JUDICIAL ACTIVISM IN AFRICA: POSSIBLE DEFENCE AGAINST AUTHORITARIAN RESURGENCE?

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ABSTRACT

One of the key innovations of the constitutional rights revolution which swept through the African continent in the 1990s was the introduction of independent judiciaries. For a judiciary, which in most parts of Africa was sidelined before the 1990s, its sudden emergence at the heart of constitutional rights adjudication has posed enormous challenges. Standing firmly between the individual citizens and the wielders of power, the judiciary has become the ultimate arbiter in the arena of constitutional rights necessitating a more active approach to adjudication. It is contended that although the concept of judicial activism is quite controversial, it has an important place to play in entrenching constitutional governance in Africa.

The paper will briefly consider the concept of judicial activism. The judiciary in Africa has not been immune from the forces of globalisation which have affected all areas of political, social and economic life. The inward-looking culture which was characteristic of the old judiciary is gradually being abandoned as judges come to see themselves as members of a global legal community where knowledge and ideas are exchanged across jurisdictions. It will however try to draw inspiration from some of the approaches and major achievements of judicial activism in other countries, will examine a developed country like Britain and a developing country like India to see what lessons can be learnt. It will be shown that through judicial activism the frontiers of fundamental human rights and social justice have been expanded.

It is contended that the constitutional rights revolution can only be realised with a judiciary that uses its powers to negate the authoritarian impulses of elected politicians. It is argued that this calls for a new judicial approach to adjudication which requires judges to adopt a fresh, innovative and principled approach to reflect adequately the dramatic and dynamic changes of our times and the revulsion against dictatorship. From some recent cases in South Africa, it will be shown that judicial activism must not be a licence for judicial arbitrariness. Nevertheless, if the judiciary is to play an effective role in promoting constitutional governance in Africa, it is contended that it must liberate itself from being perceived as the handmaiden of the executive, act boldly and decisively to enforce both the letter and spirit of the law. It is contended that the judges in Africa today must act as the last line of defence to arrest the looming authoritarian resurgence.

1. INTRODUCTION
One of the key innovations of the constitutional rights revolution of the 1990s was the attempt to introduce independent judiciaries. The struggle for judicial independence is occurring throughout the world and not only in the fledgling democracies in Africa. For a judiciary, which in most parts of Africa was sidelined before the 1990s, its sudden emergence at the heart of constitutional rights adjudication has posed enormous challenges especially in countering the resurgence of majoritarian abuse or dominant party dictatorships that use multipartyism as a cloak to perpetuate their dictatorial tendencies. Standing firmly between the individual citizen and the wielders of power, the judiciary has become the ultimate arbiter in the arena of constitutional rights. The concept of judicial activism although quite controversial, it is contended that it has an important role to play in entrenching the rule of law and constitutional governance in Africa.

The paper will start by briefly considering the concept of judicial activism itself. It will then examine its application in some Commonwealth jurisdictions outside Africa. This will be followed by the discussion of two contrasting cases of its application in Africa, one, Botswana generally regarded as a shining light of African democracy and constitutionalism, operating within an old typical Westminster crafted constitution and the other, South Africa, being a new “third wave” democracy with one of the newest and best “state of the art” constitutions in the world and a possible pointer of the direction in which genuinely democratic African states should move. From this, there will be an attempt to distil the main lessons that can be drawn from this overview of contrasting approaches of judicial activism within and from outside the continent. In concluding, it will be argued that although, as Alexander Hamilton famously put it, the judiciary had neither the power of “the sword or of the purse,” the African judge more than judges elsewhere have a special duty to creatively promote the course of constitutional justice in every facet of their judgments. The risks are high but the rewards are tremendous.

2. NATURE AND SCOPE OF JUDICIAL ACTIVISM

It must from the outset be made clear that the concept of judicial activism does not lend itself to an exact definition. It has variously been defined as, a philosophy advocating that judges should interpret the Constitution to reflect contemporary conditions and values; when courts do not confine themselves to reasonable interpretations of law, but instead create law or when courts do not limit their ruling to the dispute before them, but instead establish a new rule to apply broadly to issues not presented in the specific action.

makers or independent "trustees" on behalf of society. The array of existing disparate, even contradictory, ways of defining the concept has made its meaning increasingly unclear. We intend therefore to use the concept in this paper to mean a situation in which judges go beyond their traditional role of interpreters of the Constitution and seek to give effect to contemporary social conditions and values.

This concept is traditionally the opposite of the concept of judicial restraint, whereby the courts interpret the Constitution and any law to avoid second guessing the policy decisions made by other governmental institutions such as Parliament, and the President within their constitutional spheres of authority. On such a view, judges have no popular mandate to act as policy makers and should defer to the decisions of the elected "political" branches of the government in matters of policy making so long as these policymakers stay within the limits of their powers as defined by the Constitution. We are not going to indulge in the on-going debate on the pros and cons of these two concepts but will start from the premise that judicial activism is a reality and deal with it accordingly.

3. JUDICIAL ACTIVISM IN JURISDICTIONS OUTSIDE AFRICA

Under this section we intend to explore the manner in which the judiciary in certain jurisdictions outside Africa have exercised judicial activism. The judiciary in India and England will be discussed because of the written nature of the constitution and plurality of the citizenry of the former and because of the influence the latter has had on Anglophone Africa.

3.1 Judicial activism in India

Judicial activism has been a feature of India’s democratic setup for some three decades after an initial heavy influence of English common law ideal that the courts needed to retain a positivist role within the governmental framework. Section 131 of the Indian Constitution vests in the Supreme Court original jurisdiction in any dispute—

“(a) between the Government of India and one or more States; or (b) between the Government of India and any State or States on one side and one or more other States on the other; or (c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant...or

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6 See LA Graglia, “It’s not Constitutionalism, It’s Judicial Activism” 19 Harvard Journal of Law and Public Policy 293(1996) at p. 296 where he defines the concept as: “By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit.” See also G. Jones, “Proper Judicial Activism” 14 Regent University Law Review 141(2002) at p. 143 where the term is defined as “At its broadest level, judicial activism is any occasion where a court intervenes and strike down a piece of duly enacted legislation.”


8 See for example, T Sowell at www.tsowell.com/judicial.htm accessed on 8 June 2009.


other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.”

