill patient, on the basis, *inter alia*, of the limited resources available to the state. The Court declared (para 29) that a “court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters”. Good faith and rationality on the part of the executive and the administration were thus indicated to be of key importance for the purposes of defensible non-delivery of services. The next two cases however broke new ground.

In the now famous *Grootboom* judgment¹²⁰ the Court examined the policy on the provision of housing to the indigent in all three spheres of government and concluded that it was sorely lacking. The Court held that the state is obliged by the Constitution to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations, and that the existing programmes “fell short of the obligations imposed upon the state by section 26 (2)”. The Court therefore ordered the state to devise a programme including “reasonable measures ... to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations”. An essential element of this judgment which provided a basis for the further development of the law on the enforcement of socio-economic rights, is the emphasis on the reasonableness of implementation policies. Although this approach is not foreign to legal thinking, it remains inevitable that the determination of reasonableness will entail subjective considerations and will therefore always be prone to inconsistency.

In the *TAC*¹²¹ case the Government’s policy to make the retroviral drug Nevirapine available only to mother-and-child patients at specified clinics where the effectiveness and safety of the drug was being determined experimentally, was found by the Court not to be reasonable. The powers of the judiciary in deciding dis-

son of the Constitutional Assembly: in *re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC), where the process was explained in the introductory sections of the judgment.

¹¹⁸ Paras [76] - [78] of the first certification judgment.

¹¹⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

¹²⁰ *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC).

¹²¹ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

putes on socio-economic rights were investigated thoroughly. In paragraph 101 it was concluded that:

“A dispute concerning socio-economic rights is ... likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged ... to make a declaration to that effect. But that is not all ... [T]he Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant ‘appropriate relief’. It has wide powers to do so and in addition to the declaration that it is obliged to make ... a court may also ‘make any order that is just and equitable’.”

The Court resolved the matter by issuing an extensive order to Government, requiring it *inter alia* to devise and implement a comprehensive and co-ordinated programme affording access to health services to combat mother-to-child transmission of HIV to pregnant women and new-born children, specifying key elements of the plan to be devised against the background of the shortcomings of the existing policy, and to remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.

The effects of its judgments on the separation of powers in matters concerning socio-economic rights have constantly been in the minds of the judges. This is richly evidenced in the *TAC* judgment. In paragraph 38 of the judgment, the Court e.g. stated:

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

The suggestion that the Court would be slow to intervene where its judgment would have “multiple social and economic consequences for the community” is not particularly convincing coming from a Court which has from its inception been at the centre of the social restructuring of the country. There can be no doubt that profound consequences flowed from e.g. the Court’s declaration of the death penalty and corporal punishment to be unconstitutional, its wide-ranging jurisprudence on equality concerning *inter alia* affirmative action, gender issues, the position of homosexuals, religious freedom and the responsibility of the state towards victims of crime at the hand of accused persons out on bail, all in the course of less than a decade.

The “restrained and focused role” that the Court says is contemplated by the Constitution, also creates the impression of a studied understatement if the bold approach reflected in the jurisprudence on socio-economic rights is considered. Where the Court orders the state “to take measures to meet its constitutional obligations” and subjects the reasonableness of government conduct to evaluation, it

can by definition not be a meek and inhibited role. The Court has made it patently clear that, in terms of the powers granted it by the Constitution, it primarily lies within its domain to determine what is consistent with the Constitution and what not. The standard of measurement for this determination, viz. reasonableness, can mean nothing other than “reasonable in the opinion of the Court”. Showing its teeth, as it were, the Court stated in paragraph 99 of the *TAC* judgment:

Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.

These comments should not be understood to mean that the Court is necessarily at fault in this regard. The Court is indeed entrusted with the kind of responsibilities that it has described in its judgments to serve as an important guardian over the Constitution. Thus far it has mostly been successful if one considers the frequency with which Parliament, provincial legislatures, the President, the Government, Premiers and Ministers have contested cases before the court whose actions had been found lacking and were required to effect corrections. That the legislative and executive branches have thus far not only tolerated judicial intervention, but have also acted upon it, is a very positive element of South African constitutionalism.