Section 131A subsequently gave the court exclusive jurisdiction in regard to questions of constitutionality of central laws notwithstanding anything contained in the Constitution.11

This constitutional mandate which has been interpreted to sanction some judicial activism is manifested in a number of cases. In Golaknath v Punjab12 the court ruled that Parliament could not curtail any of the fundamental rights in the Constitution. Although it backtracked on the forcefulness of this decision some six years later, the court continued to assert that in principle no institutional body could alter the democratic essence of the Constitution. This case initiated and developed the court’s jurisprudence around what became known as the “basic structure doctrine”. In terms of this doctrine, the court was in charge of preventing the erosion of those enduring values that constitute the essence of constitutionalism.13 Thus, in Kesavananda Bharati v State of Kerala14 by a majority of 7-6, the court held that under Article 368 of the Constitution, Parliament undoubtedly had power to amend any provision of the Constitution but the amendatory power did not extend to alter the basic structure or framework of the Constitution. The court was of the view that the basic structure of the constitution included, inter alia, (1) supremacy of the Constitution; (2) republican and democratic form of government; (3) secularism; (4) separation of powers between the legislature, the executive and the judiciary, and (5) federal character of the Constitution. This decision has been characterised as “a gigantic innovative judicial leap unknown to any legal system.”15 The court still flexed its muscle in the face of state of emergency in Indira Ghandi v Rajnarain.16 The court declared void a proposed constitutional amendment that prohibited the judiciary from deciding on the validity of contested elections. The court held that the Constitution would be forever altered if the executive branch could determine how elections were to be administered. In Vishaka v State of Rajasthan17 the court laid down exhaustive guidelines to prevent sexual harassment of women in the work place, until an exhaustive legislation has been enacted for the purpose. It was held that it is the duty of every public as well as private owner to prevent sexual harassment of women in the work place. The court went further to make it mandatory to display the guidelines conspicuously in the work place and directed the legislature to make a comprehensive law on the issue. Finally, in Wadhwa v State of Bihar18 The petitioner, a professor of political science who had done extensive research in the State’s administration, was deeply interested in ensuring the proper implementation of constitutional provisions. He challenged the State’s practice of repromulgating a number of ordinances without proper approval from the legislature. The Supreme Court directed the State government to pay the petitioner Rs10, 000 for his excellent research that brought to light this repressive action.

11 This section was inserted by section 23 of Constitution (Forty-second Amendment) Act, 1976.
12 AIR 1967 SC 1643.
13 See Sathe op. cit. at p. 99.
14 (1973) 4 SC 225.
15 See A Divan, “Judicial activism and democracy”, a lead opinion in The Hindu newspaper of 2 April 2007 to be found at www.hinduonnet.com/2007/04/02/stories/2007040200941000.htm
16 AIR 1975 SC 2299.
17 AIR 1997 SC 3011.
18 AIR 1987 SC 579.
Perhaps the area in which judicial activism has been greatly felt is in the increase of individual access to the legal process which has become chaotic, expensive, time consuming and too technical and in the area of public interest litigation. Generally speaking before the court takes up a matter for adjudication, it must first be satisfied that the person who had approached the court has sufficient locus standi to maintain the action. In its attempts to help the poor and needy vindicate the violation of their fundamental rights, the court side tracked the sanctity of locus standi and the procedural complexities that were impediment to access to the courts. The court found that the adversarial process could operate fairly and produce just results only where the two parties were evenly matched in strength and resources but, given that the poor often lacked the social and material resources, they were bound to be at a disadvantage in producing all relevant evidence before the court. It also noted that quite often the social action groups that tried to assist the poor themselves may not have adequate resources to gather all relevant material to place before the court. The court decided to abandon the laissez-faire approach in the judicial process and devised a strategy and procedure for ascertaining, establishing and articulating the claims and demands of the poor by appointing socio-legal commissions of inquiry. In fact, the practice of appointing socio-legal commissions of inquiry for the purpose of gathering relevant material and information bearing on the case put forward on behalf of a disadvantaged individual or section of a community in social action litigation has now been institutionalised as a result of the Indian Supreme Court judgment in Bandhua Mukti Morcha v Union of India.

To further enhance access to the courts, the Supreme Court in Gupta v Union of India said:

“Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons...and such a person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction...”

Thus, in Maharaj Singh v Uttar Pradesh the Supreme Court held that where a wrong against community interest was done locus standi will not always be a plea to non-suit an interested public body chasing the wrongdoer in court. The court added that locus standi has a larger ambit in current legal semantics than the accepted individualist jurisprudence of old.

19 The magnitude of problems faced by litigants can best be gleaned from B. Debroy’s 2002 report in the Far Eastern Economic Review February 14 titled “Losing a World Record” in which it was stated that there were “23 million pending cases in Indian courts -20,000 in the Supreme Court, 3.2 million in the High Court and 20 million in the lower or subordinate courts.


22 (1982) 2 SCR 365 at p. 520 per Bhagwati CJ.

23 AIR 1976 SC 2602 at p. 2609.
The court has accordingly over the years allowed public interest litigation to vindicate the right to a speedy trial;\(^{24}\) the right to legal aid;\(^{25}\) the right to livelihood;\(^{26}\) and the right against pollution.\(^{27}\) The court has even gone further to provide remedies to ensure that its decisions are enforced by government through its policy of setting up a monitoring agency which would continuously check and report on the implementation of these decisions. In the *Bandhua Mukti Morcha* case, the court made an order giving various directions for identifying, releasing and rehabilitating bonded labourers, ensuring minimum wage payments, observance of labour laws, providing good drinking water and setting up dust-sucking machines in the stone quarries. It also set up a monitoring agency to check continuously and report on the implementation of these directions. In another case, it gave a State government instruction to prepare annual reports detailing implementation of the Court’s decisions.\(^{28}\)

There is general consensus that judicial activism has served India’s democracy well. The Supreme Court’s willingness to tackle controversial political and legal issues in a serious and thoughtful manner is said to have given it prime legitimacy.\(^{29}\) It has also been said that the great contribution of judicial activism in India has been to provide a safety valve in a democracy and a hope that justice is not beyond reach.\(^{30}\) Furthermore, the courts adoption of a pro-active role to make up for the inefficiencies of the executive has proved beneficial to Indian society.\(^{31}\) People in general believe that if any institution or authority acts in a manner not permitted by the Constitution, the judiciary will step in to right the wrong.\(^{32}\) Whilst these accolades are well deserved it is important to bear in mind these words of Justice Rao of the High Court of Andhra Pradesh. He said:

> “Judicial activism should not result in rewriting of the Constitution or any legislative enactments. Reconciliation of the permanent values embodied in the Constitution with the transitional and changing requirements of the society must not result in undermining the integrity of the Constitution. Any attempt leading to such a consequence would destroy the very structure of the constitutional institutions. Conscious of the primordial fact that the Constitution is the supreme document, the mechanism under which laws must be made and governance of the country carried on, the judiciary must play its activist role. No constitutional value propounded by the judiciary should run counter to any explicitly stated constitutional obligations or rights. In the name of doing justice and taking shelter under institutional self-righteousness, the judiciary cannot act in a manner disturbing the delicate balance between the three wings of the State.”\(^{33}\)

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\(^{24}\) See *Hoskot v State of Maharastra* (1978) 3 SCC 544.

\(^{25}\) Ibid.

\(^{26}\) *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545

\(^{27}\) *Kendra, Dehradun v State of Uttar Pradesh* AIR 1985 SC 652.

\(^{28}\) See P.N. Bhagwati, *op. cit.* pp. 28-29.

\(^{29}\) See Sathe *op. cit.* at p. 249.

\(^{30}\) See a Divan *op. cit.*


\(^{32}\) See MN Rao, “Judicial Activism” to be found at [www.geocities.com/bororissa/jud.html?20088](http://www.geocities.com/bororissa/jud.html?20088)

\(^{33}\) Ibid.
3.2 Judicial activism in England

Judicial activism is said to be a term that sits uncomfortably with English constitutional theory, political culture and judges. This is because the constitutional system is based on an unwritten constitution and parliamentary sovereignty. This sometimes makes it difficult to ascertain a standard to measure the conduct of the executive and the legislature. Furthermore, the legal positivism of John Austin which postulated that law was the specific command of the sovereign significantly restricted the scope of judicial creativity. The concept gave extreme deference to the value judgments of Parliament and only in exceptional cases did judges go against the judgment of Parliament. The adherence to the doctrine of precedent further hardened the creativity of the judges to the extent that until 1966, the House of Lords, the highest court in the United Kingdom, could not, by its own procedural rules, even overrule its own decisions. This situation has changed over the years and the contemporary wisdom is that the judiciary is taking a much more active course in their relationship with the executive and legislature. In the ensuing debate on this new-found courage to challenge the executive and the legislature when expedient, Lord Irvine in the House of Lords said:

“At exercising their powers of judicial review, the judges should never give grounds for the public to believe that they intend to reverse government policies which they dislike. That is why I regard as unwise observations off the bench by eminent judges that the courts have reacted to the increase in powers claimed by government by being more active themselves, and adding for good measure that this has become all the more important at a time of one-party government. It suggests to ordinary people that judicial invasion of the legislative turf.”

The above observation notwithstanding, there has been a sustained attitude of judicial activism in England particularly in the field of administrative law since the 1960s. In this area, whilst the judiciary defer to the will of Parliament in enacting laws, it however took the view that administrators who implement the laws may not act unlawfully. If they do so, the courts retained the right to hold their actions ultra vires and consequently, void. The main weapon it adopted was judicial review based on the concept of natural justice in the form of procedural fairness; that is, (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges; (3) the right to be heard in answer to those charges. This concept gave the courts a good deal of flexibility and was used to fill in the inherent gaps in

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34 See JL Waltman, “Judicial Activism in England” in Judicial Activism in Comparative Perspective (KM Holland ed.) op. cit at p. 33.
36 On 26 July 1966, in a Practice Statement read on behalf of himself and the Lords of Appeal in Ordinary, Lord Gardiner LC recognised the importance of adherence to precedent but admitted that rigid adherence to precedent may lead to injustice in particular cases and also unduly restrict the proper development of the law. They were prepared to modify their existing practice, and, while treating previous decisions of the House as normally binding, to depart from them when it appeared right to do so. See R. Cross, Precedent in English Law, 3rd ed. Oxford, OUP (1977) at p. 109 and [1966] 1 WLR 1234.
39 See Waltman op. cit at p. 36.
40 See the speech of Lord Hudson in Ridge v Baldwin [1964] AC 132. See also R v Gaming Board of Great Britain, ex parte Benaim and Khaida [1970] 2 QB 417; Lloyd v McMahon [1987] 1 All ER 1118
administrative procedures established by Parliament. Thus in *Ridge v Baldwin*, the Chief Constable of Brighton was charged with and tried for conspiracy. He was acquitted but the supervising body, the Police Board, summarily dismissed him nonetheless on the pretext of acting under a statutory enactment which gives the Board the power to dismiss “any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same.” He brought an action to challenge his dismissal on the ground that it violated the principles of natural justice since he was neither given notice of the charges against him nor allowed to present his case before the Board. The House of Lords upheld his claim and ordered his reinstatement. In *Padfield v Minister of Agriculture* the court intervened to insist on the proper exercise of ministerial discretion. In *Anisminic Ltd v Foreign Compensation Commission* the property of the plaintiff’s company was seized along with other British interests by the Egyptian Government. Some years later the Egyptians gave the British Government some money to settle claims arising out of the seizure. A statutory body, the Foreign Compensation Commission, established to handle the disbursement of the money, made an award to the plaintiff which the plaintiff found unsatisfactory. It appealed to the courts and the point at issue was whether, in terms of the statute creating the Commission, its decision was reviewable. The statute provided that the determinations “shall not be called in question in any court of Law.” The House of Lords nonetheless held that such a preclusion clause could not stop the courts from inquiring into the legality of the disbursements. In *Secretary of State for Education v Thameside Metropolitan Borough Council* a conservative-led Council attempted to resist implementation of a directive from the Labour-led Government that they implement the government’s comprehensive secondary schools policy. Consequently, the minister sought a court order to force their compliance. The statute under which the minister issued the directive empowered him to do so when he was “satisfied...that a local education authority (has) acted unreasonably with respect to...any power...conferred...under this Act.” Despite the subjective wording of the power, Lord Wilberforce said:

“This section is framed in a ‘subjective’ form – if the Secretary of State ‘is satisfied.’ This form of section is well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of the judgment, however bona fide it may be, becomes capable of challenge.”

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44 [1969] 2 AC 147.
45 See the Foreign Compensation Act 1950.
46 See section 4(4) of the Act.
48 See section 68 Education Act 1944.
49 At p. 1047.
The court held that the minister had not met this test and cancelled the directive. In doing so, the court got embroiled in a contentious public policy of a political nature. Lastly in *Conway v Rimmer* the court made significant qualifications to the doctrine of public interest immunity. The court, departing from earlier precedent, held that where public documents are sought to be withheld on the grounds that their disclosure will be injurious to the public interest in that it will undermine candour in public institutions, the certificate of the relevant minister to the effect that this will be the consequence of disclosure would no longer be accepted without question. It asserted that the court had power to inspect the disputed documents in private to determine whether it should or should not be disclosed. Lord Reid expressed the view that it was necessary to balance the interest of the government in secrecy against the demands of the public interest in disclosure.

These decisions and others significantly widened the scope for intervention by the courts to the extent that Lord Diplock once described it as “the greatest achievement of the English Courts in my judicial lifetime.”