The Court has not been silent on the theoretical vagueness of aspects of the separation of powers. In the *TAC* judgment it referred to the various decisions in which it stated “that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others”. Nevertheless, it continued:¹²²

Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.

5.2. German Foundations

Article 21 (2) of the *Grundgesetz* renders a political party which seeks to impair or abolish the “free democratic basic order” (*die freiheitliche demokratische Grundordnung*) to be unconstitutional. This is a foundational concept in German constitutional law, as is clear from the early definition provided by the *Bundesverfassungsgericht*:¹²³

¹²² Paras [98] and [99].

¹²³ BverfGE 2, 1 (12), freely translated here.

It is an order of the constitutional state (*Rechtsstaat*) founded upon the self-determination of the people, the will of the current majority, exclusive of violent or arbitrary power and which establishes freedom and equality. At least the following basic principles are characteristic thereof: respect for the human rights concretised in the Constitution, ... popular sovereignty, the separation of powers, responsibility of government, legality of the administration, the independence of the courts, multiparty democracy ...

Thus the separation of powers, though undefined as such, is considered to be a foundational principle of the German system. In a judgment of the *Bundesverfassungsgericht* of 1984 typical of the cold war era in which the Court dealt with an application for the annulment of the government's permission to the United States to deploy nuclear weapons on German territory on the basis that parliamentary permission was required,¹²⁴ the following definitive pronouncement was made:

The organisational and functional distinction and separation of powers laid down as a principle [in the *Grundgesetz*] serves in particular for the apportionment of political power and responsibility and of control over the bearers of power; it also aims at securing the taking of governmental decisions as rightly as possible, that is, by those agencies in the best position to do so according to their organisation, composition, function and mode of procedure, and acts towards moderation of State power as a whole. The concentration of political power which would lie in assigning the *Bundestag* central decision-making powers of an executive nature in foreign affairs beyond those assigned to it in the Basic Law would run counter to the structure of apportionment of power, responsibility and control laid down at present by the Basic Law. This is in no way changed by the fact that, at the federal level, only *Bundestag* members are directly elected by the people. The specific order of the apportionment and balancing of State power which the Basic Law wishes to see guaranteed must not be undermined by a monism of powers falsely derived from the democracy principle in the form of an all-embracing reservation on behalf of Parliament (BVerfGE 49, 89 [124 ff.]). Again, the principle of parliamentary responsibility of the Government necessarily presupposes a core area of the executive's own responsibility (BVerfGE 67, 100 [139]). The democracy constituted by the Basic Law is a democracy under the rule of law, and this means, in relation to the mutual relations of the organs of State, above all a democracy with separation of powers.

The Minister of Defence had provided the Court with a security assessment to justify the government's decision, but, with reference to the Court's own position within the framework of the separation of powers, it stated:

Assessments and political evaluations of this nature are incumbent on the Federal Government. The Basic Law sets to this power of judgment only the bound of evident arbitrariness. Within this extreme limit, the Federal Constitutional Court has not to consider whether assessments and evaluations of this nature are right or wrong, since it lacks legal criteria for this; responsibility has to be taken for them politically.

¹²⁴ BVerfGE 68, 1, translation provided by the Institute of Global Law, found in the internet in Oct. 2004 at <http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverge.shtml?18dec1984>.

In a recently published paper Christian Starck¹²⁵ pointed out that, although constitutional review is in itself a typical factor of the separation of powers, it may actually endanger the balance if the judiciary, which has the last word on the interpretation of the Constitution, would disregard the framework character of the Constitution, thereby constricting the political function of the legislature. The constitutional role of the Court in this regard is to oversee appropriate exercise of authority by the national organs of state, the proper allocation of federal and provincial powers and the determination of the constitutionality of legislation and executive conduct.¹²⁶ Due to the need for the Court to justify its judgments, an element of rationality is built into the application of constitutional law, thereby inducing other organs of state also to operate rationally, thereby promoting consistency in the interpretation and application of the Constitution.¹²⁷