4. **AFRICAN EXPERIENCE OF JUDICIAL ACTIVISM**

Here, we will use two contrasting cases, Botswana and South Africa, to gauge the extent of judicial activism.

4.1 **Judicial activism in Botswana**

The Botswana Constitution of 1966 escaped the wave of democratisation that swept the African continent in the 1990s leading to an epidemic of constitutional making and revision of existing constitutions. Although a few amendments have been made to it, the Constitution still retains its 1966 character. The judiciary is created under Part VI of the Constitution and is charged with the enforcement of the guaranteed human rights provisions as well as the interpretation of the Constitution. Although there is no strict separation of powers, the judicially is relatively independent and has so far acted accordingly. Thus in *Petrus & Anor v The State* the Court of Appeal declared section 301 (3) of the Criminal Procedure and Evidence Act, which provided for corporal punishment in the form of strokes to be administered by traditional instruments, void on the grounds that it infringed section 7(1) of the Constitution, prohibiting torture, inhuman, or degrading punishment. In *Attorney-General v Dow* The court declared section 4 (1) of the Citizenship Act, which traced citizenship through one’s father, void for...
violating sections 3 and 15 in that it denied citizenship to the offspring of Batswana women married to foreigners but guaranteed citizenship to the offspring of Batswana men married to foreigners. Despite these decisions and others, judicial activism has not been sustained in Botswana. However, there are at least two reasons why it can be argued that the judiciary should adopt an activist approach in Botswana.

First, the proviso to 18(2) (b) of the Constitution gives a court considerable flexibility with respect to the enforcement measures it may take to ensure that its decisions on human rights disputes are enforced when it states that courts “may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 3 to 16 (inclusive).” The judiciary, relying on section 18 (4), can put pressure on Parliament to “confer upon the High Court such powers in addition to those conferred” by the Constitution as “may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it,” in dealing with issues of fundamental human rights and freedoms under the Constitution. In other words, an activist judiciary is sanctioned by the Constitution.

Second, far from being a document that contains “time-worn adages or hollow shibboleths,” or a “lifeless museum piece,” a Constitution must be regarded as a living document designed to serve the present and future generations as well as reflect and embody their fears, hopes and aspirations. In making it clear that the method to be used in interpreting a constitution is definitely different from that to be used in interpreting an ordinary piece of legislation, Amissah J.P. in the Dow’s case quoted Lord Wright who in the Australian case of James v. Commonwealth of Australia said:

“It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrates and illuminates the full import of that meaning.”

Amissah JP also quoted with approval Kentridge JA who, in Attorney-General v. Moagi, had pointed out that a Constitution such as the Constitution of Botswana, embodying fundamental rights, should, as far as its language permits, be given a broad construction.

With such pronouncements from the highest court, composed as it was in the Dow case, with some of the best legal minds who have ever sat on the bench in Botswana, it can therefore be said that there is clear authority for adopting an open, liberal and progressive approach in dealing with cases, especially those on human rights in Botswana. In fact, the lesson that this

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64 [1936] AC 578, at 614.
and other authorities from the Commonwealth teach us is that the broad and generous approach to be adopted in the interpretation of a Constitution inevitably involves some judicial activism.

A major obstacle to the effective enforcement of human rights in Botswana, as in most African countries, is the obvious fact that too many people whose constitutionally protected human rights have been violated have, due either to ignorance, poverty, marginalisation or some other social or economic disadvantage, been unable to approach the courts for relief. There are many imaginative methods that the courts can adopt to help them. As seen from the discussions in 3.1 above, the Supreme Court of India has given a very broad interpretation to article 32 of the Indian Constitution, which appears in the chapter on fundamental rights and confers powers on the court to issue directions, orders or writs for the enforcement of such rights to depart from the traditional rule of *locus standi* and to broaden access to justice to the poor and disadvantaged in society. It has taken the view that, where a person or class of persons is by reason of poverty or other form of social, economic or political disability unable to approach the courts for relief, any member of the public or social action group, acting *bona fide*, can maintain an application in the court seeking judicial redress for the legal wrong or injury caused to such a person or class of persons. The Supreme Court effectively evolved what is known as epistolary or open-letter jurisdiction, where the fundamental rights jurisdiction of the court can be activated just by addressing a simple letter on behalf of the disadvantaged group without insisting on the normal expensive court formalities. The proviso to section 18(2)(b) of the Botswana Constitution is couched in similar language and can be so interpreted to facilitate access in human rights cases to the poor, the down-trodden and illiterate of our society. Besides this, there have been many instances, not only in India, but also in Britain and in the United States, where courts, after reading newspaper items and conducting initial investigations, have on their own motion opened up inquiries into the violation of human rights.

The proviso to section 18(2) (b) of the Constitution also provides the flexibility for expanding the existing remedies available to the courts in dealing with human rights cases. The effectiveness of the Bill of Rights depends very much on the orders and decisions of the courts being enforced and respected. The decisions and other orders made by the courts are not self-executing. They have to be enforced through state agencies and if these refused to cooperate, as is often the case in many African countries, the ends of justice will be defeated. Although the record of government compliance in Botswana with court decisions is good, the delay, particularly in repealing provisions declared unconstitutional, has left violations unremedied for several years until the government found it politically convenient to act. Section 18 (2) (b), it is contended, gives the courts considerable flexibility to compel the government to comply with its decisions but they have so far not been used in an imaginative way. There is no better statement explaining the scope of this power than the following *dicta* of the full bench of the High Court in the *Kamanakao I v The Attorney-General & Another* case:

67 Ibid. at p. 128.
68 For example, the decision in Dow’s case was handed down on 3 July 1992, the legislation which gave effect to it, the Citizenship Act 1998, came into effect on 24 April 1998.
“It can readily be seen that the remedies available to the court are wide and varied. Such remedies are not spelt out in any precise language, but they are couched in broad terms indicating by what processes the court may require the provisions contravened to be enforced, i.e. the breach to be corrected. Thus the court is empowered to consider issuing orders or writs or making directions, all for the purpose of enforcing or securing the enforcement of the relevant provisions of the Constitution.

[The] Constitution intended to give the High Court power to order the immediate enforcement of the provisions contravened, or where appropriate to give such directions as to recognise that other things will have to be done leading ultimately to the enforcement of the provision breached. The diversity of the methods of enforcement given to the court indicates the flexibility which the Constitution has granted to the court in order to deal with the circumstances of each case.” 69

Ironically, earlier in the same judgment, the court had declared:

“We have now come to the point where we can deal with the requirements of the applicants for orders designed to compel the Government of Botswana to take positive steps to appoint and recognise Wayeyi Chiefs… As a matter of judicial policy the courts are reluctant to issue orders for carrying out of works and other activities which require their supervision. It is obvious that for a court to issue orders requiring positive action on the part of the government on a continuing basis is a mammoth task. The performance by government of required activities to fulfil the orders sought by the applicants must involve inter alia, careful planning, budgeting and funding, manpower and other inputs on the part of the State...The court, in our view, would be incapable of supervising the required activities and would thus be unable to judge whether the performance is adequate, or to know whether the person ordered has wilfully disobeyed the order, in the event of a complaint of lack of execution. Now it is a well known rule of our law that courts should not issue orders for doing things which they would not be capable of supervising.” 70 (Emphasis added).

Is this so-called “judicial supervision,” so complex and near impossible as the court suggests? As we shall soon see, this is not really the case. Without compliance within a reasonable time by the State with court orders and decisions not only will the system of human rights protection be undermined but also the administration of justice would fall into disrepute.

In Good v Attorney General (2) 71 some reticence was shown by the Court of Appeal in the face of an issue which required some activism. The appellant was an Australian national and a Professor of Political Studies employed by the University of Botswana. In February 2005, the President of Botswana, acting in the exercise of the powers vested in him by section 7(f) of the Immigration Act declared the appellant an undesirable inhabitant or visitor to Botswana and gave him three days to leave the country. The appellant's application to have the decision of the President set aside was dismissed and he appealed against that finding.

70 Ibid. at pp. 676-677.
71 [2005] 2 BLR 337 (CA)
The appellant argued that the President had failed to apply his mind properly to all the facts and the law and had acted irrationally in making his decision and, further, that sections 11(6) and 36 of the Act were *ultra vires* the Constitution and therefore invalid. The court held, *inter alia*, that the President had been entrusted by Parliament to make the necessary decision. This was an executive function and it was not the function of the court to second-guess him in his decision. Parliament decreed that the information and grounds upon which the decision was made were not subject to disclosure and it had not acted *ultra vires* the Constitution in doing so. Was this a case for the application of the principle in *Secretary of State for Education v Thameside Metropolitan Borough Council* in order to ascertain whether the facts upon which the decision was based did exist and if so, whether they were taken into account in coming to the conclusion that was arrived at? In the light of section 36(2) of the Immigration Act which was interpreted as preventing the disclosure of any information about the grounds of the decision, the majority of the court was not prepared to question the *bona fides* of the President.72 However, Lord Coulfield JA, in his separate opinion, stated that in his view, section 36(2), as so interpreted, amounted to an undue interference with the “protection of the law”. Its effect was that a person subjected to deportation as an undesirable inhabitant may be denied the opportunity to know why he is being deported, even when the disclosure of the reasons could do no harm to the public interest. This, he suggested, was an arbitrary limitation of the protection of the law. In a commentary on the case,73 it has been pointed out that the decision of the court not to second guess the executive’s decisions where national security is concerned demonstrates a failure to strike a balance between the protection of civil liberties and national security. This, it is suggested, creates an environment where executive powers can be easily abused to achieve other ends not related to the protection of the security of the state.

On the whole, the judges in Botswana in spite of certain landmark cases like *Attorney-General v Dow* have not been as “activist” as one would expect from Africa’s oldest democracy. An early study on judicial activism in the country has provided evidence to suggest that the country’s contract system of judicial appointments has not helped because the contracts of some of the judges who displayed strong traits of judicial and constitutional activism were not renewed.74 However, the rapid localisation of the judiciary in recent years should remove any perceived threat of the use of periodic contract renewals to curb judicial activism among judges. We suggest that the contemporary attitude of the Botswana judiciary should be the appreciation of the ultimate goals of the society and within that context to play a positive role in their achievement.76 South Africa provides an interesting contrast of judicial activism in Anglophone Africa in terms of a new democracy that is built on one of the most modern and liberal constitutions in the world today. We next take a look at judicial activism in that country.

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72 Per Tebbutt JP at p. 358.
75 For example those set out in the *Long Term Vision For Botswana* (Vision 2016) such as building an open, democratic and accountable nation.
4.2 Judicial activism in South Africa

The recent constitutional and legal history of South Africa is fairly notorious and need not be belaboured here. Suffice it to say that the political transformation that started in 1994 and ended with the certification of the final Constitution in 1996 led to an overhaul of the structure of the judiciary. The former apex court, the Appellate Division of the Supreme Court of South Africa (AD), which had distinguished itself during the apartheid era by its craven submission to the executive was relegated to second place in the hierarchy of courts. Above it was created the Constitutional Court which acted as final authority in all constitutional matters whilst the Appellate Division now renamed Supreme Court of Appeal (SCA) was given final authority in all non-constitutional law matters, but later when it became obvious that the attempt to separate the constitutional from the non-constitutional matters may be problematic, its jurisdiction was extended to include constitutional matters, but subject to the final review by the Constitutional Court.

The long history of apartheid and the role which the judiciary played in it and the radical transformatory foundation laid down by the South African 1996 constitution has led one commentator to rightly suggest that what obtains in South Africa today is “judicial activism of a special type.”\(^{77}\) The cue for this is laid down in section 39 of the 1996 Constitution which states:

“1. When interpreting the Bill of Rights, a court, tribunal or forum
   a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
   b) must consider international law; and
   c) may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

It is worthwhile noting that section 39 merely requires the South African judge “when interpreting” the Constitution to do what judges should normally do when interpreting a Constitution, that is, to give effect to its values. This is not necessarily synonymous with judicial activism; nevertheless, it does make it much easier than not for a judge to adopt an activist stance. In a number of cases decided since 1996 where the judges can be said to have adopted an activist approach, they have frequently invoked expressions such as “constitutional values,” and “the spirit, purport and objects of the Bill of Rights,” which appear in section 39 of the Constitution. This has however, only served as a starting point for as most of these cases show, the judges have often tried to adapt the law in a manner that will reflect the changing mores of the society. The activist approach has been more pronounced in certain areas of the law more than others.