German law distinguishes legislative and judicial conduct *inter alia* by the view that a legislature, in making a law, deals with an open, undetermined factual situation. A court, which is normally required to determine the facts by means of the weighing of evidence, makes a decision on the basis of an actual set of facts.¹²⁸ To those facts, the Court must then apply the Constitution. To prevent a violation of the principle of the separation of powers, the Court's method of interpretation should however be consistent. Arbitrary interpretation methods would lead to an infringement of the principle.¹²⁹ The approach that the *Bundesverfassungsgericht* should refrain from adjudicating a matter on the basis of it being concerned with a "political question" and that it should exercise "judicial self restraint", is not appropriate: where the Constitution provides a framework for the making of political decisions, the fact that a matter of political concern is involved may not preclude the Court from deciding whether the decision falls within the framework of the Constitution.¹³⁰

5.3. Canadian Dichotomy

Being a common law country with a governmental system known as "responsible government" and a relatively short history of constitutional supremacy, the separation of powers has, in the absence of specific constitutional attention to the doctrine, taken some time to take root. Thus Strayer¹³¹ wrote in 1988:

¹²⁵ Christian Starck, Gewaltenteilung und Verfassungsgerichtsbarkeit, in: id. (ed.) Fortschritte der Verfassungsgerichtsbarkeit in der Welt – Teil I, Baden-Baden 2004, 117, at 118-119.

¹²⁶ Id., 121.

¹²⁷ Id., 123.

¹²⁸ A similar construction is made in Canada: Patrick J. Monahan, The Supreme Court of Canada in the 21st Century, 80 The Canadian Bar Review 389-390 (2001).

¹²⁹ Starck (note 125), 126 and 129.

¹³⁰ Schlaich/Korioth (note 53), 339-340; Starck (note 125), 127.

¹³¹ Barry L. Strayer, The Canadian Constitution and the Courts, 3rd ed., Toronto 1988, 137. Cf. Hogg (note 73), 205 et seq.

It has been held that there is no constitutional separation of powers at either the provincial or the federal level in Canada. Thus the delegation by Legislature or Parliament of part of its law-making power to executive or other agencies has been upheld. It is also apparent that the executive branch of Government can exercise judicial functions on occasion, subject to the requirement that the members of any agency exercising functions analogous to a Superior, District or County Court must, by virtue of s. 96 of the B.N.A. 1867, be appointed by the Governor General ... It has also been held that the courts may perform non-judicial as well as judicial functions.

Chief Justice Lamer recognised in 1996¹³² that “this Court has held that the separation of powers under the Canadian Constitution is not strict”,¹³³ but in the same breath, as it were, he stated: “One of the defining features of the Canadian Constitution, in my opinion, is the separation of powers.” Very significantly for the present discussion, because it would appear that the separation is primarily focussed on a separation between on the one hand the judiciary, and on the other the executive-cum-legislature, he went on to say:¹³⁴

The constitutional status of the judiciary, flowing as it does from the separation of powers, requires that certain functions be exclusively exercised by judicial bodies. Although the judiciary certainly does not have an interpretative monopoly over questions of law, in my opinion, it must have exclusive jurisdiction over challenges to the validity of legislation under the Constitution of Canada, and particularly the Charter. The reason is that only courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature.

In the following year the Chief Justice was even more explicit in a case¹³⁵ pertinently dealing with the issue of judicial independence:

What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.

¹³² *Cooper v Canada (Human Rights Commission)* 1996 3 S.C.R. 854 para [10].

¹³³ In para [11] he added: “However, the absence of a strict separation of powers does not mean that Canadian constitutional law does not recognize and sustain some notion of the separation of powers.” In *Newfoundland Assn. of Public Employees v R.*, 2002 NLCA 72 (which is discussed below as strongly critical of the Supreme Court) the provincial court relied heavily on this statement as a matter of settled doctrine.

¹³⁴ In para [13].

¹³⁵ *Manitoba Provincial Judges Assn. v Manitoba (Minister of Justice)* 1997 3 S.C.R. 3 paras [140] and [141].

To be sure, the depoliticization of the relationships between the legislature and the executive on the one hand, and the judiciary on the other, is largely governed by convention ... However, to my mind, the depoliticization of these relationships is so fundamental to the separation of powers, and hence to the Canadian Constitution, that the provisions of the Constitution, such as s. 11 (d) of the Charter, must be interpreted in such a manner as to protect this principle.