\(^{78}\) See Hugh Corder, op.cit. In fact, the account in this section of the paper is based on this author’s insightful study and analysis of the South African situation.
On account of its recent history, South African judges have felt less restraint and quite courageous and innovative in dealing with matters dealing with human rights. The very first case that came before the Constitutional Court, *S v Makwanyane*,\(^79\) dealt with the highly sensitive issue of the death penalty which the apartheid regime had widely used in trying to destroy the resistance to its inhumane system. The sensitivity of the matter was not only compounded by the fact that the ANC had long adopted an abolitionist stance on the matter but it came at a time of rising crime rate. Both the Constituent Assembly that negotiated the Constitution and the South African Law Commission had been unable to agree on the matter and had agreed to leave it, in the words of the latter, to the “Solomonic” wisdom of the courts.\(^80\) The Court after reviewing the legislative history of the drafting of the Constitution and relying primarily on the prohibition of cruel, inhuman and degrading treatment and punishment as well as on the rights to human dignity and equality concluded that the death penalty did not have a place in the legal system of a democratic South Africa. Hugh Corder, after noting the public outcry against this judgment concludes that it “represents a brave and principled staking of a claim for the authority of the judiciary in general and the Constitutional Court in particular to pronounce on matters of great social controversy, and even on occasion to go against the likely social consensus in giving expression to the words of the constitution.”\(^81\) In *Bhe v Magistrate of Khayelitsha*\(^82\) the Constitutional Court was faced with yet another issue left open by the failure of the Constitution to adequately reconcile and balance the right to equality with customary law. The question that arose was whether in the new dispensation, two young girls born outside marriage recognised in civil law were to be deprived of any right to their father’s estate, which under the applicable customary law of succession was subject to the principle of primogeniture under which the estate accrued to their paternal grandfather. In granting an order that the legislative provisions under which this happened were invalid, the Constitutional Court relied on the infringement of the right to equality and dignity of women and the rights of the child enshrined in the Bill of Rights. The court after a detailed consideration of the customary law rule of primogeniture concluded that it was inconsistent with the Constitution insofar as it discriminated against women and extramarital children and to fill the gaps left by the declaration of invalidity, and pending Parliament finding the time to revise the law, crafted a number of specific measures for the guidance of inferior courts faced with such a situation. Another example of judicial activism came in *Minister of Home Affairs v Fourie*,\(^83\) a case dealing with same-sex marriages. Two women who had had a long stable domestic relationship sought to be married and when this proved impossible, sought an order of mandamus requiring the Minister of Home Affairs to recognise their union and a declaration that the common law definition of marriage was unconstitutional. Although some of the judges in the Supreme Court of Appeal whilst agreeing that the definition was no longer tenable felt that it was for Parliament to change the law, the Constitutional Court declared the common law definition and the relevant sections in the Marriage Act unconstitutional but suspended the declaration and gave the legislature one year to change the law.\(^84\) In reaching this conclusion, Sachs J, for the majority, while

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\(^{79}\) 1995 (3) SA 391 (CC).


\(^{81}\) Op. cit. at pp. 332-333.

\(^{82}\) 2005 (1) SA 580 (CC).

\(^{83}\) 2006 (1) SA 524 (CC).

\(^{84}\) For a critique of the decision, see N Bohler-Muller, “Judicial Deference and the Deferral of Justice in regard to Same-sex Marriages and in Public Consultation” (2007) 40 De Jure 90. The writer points out that the majority judgment was disappointingly tentative, while that of the minority, who wanted the court to read in
acknowledging the importance of religion in public life, ruled that it would be improper to use the religious sentiments of some as a guide to the enjoyment of constitutional rights of others.

It is perhaps in the area of the protection of socio-economic rights that the South African Constitution was not only very innovative but has provided the courts with the opportunity to develop principles recognised and respected worldwide. A number of cases dealing with the right to housing and health will be briefly mentioned here as illustrating the extent of judicial activism in this area. As Hugh Corder puts it, “the formulation of socio-economic rights [in the Constitution] clearly anticipates a relatively extensive but nuanced judicial role for their appropriate realization, and the judges have generally not disappointed.”85 As regards housing, in Government of the Republic of South Africa v Grootboom,86 when faced with the plight of 900 women and children living in an informal settlement under cold and wet conditions, the High Court relying on the suffering of the children and the “immediacy” of the language in which the children’s rights was couched in the Constitution (“Every child has the right ... to basic... shelter”), ordered the provision of emergency shelter to the children and their parents. The State appealed to the Constitutional Court, arguing that it had a logical plan for the provision of housing in an orderly and systematic manner and that the effect of the High Court order would disrupt the plans through privileging certain groups over those patiently waiting on a housing list and entail expenditure of scarce resources. The Constitutional Court, whilst acknowledging the difficulties of the situation pointed to the absence of mechanisms for dealing with the emergency needs of those in dire straits as a flaw to the plans and confirmed the order. In reaching this conclusion, the court was clearly going out of its way to look at the massive social needs for public housing and willing to hold the executive accountable for the way it was dealing with the problem. This approach was taken further in a series of cases one of which is President of the Republic of South Africa v Modderskip Boerdery (Pty) Ltd (Agri SA and others, amici curiae).87 Because of acute overcrowding in an informal settlement in Johannesburg, thousands of people moved over to a neighbouring farm land and erected basic shelters in which to live. The landowner failed through various lawful means to evict the squatters and went to the High Court seeking confirmation of his property rights and an acknowledgment that the State had an obligation to resolve the issue. The Constitutional Court in confirming the novel remedy of constitutional damages that had been awarded by the High Court held that the State was obliged to provide effective dispute-resolution mechanisms for its citizens and had failed to do so in this case. The Court once again recognising the gravity of a social problem made it clear that the State was under a duty to take action. In Minister of Health v Treatment Action Group (TAC) (No.2),88 the Constitutional Court was faced with a highly sensitive political case in which the applicants contested the State’s policy of selecting test sites for the provision of anti-retroviral drugs to HIV-positive mothers and their new-born children and sought the right to these services for every child. The Minister resisted the application, questioning the constitutional obligation of government to provide an “effective, comprehensive and progressive programme” such as that argued for by TAC. The Court whilst acknowledging that “courts are ill-suited to adjudicate upon issues where court orders could have multiple

86 2001 (1) SA 46 (CC).
87 2005 (5) SA 3 (CC).
88 2002 (5) SA 721 (CC).
social and economic consequences,” refused to be swayed by the State’s argument that it should confine itself to a declaratory judgment. It decided that it was under a duty to grant effective remedies in all cases which included in this case an order for mandamus and the exercise of supervisory jurisdiction.