5.4. “No Bright Lines” and Judicial Politics

Upholding the doctrine of the separation of powers theoretically, legally and structurally is clearly considered to be desirable by constitutional courts. In the absence of “bright lines” separating the three components of government authority, judicial involvement in politics is however not excluded by the doctrine – it merely inhibits unsubstantiated judicial overreach. In fact, it is incumbent upon the courts as (mostly final) interpreters of the Constitution to draw the lines separating the respective fields of competence. The courts are required not only to delineate the scope of their own jurisdictional reach, but also to interpret the Constitution’s meaning regarding the separation of legislative and executive authority. Despite the measure of textual limitation involved, and the level of judicial reasoning and justification required of especially constitutional courts, much scope remains for the authoritative interpreters of constitutions to allow themselves to obstruct, promote, and sometimes even to steer, political agendas. This appears to be unavoidable. Whether a specific court might abuse its privilege or avoid its responsibilities in the political field, is not determined by any constant factor: it depends on elements such as the attitude of those for the time being occupying the bench, the social and economic circumstances and the facts and legal issues in cases the court is called upon to deal with. The politics of constitutional adjudication are clearly different from parliamentary, governmental and electoral politics. It involves rational justification and legal foundation, but constitutional review can nevertheless not claim to be innocent of politics.

6. The Political Responsibility of the Judiciary

It is quite likely that individuals, bodies and a public involved in constitution-writing or the introduction of a set of justiciable fundamental rights are usually so caught up in the broad principles, technicalities and short-term political goals of the process, that little thought is given to the implications of a new constitution regarding the politics of constitutional adjudication. The introduction of the Canadian Charter of Rights is an excellent example as described by Michael Mandel.¹³⁶ He points out that around its introduction, “the dominant theme in the selling of

¹³⁶ The Charter of Rights and the Legalization of Politics in Canada, rev. ed. Toronto 1994, 39-40.

the Charter has been democracy”, that it was argued that it was better to trust “impartial and non-partisan courts” than politicians to protect basic rights and that judges would be like referees in constitutional cases who would not take sides: “The judiciary would not be a protagonist except on behalf of the constitution itself.” Even in the absence of comparative South African empirical research it is safe to assume that a similar attitude was present in the circumstances surrounding the introduction of the new constitutional dispensation there.¹³⁷

From the material discussed above, it is clear that such public naivety cannot last under the pressures of the resolution of actual and contentious constitutional disputes. Neither is it defensible that the judiciary should seek to perpetuate the illusion that its task is merely to “find” the law in accordance with abstract interpretative methods, divorced from subjective perspective and preference. How, then, should the judge go about adjudicating cases with political impact?

Even “without a satisfactory account having been provided for why so much power should be entrusted to a small group of lawyers who are unelected and virtually unaccountable to anyone but themselves”, Beatty proposes to find answers to the global trend of the “judicialization of politics” in the principle of proportionality. After an impressive wide-ranging comparative analysis of jurisprudence, he writes: “Despite the carnage that the theorists have made of each other’s ideas, judges all over the world have converged on a framework of analysis that allows them to evaluate the work of the political branches of government from a common perspective and without regard to their own political and moral philosophies.”¹³⁸ It is not possible here to do justice to Beatty’s suggestions and analyses. Proportionality as a vehicle for objective determination of the justification of incursions by the authorities into the sphere of rights, certainly promises (and delivers) much more objectivity in constitutional jurisprudence than reliance merely on the experience, integrity and wisdom of judges. Is proportionality however really capable, as long as the judges “stick to the facts,”¹³⁹ to settle disputes about the limits of legitimate lawmaking “on the basis of reason and rational argument”¹⁴⁰ and to immunise constitutional review from the need for the court to make moral choices?¹⁴¹ It sounds too good to be true, given the pervasiveness of

¹³⁷ The following remark by the Constitutional Court in para [39] of the “First Certification Judgment” provides some indication of such mode of thought: “There is a distinction to be made between what the NT [the new constitutional text] may contain and what it may not. It may not transgress the fundamental discipline of the CPs [constitutional principles]; but within the space created by those CPs, interpreted purposively, the issue as to which of several permissible models should be adopted is not an issue for adjudication by this Court. That is a matter for the political judgment of the CA [Constitutional Assembly], and therefore properly falling within its discretion. The wisdom or correctness of that judgment is not a matter for decision by the Constitutional Court. The Court is concerned exclusively with whether the choices made by the CA comply with the CPs, and not with the merits of those choices.”