Besides introducing the notion of “constitutional damages” in the Modderklip case, the judges in South Africa have also been active in crafting appropriate remedies and processes as the circumstances warrant. In Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza,89 where the appellants had challenged the right of the defendants to act on behalf of other extremely poor people whose disability grants had been arbitrarily terminated by the provincial government because of problems of fraud, the Supreme Court of Appeal in a clear instance of activist law-making considered this a classic instance in which a class action could be brought and then proceeded to set out the hitherto undefined elements of a class action in South African law. In Jaftha v Schoeman90 the appellant had lost her home to settle a debt of R 250 based on section 66 (1)(a) of the Magistrates Courts Act, which authorised sales in execution against the immovable property of judgment debtors. It was a piece a legislation which had considerably been abused especially in rural areas, leading to many people losing their homes worth more than the debt for which execution is being levied to discharge the debt. When the matter came before the Constitutional Court, it was held that the provision in the Act authorising such sales was unconstitutional for being overbroad in effect and easily capable of being used by unscrupulous individuals to take advantage of debtors. Instead of referring the matter to Parliament to amend the Act, the court held that the defect will be remedied by reading into the offending section the words, “a court, after consideration of all relevant circumstances, may order execution.” Although reading into statutes words that will enable it make sense is a common interpretative technique, Hugh Corder is probably right when he argues that what the court did here was a reflection of that desire to provide greater protection of the vulnerable in society and also a reflection of growing judicial impatience with the legislature’s slow passage of legislation to address the deep rooted problems of society.91

Another remedy crafted by the South African courts is the concept of structural interdict, which has been used with great success to also overcome governmental inertia. In its judgment in August & Another v Electoral Commission & Others,92 the Constitutional Court for the first time made use of a structural interdict, which directs a violator to take steps to rectify a violation of rights under the court’s supervision. This followed a holding that the Electoral Commission had violated prisoners’ rights to vote by failing to take steps to allow them to register as voters on the national voters’ roll. The court ordered the Commission to make arrangements for them to register and once registered to vote in the election. A similar order was given by the court in Strydom v Minister of Correctional Services,93 in which the

89 2001 (4) SA 1184 (SCA).
90 2005 (2) SA 140 (CC).
93 1999 (3) BCLR 342 (W).
prison authorities were ordered to report on affidavit to the court within a month of the order, setting out a timetable for the upgrading of the electrical system in the Johannesburg prison.94

Perhaps particularly significant for the purposes of our main theme here are a group of cases where the South African courts had to get involved in cases that were overtly of a political nature or bound to have a political impact. Thus, in AZAPO v President of the Republic of South Africa,95 AZAPO, a political party and the ideological successor of the black-consciousness leader, Steve Biko, together with his widow and the families of another activist slain during the apartheid period, challenged the constitutionality of the Promotion of National Unity and Reconciliation Act 1995 which had provided for the creation of the Truth and Reconciliation Commission (TRC) with powers to grant amnesty to perpetrators of some crimes during the apartheid period who confessed. They alleged that it violated their rights to life and to dignity and certain principles of international law, both customary and treaty-based. In dismissing the application, the court relied on the simple reality that, without the type of compromise exemplified by the jurisdiction of the TRC, there would have been no peaceful transfer of power, at least given the relatively low levels of violence which accompanied the events of 1990 to 1994. As Mahomed DP put it:

“If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened...might never have been forthcoming, and...the bridge itself would have remained wobbly and insecure...It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimization.”96

This conclusion was based on the court’s recognition of the necessity for healing the wounds of the past and creating the emotional and structural climate for reconstruction of a new society. The court went even further in Mohamed v President of the Republic of South Africa.97 The appellant, a foreign national, was standing trial in the US accused of involvement in the bombing of the US embassy in Tanzania. He had come to South Africa illegally and the South African authorities had arrested him and with his consent, allowed him to be flown to the US to stand trial there. The appellant alleged that his treatment was unlawful and unconstitutional and that his right to life had been breached by being handed over to the US authorities without an assurance that the death penalty would not be imposed (as had been given to one of his co-accused, who had been detained in Germany) in the event of his being convicted of the crime. The Constitutional Court held that his removal had not been authorised by any statutory law and the failure to seek assurances that his right to life, dignity and not to suffer cruel, inhuman or degrading treatment or punishment would not be infringed was contrary to the values underlying the Constitution. As regards the relief, although Mohamed was no longer within the court’s jurisdiction, the court nevertheless held that a declaration of unlawfulness of the State’s action was still necessary because of the important issues of legality and policy at stake. The Court also ordered that its views on the matter should be communicated to the US court dealing with the matter and in doing so, dismissed the State’s argument that to do so would be tantamount to a breach of the

95 1996 (4) 671 (CC).
96 Ibid. at para.19.
97 2001 (3) SA 893 (CC).
separation of powers. In *Doctors for Life International v Speaker of the National Assembly*, the applicants sought direct access to the Constitutional Court, alleging that Parliament had failed to comply with several peremptory provisions of the Constitution when enacting certain species of legislation concerning public health, in particular that it had failed sufficiently to facilitate public participation in the law-making process. The court made it clear that it had exclusive jurisdiction in matters of compliance with the “manner and form” of the parliamentary process, as this fell under section 167(4) of the Constitution. By a majority, the court held that with respect to some of the impugned pieces of legislation, applying the test of reasonableness, there was no evidence that there had been public hearings or comments from the public as the legislation required. Faced with the State’s argument that the court’s intervention in the matter breached the doctrine of separation of powers, the court held that important though the doctrine was, the court will not allow it to be used or relied upon to prevent it from carrying out its obligation to prevent any violation of the Constitution. For practical reasons, the court was prepared to suspend the effect of its order for 18 months to allow Parliament time to remedy the defect. The court went further to limit the availability of court process to achieve this kind of result by holding that “…only those applicants who have made diligent and proper attempts to be heard…should be entitled to rely on any failure to observe …the Constitution.

It is worthwhile also pointing out that the South African courts have not used the workings of section 39(2) of the Constitution to unlock their creative powers in dealing only with constitutional disputes but have in many cases tried to realign well established common law principles to reflect the new constitutional values. In *National Media Ltd v Bogoshi* and again in *Khumalo v Holomisa* the courts restated and extended the principles of the common law of defamation in the new constitutional era. In *Minister of Safety and Security v Van Duivenboden* and *Van Eeden v Minister of Safety and Security*, the courts consciously applied section 39(2) to extend the Roman-Dutch concept of wrongfulness in the light of recent developments in English law. In what has been considered to be one of the “most far-reaching and activist judgments yet delivered” the Constitutional Court, in *K v Minister of Safety and Security*, drawing on comparative analysis and earlier South African case law, developed a test of vicarious liability to align it with the constitutional values in section 39 of the Constitution.

Whilst one will commend the activist role so far taken by the South African judiciary, a note of caution must be sounded on the danger of “unrestraint activism” by which a judge injects his personal views into judgments or expresses his political preferences which may lead to far-reaching political consequences that could undermine the body politic of the country. The judgement of Nicholson J in *National Director of Public Prosecutions v Zuma* is a case in point. The trial judge set aside the decision by the National Director of Public Prosecutions (NDPP) to indict the respondent, Jacob Zuma. When the matter came before the Supreme Court of Appeal, the court concluded that in the course of his judgment, the trial judge

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98 2006 (6) SA 416 (CC).
100 1998 (4) 1196 (SCA).
101 2002 (5) SA 401 (CC)
103 2003 (1) SA 389 (SCA).
104 Hugh Corder, *op.cit.* at p. 357.
105 2005 (6) SA 419 (CC).
subverted the judicial function by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions.\(^{107}\)

As Harms DP put it:

“The independence of the judiciary depends on the judiciary’s respect for the limits of its powers. Even if, in the words of the learned judge, the judiciary forms a ‘secular priesthood’ (para 161) this does not mean that it is entitled to pontificate or be judgmental especially about those who have not been called upon to defend themselves – as said, its function is to adjudicate the issues between the parties to the litigation and not extraneous issues.”

One will concede that this case is an aberration in an otherwise judicious use of the powers given to the judiciary by the Constitution. Be that as it may, the danger posed by unrestrained judicial activism should be noted.

5. LESSONS AND CONCLUSION

A number of interesting lessons can be drawn from this brief comparative perspective of judicial activism within some Commonwealth jurisdictions with particular emphasis on Botswana and South Africa, which can help courts in the diverse legal systems that operate in Africa today.

The first point is whether there should be a constitutional mandate for judicial activism to take place. As the example of England shows, this need not be the case. Nevertheless, the broad mandate provided in the Indian and South African Constitutions is very helpful. The main advantage of a constitutional injunction is that it may help to keep judicial activism within bounds and prevent both extremes of judicial passivity and judicial adventurism. Besides this, it must now be recognised and accepted that the effectiveness of the Constitution depends very much on the ability of judges to breathe life and relevance into its provisions to ensure that they are not frozen in time. Courts in Africa cannot also run away from the gradual but progressive “internationalisation” of legal rules and standards in general and constitutional law principles in particular.\(^{108}\) This means going beyond the normal common law judicial liberalism which enables judges to refer to, cite and rely on the decisions of courts in other common law jurisdictions as persuasive authorities. Because of the commonality not only in the provisions of many constitutions but also the fact that they have been inspired by the same philosophy, it is now not just possible but actually imperative that judges, in dealing with legal problems, investigate how these problems have been solved in other jurisdictions, both by national and international courts. Although the judicial outcome depends as much on how thoroughly the counsel on both sides have done their research, the fundamental character of the common law as a system in which judges draw their inspiration from the basic conceptions of justice and fairness should remain the driving force.


the times. As the former Chief Justice of Zimbabwe, Gubbay, rightly observed, “a judicial decision has greater legitimacy and will command more respect if it accords with international norms that have been accepted by many jurisdictions, than if it is based upon the parochial experiences or foibles of a particular judge or court.”

Such was the approach adopted in the Dow case as evidenced by this dictum of Aguda JA:

“…it is the primary duty of the judges …. to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.”

African constitutional systems have borrowed extensively from Western constitutional models in areas such as separation of powers but these borrowed models have been adjusted and adapted to the conditions unique to each country. There is no reason therefore why the concept of judicial activism should be an exception.

Despite the constitutional reforms of the 1990s, it is still a fact, even in South Africa’s much appreciated modern Constitution, that rather excessive powers have been conferred on the executive and the latter is daily arrogating more powers upon itself. A passive judiciary in the face of Africa’s overbearing executives and the constitutional weaknesses of the legislature, compounded by the looming phenomena of one party domination leading to the rubber stamping of legislation, does not augur well either for progressive or effective legislation. Unlike the timidity displayed by courts in Botswana, the timely intervention of the apex courts in India and South Africa have not only resulted in defective legislation being promptly remedied but also new remedies and processes have been introduced to address serious social problems that the government and legislature have been too slow or indifferent to address. Thus, both in India and South Africa, the highest courts devised imaginative means to facilitate access to courts by the poor and needy. In India the courts sidetracked the rigid doctrine of locus standi by introducing the device of socio-legal commissions of inquiry in the cases of Bandhua Mukti Morcha and Gupta. In South Africa, the Constitutional Court achieved a similar end by introducing the concept of class action in South African law in the Ngxuza case. In the South African cases of Grootboom, Modderskip and TAC, the South African courts had no hesitation in taking decisions that compelled the government to urgently address the desperate social needs of the poor. To ensure that government effectively complied with court decisions, the South African courts in the TAC case have exercised supervisory jurisdiction in circumstances where the courts of Botswana will not. They have also used the structural interdict in the August and Strydom cases to achieve a similar end. In similar circumstances, as we saw in the Bandhua Mukti Morcha case, the Indian courts have

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110 [1992] BLR 119, at p. 166. The dicta in this case sit rather uneasily with the recent view of Tebbutt JP in Good v Attorney-General [2005] 2 BLR 337 at p. 357 where the learned Judge President said: “The rule of law is also the cornerstone of the domestic law of the country and its application is not dependent upon some concept of a quality of law inherent in the articles of international treaties or conventions, which were not in existence when the Botswana Constitution was framed.” This dictum is questionable not only because it throws into doubt the relevance and value of the international human rights system on which the national regime is substantially built but also appears to suggest that “international treaties and conventions” such as the Universal Declaration of Human Rights, which came into existence before Botswana became an independent state with its own Constitution in 1966, are of no relevance.
adopted the policy of setting up a monitoring agency. Fearing that an unconstitutional piece of legislation may take too long and therefore cause undue and unnecessary hardship before it is amending by the legislature, the South African courts did not hesitate in the Jaftha Schoeman case, to remedy the defect by reading into legislation words that will make it conform to the Constitution. It is perhaps in the defence of constitutionalism that judicial activism in South Africa has manifested itself in the most endearing manner. First, in the Makwanyane case and again in the Bhe case, the Constitutional Court did not hesitate to provide clarity to constitutional obscurities created by the clear inability of the Constituent Assembly to agree on certain controversial issues. Then in AZAPO, Mohamed, and Doctors for Life cases, the courts firmly asserted the rule of law in the face of executive pressure.

In the midst of the transitional period of most of the new or revised African constitutions and with the legislature struggling to maintain its independence in the face of ominous signs of authoritarian resurgence, the judiciary is arguably the last line of defence. Their intervention can only be effective if judges are ready to reflect in their judgments the overwhelming and dominant yearning of the ordinary man for social justice, freedom and other fundamental rights that are a concomitant of the fresh wind of democracy and constitutionalism today. The judiciary certainly has no sword or purse, as Alexander Hamilton said, but if their judgments fully reflect the contemporary hopes, aspirations and fears of the people, they will carry the people along for without the people, there will be no swords and purses. The main lesson that can be drawn from this brief discussion is that judicial activism is a powerful weapon which judges all over Africa can use not only to counter authoritarianism but also to promote policies that are socially and economically progressive. As said by Nwabueze some years ago, “when the courts seek to confine their own function unduly by a narrow, positivist interpretation of the law, constitutionalism may be endangered.”