¹³⁸ Beatty (note 1), 159-160.

¹³⁹ Id., 166.

¹⁴⁰ Id., 169.

¹⁴¹ Id., 170.

political and other subjective influences on the process of human decision-making. The fact that judges are human cannot be dispensed with: whether a particular limitation on rights is proportionally justifiable still requires subjective evaluation.

A peculiarly innovative Canadian response to the difficulty of judicial politics is to be found in what has become known as “democratic dialogue”. The term was created in an academic article by Hogg and Bushell and almost immediately acknowledged by the Supreme Court.¹⁴² Roach provides the following characterisation of this process:¹⁴³ “Courts remind legislatures of values that might otherwise be neglected, and legislatures respond by expanding or refining the terms of the debate and by making clear why rights have to be limited in particular contexts.” The application of this mechanism in other jurisdictions has only limited viability for at least two reasons: the Canadian “notwithstanding” clause in section 33 of the Charter, and the existence of a unique politico-judicial culture which has developed over many years. The mere existence of this democratic dialogue is an acknowledgement of the engagement of the Supreme Court in politics, albeit in a particularly judicial fashion.

Despite the huge impact that the “counter-majoritarian” debate has had in scholarly literature, it must be clear that constitutional review has become an indispensable component of the contemporary constitutional state – those who are uncomfortable with it must learn to live with their discomfort. In a sense the “difficulty” is a luxury associated with established constitutional democracies. Where circumstances arise whereunder an element of constitutionalism (such as multi-party democracy) comes under pressure, the nature of the “difficulty” might change. South Africa, where the governing party has attained an overwhelming majority, effectively neutralising parliamentary opposition politics, non-majoritarian constitutional review may become essential for the survival of constitutionalism. If politics in constitutional adjudication cannot be avoided, let us then rather have fearless judicial consistency as a corrective to majoritarian arrogance than judicial echoes of government policy and ideology. It is the duty of especially the constitutional judge to recognise his or her own political preju-

¹⁴² Monahan (note 128), 388; Peter W. Hogg/Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 Osgoode Hall L.J. 75 (1997); in *Vriend v Alberta (Attorney General)* 1998 1 SCR 493 paras [138] and [139] Iacobucci J said: “As I view the matter, the Charter has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a ‘dialogue’ by some (see e.g. Hogg/Bushell, *supra*). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives ... By doing this, the legislature responds to the courts; hence the dialogue among the branches. To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.”

¹⁴³ Roach (note 64), 250.

dices,¹⁴⁴ to express them rationally in judgments in which they may directly affect a decision, to consider whether the prejudice is strong enough to blind him or her to arguments from a different perspective and to the impact of a decision on those holding different views (in which case recusal is indicated), and not to use the bench as a platform to mould the law to fit a political agenda.

Although clearly not in itself sufficient to guarantee sound judicial politics, the quality of the judiciary under constant political pressure is of key importance. No wonder then that the stakes are considered to be so high when judges are appointed. We may speak with Professor Karl Doehring where he, at the end of his discussion of the judicial authority over the legislature and the executive in Germany¹⁴⁵ remarks (freely translated):

Once a constitutional court is established, the question arises who watches over the sentry? The answer is simple: no one. If one accepts the existence of unfettered justiciability of all legal questions, there is a danger that we will not have a government of law, but a government of judges. Then there is no escape, only the hope that we have excellent judges, and then we must ask how to obtain such judges. Unfettered justiciability promotes unfettered trust in the judiciary. Do we have that?

¹⁴⁴ Cf. Cory J's dictum quoted above at note 108.

¹⁴⁵ Karl Doehring, Zur Erstreckung gerichtlicher Kontrolle des Gesetzgebers und der Regierung, in: *Verfassungsstaatlichkeit – Festschrift für Klaus Stern*, München 1997, 1059, 1069.